Congress of the United States
Washington, DC 20510

October 3, 2022

The Honorable Xavier Becerra
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Attention: Nondiscrimination in Health Programs and Activities (RIN 0945-AA17)

Dear Secretary Becerra:

We write to express our strong support for the critical changes included in the Department of Health and Human Services ("Department") proposed rule entitled "Nondiscrimination in Health Programs and Activities," RIN 0945-AA17. These changes to the regulations implementing Section 1557 of the Affordable Care Act (ACA) will have a significant impact on ensuring nondiscrimination in healthcare for LGBTQI+ people and properly recognize Congress' intent in passing Section 1557 of the Affordable Care Act to prohibit all forms of sex discrimination.

We strongly support the explicit clarification that Section 1557 unequivocally prohibits discrimination on the basis of sexual orientation, gender identity, and sex characteristics, including intersex traits. These forms of discrimination have run rampant and unchecked in our medical system. This outright discrimination flies in the face of the very foundation of civil rights that our nation has proudly built over the past decades. This rule will help to ensure that Section 1557 is properly interpreted and enforced to prohibit these forms of discrimination within healthcare.

According to the National Center for Transgender Equality's (NCTE) Report of the 2015 U.S. Transgender Survey, for example, transgender people experience a high level of mistreatment and discrimination by healthcare providers. One-third (33 percent) of respondents report that in the past year they had at least one negative experience with a healthcare provider, with higher rates for people of color and those with disabilities. These experiences include outright refusal of care, verbal and physical abuse, and sexual assault. Due to a justified fear of violence and discrimination, 23 percent of respondents reported in the past year that they had not sought care when they have needed to.

Similarly, recent surveys of LGBTQI+ Americans by the Center for American Progress found 69 percent of intersex respondents reported discriminatory experiences in healthcare in the prior year, and 50 percent of intersex respondents postponed or did not seek needed medical care due to disrespect or discrimination from providers. A national survey by the Trevor Project found that youth who both had intersex traits and identified as LGBTQ reported a healthcare provider trying to change their sexual orientation or gender identity at twice the rate of their non-intersex LGBTQ peers. The changes that the Department has included in the proposed rule will have a substantial impact in combating this current reality.

We are also encouraged by the Department's codification that Section 1557 prohibits discrimination on the basis of association. As is already established in other antidiscrimination laws, discrimination by association includes discrimination against someone because of the characteristics of someone they have a relationship with or are associated with. This type of discrimination in a medical setting can include denial of care due to having a same-sex partner, or for even having a parent in the LGBTQI+ community. It is important that protections against all forms of discrimination are explicitly prohibited in the final rule.

Another critical step in properly implementing civil rights protections in healthcare under Section 1557 is the Department's decision to recognize providers who received payments under Medicare Part B as recipients of Federal Financial Assistance (FFA). The past exclusion of Medicare Part B from FFA designation has created confusion and opened the door to providers to refuse service not only to LGBTQI+ individuals, but also to individuals on the basis of race and national origin. The harm this exclusion has caused historically to marginalized communities cannot be understated, so we are pleased to see this step made by the Department to prevent future discrimination through this new FFA definition.

The Department's proposal to once again recognize Section 1557's application to private insurance continues this aim of properly implementing Congress' intent when drafting Section 1557 to encompass all forms of healthcare access. According to data in a new report from the Center for American Progress, transgender and nonbinary people at-large experience significant discrimination when seeking insurance coverage for medical care. Key findings include that in the past year:

- 30 percent of transgender or nonbinary respondents, including 47 percent of transgender or nonbinary respondents of color, reported experiencing one form of denial by a health insurance company;
- 28 percent of transgender or nonbinary respondents, including 29 percent of transgender or nonbinary respondents of color, reported a denial of coverage for gender-affirming hormone therapy; and
- 22 percent of transgender or nonbinary respondents, including 30 percent of transgender or nonbinary respondents of color, reported a denial of coverage for gender-affirming surgery.

We also want to applaud the essential decision to include coverage of telehealth under ACA's Section 1557. Telehealth has had a pivotal impact on expanding healthcare access to communities that have otherwise struggled to receive traditional healthcare in the past. This change in particular has been groundbreaking for rural communities, communities that do not have the necessary means of transportation, and communities, such as LGBTQI+ people, who have traditionally struggled to find local, culturally competent healthcare providers. Allowing for LGBTQI+ people living in these communities to have access to a greater number of providers in their state increases their opportunities to receive equitable care. We implore the Department to ensure that telehealth coverage is included in the final rule.

