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Submitted through the Federal eRulemaking portal at
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The Honorable Sylvia Matthews Burwell
Secretary
U.S. Department of Health and Human Services
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ATTN: 1557 NPRM (RIN 0945-AA02)
**RE: Nondiscrimination in Health Programs and Activities,
Proposed Rule**

Dear Secretary Burwell and Director Samuels:

For nearly 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. With more than a million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C., for the principle that every individual's rights must be protected equally under the law, regardless of race, religion, gender, gender identity, sexual orientation, disability, or national origin.

We write in support of the Department of Health and Human Services (HHS) Notice of Proposed Rulemaking (NPRM) to ensure

nondiscrimination in federally funded healthcare programs pursuant to Section 1557 of the Affordable Care Act (ACA). The protections offered by Section 1557’s nondiscrimination mandate are vitally important to advancing equality.

While there are many important improvements to patient health reflected in the NPRM, here we focus on several specific issues where we believe additional improvements can be made, or where HHS has specifically asked for comment in the preamble to the NPRM. The ACLU provides the following recommendations to further improve the regulations for Section 1557.

1. Definition of Sex Discrimination

a. Pregnancy Discrimination Is Prohibited Sex Discrimination

We strongly support the proposed regulation’s definition of “on the basis of sex” to include discrimination on the basis of “pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions.” Section 1557’s prohibition of sex discrimination necessarily includes discrimination based on pregnancy – as the preamble rightly notes.¹ Pregnancy discrimination constitutes sex discrimination under Title IX² and other civil rights statutes such as Title VII³ and also necessarily constitutes sex discrimination under Section 1557. These laws prohibit discrimination based on pregnancy itself, as well as pregnancy-related conditions.⁴ Accordingly, there would be no legal support for a narrower construction of Section 1557’s sex discrimination prohibition.

b. Protection from Discrimination Based on Sex Stereotypes or Gender Identity

We commend HHS for clearly stating that discrimination based on sex stereotypes or gender identity constitutes discrimination on the basis of sex. Title IX and other civil rights statutes have consistently been interpreted to bar discrimination based on sex stereotyping concerning appearance, behavior, and family role, among other traits, and Section 1557 must be understood to ban such discrimination.⁵ Since the ACA has been law, for instance, HHS’s Office for Civil

¹ Nondiscrimination in Health Programs and Activities, 80 Fed. Reg. 54177 (proposed Sept. 8, 2015)(to be codified at 45 C.F.R. pt. 92).

² 34 C.F.R. § 106.40(b)(1) (2012). *See also Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779, 784 (3d Cir. 1990); *Hogan v. Ogden*, No. CV-06-5078-EFS, 2008 WL 2954245, at *13 (E.D. Wash. July 30, 2008); *Chipman v. Grant County Sch. Dist.*, 30 F. Supp. 2d 975, 977-78 (E.D. Ky. 1998); *Hall v. Lee Coll.*, 932 F. Supp. 1027, 1033 n.1 (E.D. Tenn. 1996); *Cazares v. Barber*, No. CIV-90-0128-TUC-ACM, slip op. (D. Ariz. May 31, 1990); *Wort v. Vierling*, No. 82-3169, slip op. (C.D. Ill. Sept. 4, 1984), *aff’d*, 778 F.2d 1233 (7th Cir. 1985).

³ 42 U.S.C. § 2000e(k) (2012).

⁴ *See, e.g.*, 42 U.S.C. § 2000e(k) (2012); *see also* 29 C.F.R. pt. 1604 app.; *Newport News Shipbuilding & Dry Dock v. EEOC*, 462 U.S. 669 (1983).

⁵ *See* U.S. Dep’t of Educ. Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties: Title IX* (Jan. 19, 2001), <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>; U.S. Dep’t of Educ., “Dear Colleague,” 7-8 (Oct. 26,

Rights reports having resolved a complaint brought by a male victim of intimate partner violence who was denied proper treatment and ridiculed by staff, and a complaint of biased billing practices by a medical center that automatically assigned male spouses the role of guarantor for medical costs incurred by a female spouse.⁶

We further applaud the recognition in the definition of sex stereotypes and gender identity that stereotypes about gender frequently result in discrimination against non-binary identified people. Maintaining a robust definition of prohibited sex discrimination is essential to ensuring protections for people regardless of gender identity. As many federal agencies and courts have recognized, discrimination based on gender identity, including gender expression, gender transition, and transgender status, is necessarily a form of sex discrimination.⁷

In 2012, for instance, the Equal Employment Opportunity Commission (EEOC) held that “intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination based on sex, and therefore a violation of Title VII.”⁸ The Attorney

2010), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010_pg7.html; U.S. Dep’t of Hous. and Urban Dev., *Quid Pro Quo and Hostile Environment Harassment and Liability for Discriminatory Housing Practices Under the Fair Housing Act*, 80 Fed. Reg. 63720 (Oct. 21, 2015); *Hibbs v. Nev. Dep’t of Hum. Res.*, 538 U.S. 721, 736 (2003) (Family and Medical Leave Act intended to eradicate stereotypes about men’s and women’s family roles, which “created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers’ stereotypical views about women’s commitment to work and their value as employees”); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (prescriptive and proscriptive sex stereotypes violate Title VII because “we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group”); *City of L.A., Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978) (internal citation omitted) (Title VII was “intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes”); *Califano v. Goldfarb*, 430 U.S. 199, 216-17 (1977) (striking down as unconstitutional gender discrimination Social Security Act’s requirement that male spouses prove financial dependence to claim survivors’ benefits, while not imposing such requirement on female spouses); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 653 (1975) (holding that restricting Social Security survivors’ benefits to female spouses is unconstitutional gender discrimination); *Frontiero v. Richardson*, 411 U.S. 677, 690-91 (1973) (striking down federal statute awarding military benefits to male spouses only upon showing financial independence, when no such requirement was placed on female spouses). See also *Lewis v. Heartland Inns of America, L.L.C.*, 591 F.3d 1033, 1039 (8th Cir. 2010) (unlawful sex stereotyping to deny woman with “tomboyish’ appearance” instead of “Midwestern girl look” front desk job at hotel); *Chadwick v. WellPoint, Inc.*, 561 F.3d 38, 45 (1st Cir. 2009) (explanation to mother of 6-year-old triplets that she was denied promotion because she “ha[d] a lot on [her] plate” reflected unlawful stereotyping); *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 122 (2d Cir. 2004) (statements by decision-makers that teacher not suited for tenure because she had “little ones,” and “it was not possible for [her] to be a good mother and have this job” are evidence of impermissible sex stereotypes).

⁶ U.S. Dep’t of Health and Human Servs., Office for Civil Rights, “OCR Enforcement under Section 1557 of the Affordable Care Act Sex Discrimination Cases,” <http://www.hhs.gov/ocr/civilrights/understanding/section1557/casesum.html>.

⁷ See, e.g., *Smith v. City of Salem*, 378 F.3d 566, 572-75 (6th Cir. 2004); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000) (Equal Credit Opportunity Act); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (Gender Motivated Violence Act). See also Statement of Interest of the United States at 14, *Jamal v. Saks*, No. 4:14-cv-02782 (S.D. Tex. Jan. 26, 2015), ECF No. 19.

⁸ *Macy v. Holder*, EEOC Doc. 0120120821, 2012 WL 1435995, at *12 (EEOC Apr. 20, 2012).

General affirmed this interpretation in a 2014 memorandum.⁹ The Department of Labor has taken the same position in internal guidance and proposed regulations,¹⁰ as has the Office of Personnel Management in its regulations.¹¹ Similarly, the Departments of Education and Justice have clarified on multiple occasions that, under Title IX, “discrimination based on gender identity, including transgender status, is discrimination based on sex.”^{12, 13} The Department of Housing and Urban Development has similarly concluded that the Fair Housing Act covers claims based on sex stereotypes and gender identity.¹⁴

To date, the only court to rule on the issue in the context of Section 1557 has reached the same conclusion: the ACA’s sex discrimination prohibition “necessarily” encompasses bias based on gender identity or transgender status.¹⁵

By explicitly articulating Section 1557’s application to discrimination based on gender identity and sex stereotypes, the proposed rule’s definition of sex discrimination will provide needed clarity and address a widespread and urgent problem.

c. Protection from Discrimination Based on Sexual Orientation

In contrast to the recognition that sex discrimination encompasses discrimination based on pregnancy, sex stereotypes, and gender identity, and in contrast to the legal position taken by the EEOC and a number of courts, the proposed regulations fail to recognize that sex discrimination also necessarily includes discrimination based on sexual orientation. We urge HHS to state explicitly that the protections against sex discrimination in Section 1557 extend to discrimination on the basis of sexual orientation.