We also support the rule's acknowledgment that when a Religious Freedom Restoration Act claim or other religious exemption request is made, it must be analyzed on a case-by-case basis. The potential harm to third parties must be considered when deciding whether to grant a

religious exception, as well as the government's compelling interest in eradicating discrimination and ensuring timely access to healthcare. Patients who are denied care experience exceptional harm in the resulting delay in care and future hesitance to seek out care as needed. Recent [data from the Center for American Progress] show that 12 percent of transgender respondents, and 20 percent of transgender respondents of color, experienced a denial of care based on the provider's religious beliefs or the stated religious tenets of the healthcare facility in the past year, while 53 percent of intersex respondents had this experience. As required by the Establishment Clause in the First Amendment of the Constitution, the government is not permitted to grant religious exemptions from neutral laws if doing so shifts the burden to third parties without considering this harm to third parties.

Recommended Changes to the Proposed Rule

While the protections outlined in the proposed rule are an exceptional leap forward in ensuring all patients receive the dignified and quality healthcare they deserve, we urge the Department to further strengthen the rule by:

1. **Stating explicitly that Section 1557, as interpreted in this rule, preempts inconsistent state and local laws and actions.** Some actors continue to make the argument that, based on personal belief, gender-affirming care is never clinically appropriate. While providers are permitted to exercise clinical judgment as to whether a particular service is appropriate for an individual patient, the rule must unambiguously clarify that providers cannot argue that outright refusal of care is appropriate because it is in compliance with a discriminatory state or local law.
2. **Adopting clearer language regarding denial of gender-affirming care and discrimination on the basis of gender identity by:**
   A. Adding "transgender status" in sections 92.206(b)(1), (b)(2), and (b)(4). "Transgender status" and "gender identity" are often used interchangeably; however, there have been cases where people seeking to discriminate have sought to distinguish between these two terms.[1] We recommend that "transgender status" be included alongside all other mentions of gender identity in the proposed rule.
   B. Omitting the indicated language below in section 92.206(b)(4), as a provider could partake in a discriminatory denial of care even if a claimant cannot prove that the care was provided in other cases for other purposes.
   C. Omitting the indicated language below in section 92.206(b) in order to provide a clearer explanation of gender identity discrimination.

   The suggested changes are reflected as follows:

   "In providing access to health programs and activities, a covered entity must not:

   (1) Deny or limit health services, including those that are offered exclusively to individuals of one sex, to an individual based upon the individual's sex assigned at birth, gender identity, **transgender status,** or gender otherwise recorded;

   (2) Deny or limit a health care professional's ability to provide health services on the basis of an individual's sex assigned at birth, gender identity, **transgender**

[1] *See*, *e.g.*, "Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs," Proposed Rule, 85 Fed Reg 44811 (July 24, 2020).

status, or gender otherwise recorded ~~if such denial or limitation has the effect of excluding individuals from participation in, denying them the benefits of, or otherwise subjecting them to discrimination on the basis of sex under a covered health program or activity~~;

(4) Deny or limit health services sought for purpose of gender transition or other gender-affirming care ~~that the covered entity would provide to an individual for other purposes~~ if the denial or limitation is based on a patient's sex assigned at birth, gender identity, **transgender status,** or gender otherwise recorded."

3. **Clarifying the prohibition on categorical coverage exclusion of services related to gender transition or other gender-affirming care.** Currently, section 92.207(b)(4) can be misread as only applying if an insurer excludes *all* health services related to gender transition or gender-affirming care. We recommend deleting the word "all" to make clear that the exclusion of any such services is prohibited. We also encourage OCR to clarify in the preamble to the final rule that "gender affirming care" is care that affirms an individual's self-identified gender, is responsive to their self-reported needs and goals, and is provided with informed consent or assent of the individual; that "conversion" practices, such as sexual orientation and gender identity change efforts and medical interventions imposed to "normalize" a child's variations in sex characteristics in accordance with the presumed or assigned sex, are distinct from gender-affirming care and other health services related to gender transition; and that the rule should not be interpreted as prohibiting the adoption or application of any nondiscriminatory policies, practices, or requirements that ensure that the intended recipient of a non-emergent medical intervention or other health service has the opportunity to provide or withhold their informed consent or assent to the proposed intervention or service.
4. **Providing explicit examples of prohibited discrimination based on sex characteristics.** Providing explicit examples of prohibited forms of discrimination will ensure that covered entities understand their obligations to intersex patients. Helpful examples of prohibited discrimination would include a medical school subjecting students or faculty to invasive personal questions about their intersex traits, a provider refusing to accept an intersex patient because they are uncomfortable with their sex characteristics, providers providing false information about the existence or nature of intersex traits, and a hospital having a general policy of limiting the performance of sterilizing procedures or major surgeries on genitalia for infants but not following this policy for intersex infants.
5. **Requiring entities that receive a religious exemption to provide notice of that exemption.** While entities will be required to issue a notice of nondiscrimination, the proposed rule does not require that they provide notice if they have received an exemption. Requiring an exemption notice would allow for individuals to make informed decisions in their choice in providers and their care. We ask that an exemption notice — that includes the scope of said exemption — be included as a requirement in section 92.302.
6. **Clarifying how the Department will handle intersectional claims.** Some claimants will have intersecting claims of discrimination in healthcare. We encourage the Department to unambiguously state the inclusion of protections for intersectional cases in section 92.101(a)(1) and sections 92.207(a), (b)(1), and (b)(2).

Additional Recommendations

We urge HHS to work with the Department of Justice (DOJ) and other agencies to adopt a Section 1557 common rule that expressly enumerates protection against discrimination. The protections established in Section 1557 extend to all health programs and activities funded or administered by federal agencies. Similar to the Title IX common rule adopted jointly by several agencies in 2000, a common rule would make clear that the ACA's nondiscrimination protections extend across all federal agencies, allowing for consistent enforcement for program beneficiaries and covered entities.

We further urge OCR to build on this landmark rule by implementing a strategic, comprehensive approach to advancing equity, addressing sex-based discrimination, and protecting patient privacy rights for LGBTQI+ patients. For example, OCR should open civil rights and privacy compliance reviews of medical institutions known to perform genital or sterilizing surgeries on infants or young children with intersex traits; and should ensure its public-facing materials enumerate and discuss discrimination against all members of the LGBTQI+ community, including transgender, nonbinary and intersex people.

In regard to the Department's request for comment on whether or not to apply this rule to all HHS programs – and not just health programs, we support doing so and recommend that such application be done through separate rulemaking.

Conclusion

As extremist state politicians continue to chip away at the basic human right to healthcare for those in the LBGTQI+ community and to promote extremist threats and rhetoric, it is critical to enshrine robust, permanent protections and accountability mechanisms in federal law. We applaud the Department's comprehensive approach in this proposed rule and the obvious care that has been taken to include the voices of affected communities. We ask that the Department continue to take feedback under thorough consideration regarding the final rule and its implementation, as it is crucial that we get these protections implemented successfully. On behalf of our constituencies and our loved ones that will be deeply affected by these changes, we implore the Department to recognize the gravity of ensuring that an exhaustive and comprehensive foundation of nondiscrimination protections is established.

We thank the Department again for this exceptional rule and for its forthcoming role in advancing equitable healthcare access and nondiscrimination protections for LGBTQI+ people. The proposed rule properly implements Congress' intent in passing Section 1557 to have a healthcare system free from discrimination. We are confident that with the inclusion of the changes we have detailed, the final rule will be a major accomplishment in the greater fight for safeguarding civil rights for all Americans.

Sincerely,

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Member of Congress

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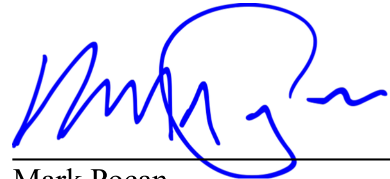

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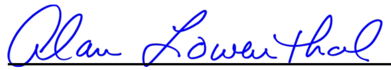

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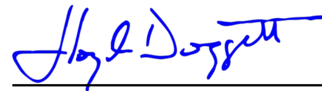

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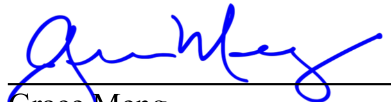

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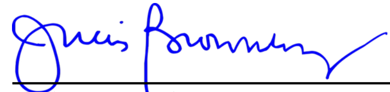

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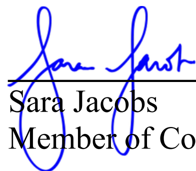

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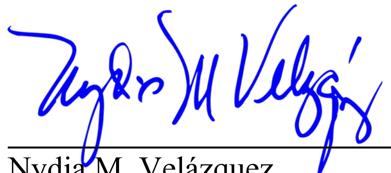

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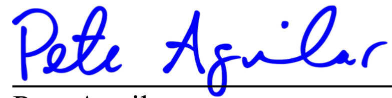

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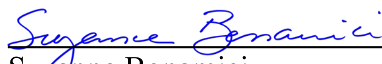

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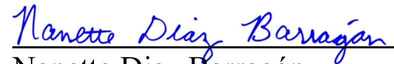

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