⁹ Attorney General Memorandum, *Treatment of Transgender Employment Discrimination Claims Under Title VII of the Civil Rights Act of 1964* (Dec. 15, 2014).

¹⁰ U.S. Dep’t of Labor, Discrimination on the Basis of Sex, 80 Fed. Reg. 5246 (proposed Jan. 30, 2015)(to be codified at 41 C.F.R. pt. 60-20); Office of Federal Contract Compliance Programs (OFCCP) Dir. 2015-1, Handling individual and systemic sexual orientation and gender identity discrimination complaints (Apr. 16, 2015); OFCCP Dir. 2014-02, Gender Identity and Sex Discrimination (Aug. 19, 2014).

¹¹ See 5 C.F.R. §§ 300.102-300.103, 335.103, 410.302, 537.105.

¹² Statement of Interest of the United States at 5, *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, No. 4:15-cv-54, 2015 WL 5560190 (E.D. Va. Sept. 17, 2015), ECF No. 28; Statement of the United States at 12, *Tooley v. Van Buren Pub. Sch.*, No. 2:14-cv-13466 (E.D. Mich. Feb. 20, 2015), ECF No. 60; U.S. Dep’t of Educ., *Title IX Resource Guide 1* (Apr. 2015); U.S. Dep’t of Educ., *Questions and Answers on Title IX and Sexual Violence*, at 5 (Apr. 29, 2014).

¹³ See U.S. Dep’t of Educ., “Dear Colleague,” *supra* note 5 at 7-8.

¹⁴ *U.S. Dep’t of Hous. and Urban Dev. v. Toone*, Charge of Discrimination, FHEO Nos. 06-12-1130-8, 06-121363-8 (Off. Hr’gs. and Appeals Aug. 15, 2013),

<http://portal.hud.gov/hudportal/documents/huddoc?id=13HUDVTOONE.PDF>; Memorandum from John Trasviña, Assistant Sec. for Fair Housing and Equal Opportunity, to FHEO Regional Directors, *Assessing Complaints that Involve Sexual Orientation, Gender Identity, and Gender Expression* (June 2010),

<http://www.fairhousing.com/include/media/pdf/hud-sexual-orientation.pdf>.

¹⁵ *Rumble v. Fairview Health Services*, No. 14-cv-2037, 2015 WL 1197415, at *2 (D. Minn. Mar. 16, 2015).

Lesbian, gay, and bisexual (LGB) people experience discrimination in healthcare at extraordinary rates – one study found that over half of LGB people surveyed reported discrimination from healthcare providers – including refusals of care, harsh language, or even physical abuse – because of their sexual orientation.¹⁶ Almost ten percent of LGB respondents reported that they had been denied necessary healthcare expressly because of their sexual orientation.¹⁷ Delay and avoidance of care due to fear of discrimination compound the significant health disparities that affect LGB people.¹⁸

LGB people also encounter discrimination in health insurance coverage. In 2014, among LGB people whose incomes made them potentially eligible for financial assistance to gain coverage under the ACA, 27 percent of gay men, 21 percent of lesbians, and 27 percent of bisexuals did not have coverage.¹⁹ Even for those who have access to employer-sponsored coverage, extending that coverage to a same-sex spouse or partner can be difficult: studies conducted in 2013 and 2014 found that, among low- and middle-income LGBT individuals who had tried to access coverage through their employer for a same-sex partner, more than 50 percent reported encountering trouble, and almost 75 percent reported feeling discriminated against in the process.²⁰

To ensure that the protections of Section 1557 reinforce and harmonize with existing nondiscrimination protections under the ACA – and to protect LGB people not only in gaining access to health insurance coverage but also in successfully accessing healthcare – the final rule should include explicit protection from discrimination on the basis of sexual orientation. Below, we discuss in more detail why such discrimination should be understood as a form of prohibited sex discrimination under Section 1557, and we recommend stating explicitly that discrimination on the basis of sex includes discrimination on the basis of sexual orientation. This conclusion reflects the reasoned position of the EEOC and the Department of Labor, federal agencies charged with enforcement of nondiscrimination laws in the workplace, and is well supported under current case law.

¹⁶ Lambda Legal, *When Health Care Isn't Caring: Lambda Legal's Survey on Discrimination Against LGBT People and People Living with HIV* at 5 (2010), http://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-report_when-health-care-isnt-caring.pdf.

¹⁷ *Id.*

¹⁸ David J. Lick, Laura E. Durso & Kerri L. Johnson, *Minority Stress and Physical Health Among Sexual Minorities*, 8 *Persp. On. Psychol. Sci.* 521 (2013), <http://williamsinstitute.law.ucla.edu/research/health-and-hiv-aids/minority-stress-and-physical-health-among-sexual-minorities/>.

¹⁹ Kellan E. Baker, Laura E. Durso & Andrew Cray, *Moving the Needle: The Impact of the Affordable Care Act on LGBT Communities* at 4 (2014), <https://cdn.americanprogress.org/wp-content/uploads/2014/11/LGBTandACA-report.pdf>.

²⁰ *Id.* at 7; Laura E. Durso, Kellan Baker, & Andrew Cray, *LGBT Communities and the Affordable Care Act: Findings from a National Survey* (2013), <https://cdn.americanprogress.org/wp-content/uploads/2013/10/LGBT-ACAsurvey-brief1.pdf>.

As the EEOC noted in its recent decision in *Baldwin v. Foxx*, discrimination on the basis of sexual orientation is sex discrimination under the plain meaning of the term, because sexual orientation turns on one's sex in relation to the sex of one's partner.²¹ Numerous federal courts have reached the same conclusion in cases seeking the freedom to marry for lesbians and gay men and in a challenge to the Defense of Marriage Act.²² These decisions have held that the Equal Protection Clause forbids marriage bans for same-sex couples and the denial of federal benefits for individuals who are married to same-sex partners because such discrimination classifies on the basis of sex because “[o]nly women may marry men, and only men may marry women.”²³ This reasoning applies with equal force to Section 1557 as it does to Title VII, Title IX,²⁴ and the Equal Protection Clause.

Even if it were not discrimination under the plain meaning of the term “sex,” discrimination against lesbians and gay men often includes sex-based harassment and evaluations. Federal appellate courts routinely recognize that such discrimination against gay people is cognizable. For example, the Seventh Circuit held that a plaintiff stated a valid claim of sex discrimination under Title VII when he was harassed by co-workers by being called a “fag” and a “queer” because “a homophobic epithet like ‘fag,’ for example, may be as much of a disparagement of a man’s perceived effeminate qualities as it is of his perceived sexual orientation.”²⁵ Other appellate authorities, including in circuit courts that have concluded erroneously that Title VII does not guarantee equal opportunity on the basis of sexual orientation, are in accord.²⁶

²¹ EEOC Doc. 0120133080, 2015 WL 4397641, at *5 (EEOC July 15, 2015).

²² See *Latta v. Otter*, 771 F.3d 456, 480 (9th Cir. 2014) (Berzon, J., concurring); *Jernigan v. Crane*, 64 F. Supp. 3d 1260, 1286-87 (E.D. Ark. 2014), *aff’d on other grounds*, 796 F.3d 976 (8th Cir. 2015); *Rosenbrahn v. Daugaard*, 61 F. Supp. 3d 845, 859-60 (D.S.D. 2014), *aff’d on other grounds*, 799 F.3d 918 (8th Cir. 2015); *Lawson v. Kelly*, 58 F. Supp. 3d 923, 934 (W.D. Mo. 2014); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1206 (D. Utah 2013), *aff’d on other grounds*, 755 F.3d 1193 (10th Cir.), *cert. denied*, 135 S. Ct. 265 (2014); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010), *appeal dismissed sub nom.*, *Perry v. Brown*, 725 F.3d 1140 (9th Cir. 2013); *cf. Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 982 n.4 (N.D. Cal. 2012) (“Ms. Golinski is prohibited from marrying Ms. Cunninghis, a woman, because Ms. Golinski is a woman. If Ms. Golinski were a man, DOMA would not serve to withhold benefits from her. Thus, DOMA operates to restrict Ms. Golinski’s access to federal benefits because of her sex.”), *initial hearing en banc denied*, 680 F.3d 1104 (9th Cir. 2012) and *appeal dismissed*, 724 F.3d 1048 (9th Cir. 2013).

²³ *Latta*, 771 F.3d at 480 (Berzon, J., concurring).

²⁴ See *Videckis v. Pepperdine Univ.*, No. CV 15-00298 DDP, 2015 WL 1735191, at *8 (C.D. Cal. 2015) (“[A] policy that female basketball players could only be in relationships with males inherently would seem to discriminate on the basis of gender.”).

²⁵ *Doe ex rel. Doe v. City of Belleville, Ill.*, 119 F.3d 563, 593 & n.27 (7th Cir. 1997), *vacated on other grounds*, 523 U.S. 1001 (1998).

²⁶ See, e.g., *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009) (concluding that effeminate gay man who did not conform to his employer’s expectation of how men should present themselves and behave provided sufficient evidence of gender stereotyping harassment under Title VII); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 874-75 (9th Cir. 2001) (holding that plaintiff, a male waiter, stated a Title VII claim based on harassment “for walking and carrying his tray ‘like a woman’—i.e., for having feminine mannerisms”); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 & n.4 (1st Cir. 1999) (considering gay plaintiff’s claim that his co-workers harassed him by “mocking his supposedly effeminate characteristics” and acknowledging that “just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of

While discrimination against gay people often is accompanied by explicit evidence of disparate treatment because of an individual's gender nonconformity, it need not be to constitute sex discrimination. Since 2011, the EEOC has recognized that discrimination against lesbians and gay men is unlawful to the extent that it turns on the sex-role expectation that women should be attracted to and date only men (and not women), and that men should be attracted to and date only women (and not men).²⁷ More recently, the Department of Labor's Office of Federal Contract Compliance Programs promulgated a proposed rule that would codify this reasoning and provide that federal contractors must not make employment decisions because an employee "does not conform to sex-role expectations by being in a relationship with a person of the same sex."²⁸ As a practical matter, this means that all discrimination against gay people because of their sexual orientation is unlawful, because nonconformity with sex-role expectations is the very quality that defines lesbians and gay men.

Federal district courts likewise have begun to recognize that discrimination against lesbians and gay men is a form of sex stereotyping precisely because being gay (or being in a relationship with a person of the same sex) is inconsistent with traditional gender norms, at times without requiring additional evidence of gender nonconformity.²⁹

d. *Discrimination Against Providers or Entities That Provide Women's Health Services is Sex Discrimination*

In addition, we recommend that HHS interpret these proposed standards to prohibit actions by covered entities that have the effect of denying or restricting women's timely access to providers

femininity . . . a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity")(internal citations omitted).

²⁷ See *Complainant v. Johnson*, EEOC Doc. 0120110576, 2014 WL 4407457, at *7 (EEOC Aug. 20, 2014) (collecting cases); *Sayyad v. Johnson*, EEOC Doc. 0120110377, 2012 WL 3614539, at *1 n.1 (EEOC Aug. 17, 2012) (Title VII prohibits adverse employment actions based on "sex-stereotype that women should only have sexual relationships with men"); *Castello v. Donahoe*, EEOC Doc. 0520110649, 2011 WL 6960810, at *3 (EEOC Dec. 20, 2011) (Title VII prohibits adverse employment action "motivated by the sexual stereotype that having relationships with men is an essential part of being a woman"); *Veretto v. Donahoe*, EEOC Doc. 0120110873, 2011 WL 2663401, at *3 (EEOC July 1, 2011) (Title VII prohibits adverse employment action "motivated by the sexual stereotype that marrying a woman is an essential part of being a man").

²⁸ U.S. Dep't of Labor, *Discrimination on the Basis of Sex*, *supra* note 10, at 5279.

²⁹ See, e.g., *Deneffe v. SkyWest, Inc.*, No. 14-cv-00348-MEH, 2015 WL 2265373, at *6 (D. Colo. May 11, 2015) (denying motion to dismiss where plaintiff alleged that he failed to conform to male stereotypes by designating his same-sex partner as beneficiary); *Hall v. BNSF Ry. Co.*, No. C13-2160, 2014 WL 4719007, at *3 (W.D. Wash. Sept. 22, 2014) (denying motion to dismiss where plaintiff alleged that "he (as a male who married a male) was treated differently in comparison to his female coworkers who also married males"); *Terveer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014) (denying motion to dismiss where "Plaintiff has alleged that he is 'a homosexual male whose sexual orientation is not consistent with the Defendant's perception of acceptable gender roles'"); *Koren v. Ohio Bell Tel. Co.*, 894 F. Supp. 2d 1032, 1038 (N.D. Ohio 2012) (finding genuine issue of material fact under sex stereotyping theory where plaintiff failed to conform by taking his same-sex spouse's surname after marriage); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002) (finding genuine issue of material fact under sex stereotyping theory where plaintiff failed to conform by being attracted to and dating other women and not only men).

specializing in women’s healthcare. Since 2011, at least 15 states have taken action to restrict the ability of otherwise eligible women’s health providers to furnish federally supported healthcare to patients in need. Many others are considering adopting analogous policies. Restrictions on the participation of women’s health providers in federal health programs often place serious obstacles on women seeking timely access to care. When such providers are arbitrarily eliminated from participating in federal health programs, the many women who depend on such providers for their usual care may be forced to seek federally-supported services from geographically remote providers, settle for inferior care, or forgo care altogether. Women in need of services that reside in areas that lack adequate medical resources are likely to face significantly increased wait times and disproportionate increases in travel along with other associated costs, rendering access to a comparable alternative provider inconvenient if not prohibitively expensive. In sum, the costs and delays imposed by such restrictions harm the health and well-being of women as a class.

Actions of this kind have already caused grave harm to public health. For instance, the Texas Legislature’s 2011 decisions to exclude certain women’s health providers from the state’s federally supported family planning programs have been cited as major factors in dangerous declines in the number of women receiving care, the closures of a significant proportion of women’s health centers, and an uptick in the reported barriers to accessing reproductive healthcare.³⁰ When Kansas similarly barred certain women’s health providers from the state’s Title X-supported family planning program, the action triggered the closure of sole providers of Title X services in two counties – leaving thousands of patients in these and neighboring counties (where there were no Title X providers to begin with) who relied on these services without an alternative provider. In these circumstances, HHS must carefully assess the discriminatory effects of actions that deprive women of accessible, affordable providers specializing in women’s health. Federal funds should not be spent in any fashion that results in sex discrimination.

2. Protection From Discrimination on the Basis of Association

We applaud the inclusion of the explicit prohibition against discrimination on the basis of association. The proposed rule’s language mirrors that of Title I and Title III of the Americans with Disabilities Act (ADA), which have been understood to protect against discrimination based on association or relationship with a disabled person.³¹ Section 1557 should, therefore, be interpreted to provide at least the same protections for both patients and healthcare providers and

³⁰ Kari White, et. al, *The Impact of Reproductive Health Legislation on Family Planning Clinic Services in Texas*, 105 *Am. J. Pub. Health* 851 (May 2015); Texas Health and Human Services Commission, *Texas Women’s Health Program: Savings and Performance Reporting* (Jan. 2015), <http://www.hhsc.state.tx.us/reports/2015/tx-womens-health-program-rider-44-report.pdf>; Texas Policy Evaluation Project, *Research Brief: Barriers to Family Planning Access in Texas* (May 2015), http://www.utexas.edu/cola/orgs/txpep/_files/pdf/TxPEP-ResearchBrief_Barriers-to-Family-Planning-Access-in-Texas_May2015.pdf.

³¹ 42 U.S.C. §§ 12112(b)(4), 12182(b)(1)(E) (2012).

provider entities. In accord with the ADA, this regulation should extend its protections to providers of healthcare and other professional services who are at risk of associational discrimination due to their professional relationships with patients or clients, including those belonging to classes protected under Section 1557.³² For these purposes, the final rule should further state that unlawful discrimination based on association occurs when a provider is subject to adverse treatment because it is known or believed to furnish, refer for, or support services that are medically appropriate for, ordinarily available to, or otherwise associated with a patient population protected by Section 1557. This interpretation would, for instance, prohibit covered entities from using the provision of sex-specific services, such as abortion, as a disqualifying factor in recruiting otherwise eligible and qualified providers for participation in health programs supported by HHS. Providers should not be penalized for offering to competently care for a class of individuals with particular medical needs.

In addition, discrimination against people who have same-sex relationships is also discrimination based on association with a person of a particular sex. As the EEOC noted in *Baldwin*, Title VII prohibits associational discrimination, such as discrimination against an employee because of an interracial relationship.³³ That discrimination against gay people is also associational discrimination is particularly apparent in the employee benefits context. When employers refuse to provide insurance coverage to employees' same-sex spouses or partners, but provide such benefits to different-sex spouses or partners, the association itself is the target of the discrimination. Prior to *Baldwin*, the EEOC concluded that a female employee is "subjected to employment discrimination [where] she was treated differently and denied benefits because of her sex, since such coverage would be provided if she were a woman married to a man."³⁴ Several federal courts have reached the same conclusion in analogous contexts.³⁵ The employee benefits example is significant both because it illustrates how discrimination against gay people is associational discrimination and also because the proposed rule governs certain employee health benefit programs. Those programs must offer health benefits to employees' same-sex spouses or partners equal to the benefits offered to different-sex spouses or partners.

RECOMMENDATIONS:

³² 28 C.F.R. pt. 35, app. B (2015) (interpreting Title I and Title III of the ADA to protect "health care providers, employees of social service agencies, and others who provide professional services to persons with disabilities").

³³ *Baldwin*, 2015 WL 4397641, at *6.

³⁴ Final Determination, *Cote v. Wal-Mart Stores East, LP*, EEOC Charge No. 523-2014-00916 (Jan. 29, 2015), <http://www.glad.org/uploads/docs/cases/cote-v-walmart/cote-v-walmart-probable-cause-notice.pdf>.

³⁵ See also *In re Levenson*, 560 F.3d 1145, 1147 (9th Cir. 2009) (holding that denial of benefits for same-sex spouse of federal public defender constituted discrimination on the basis of sex or sexual orientation, either of which violates the Ninth Circuit's Employment Dispute Resolution Plan for Federal Public Defenders and Staff); *Foray v. Bell Atl.*, 56 F. Supp. 2d 327, 329-30 (S.D.N.Y. 1999) (recognizing sex discrimination theory under Title VII and the Equal Pay Act "because all things being equal, if [plaintiff's] gender were female, he would be entitled to claim his domestic partner as an eligible dependent under the benefits plan" but dismissing both claims because plaintiff and his partner were not similarly situated to married couples).

We recommend inserting the following language in the preamble of the final rule discussing §§ 92.101(b)(3)(i)-(iii) to reinforce the rule's application in the context of protecting women's access to health care.

The standards we propose in 92.101(b)(3)(i)-(iii) are intended to reach a variety of circumstances in which the actions of covered entities undermine the ability of individuals to participate in and benefit from health programs and activities on the basis of sex. For example, a covered entity engages in unlawful sex discrimination when it employs criteria that have the effect of disfavoring or disqualifying otherwise eligible providers of women's healthcare for participation in federal health programs, resulting in reduced access to federally supported healthcare for women in a region. In these and like circumstances, a covered entity must assure that its selection criteria and processes do not produce a result that has a discriminatory effect on individuals protected under Section 1557 and this rule.

In addition, in light of the foregoing discussion of sex discrimination and associational discrimination, the ACLU recommends the following changes to the regulations:

§ 92.4 Definitions

On the basis of sex

The final rule should include discrimination based on pregnancy, sex stereotypes, gender identity, and sexual orientation in the list of prohibited discrimination on the basis of sex.

Sex stereotypes

The final rule should state explicitly in the definition of sex stereotypes that stereotypical notions of gender include the sex-role expectation that women are primary caregivers, men cannot be victims of intimate partner violence, or that women should be attracted to and romantically involved only with men (and not women) and that men should be attracted to and romantically involved only with women (and not men).

§ 92.209 Nondiscrimination on the basis of association

The final rule should state explicitly that a covered entity shall not discriminate against an individual on the basis of the sex of an individual with whom the individual is known or believed to have an intimate relationship or romantic attachment, and further shall not discriminate against a provider known or believed to furnish, refer for, or support services that are medically appropriate for, ordinarily available to, or otherwise associated with a patient population protected by Section 1557.

HHS should also add the following language to § 92.209:

(b) Providers of healthcare or other related professional services. For the purposes of this section, the term “individual or entity” shall include individuals or entities that provide healthcare and other related professional services to individuals.

Discrimination on the basis of association shall include any action by a covered entity to exclude or deter from participation in, deny the benefits of, or otherwise discriminate against a provider in its health programs or activities based on the services the provider is known or believed to provide, refer for, or support that are medically appropriate for, ordinarily available to, or otherwise associated with individuals of a certain race, color, national origin, age, disability, or sex.

3. *Scope of nondiscrimination coverage*

a. Covered health programs or activities

i. Health research

Prior commenters already have urged HHS to adopt a “broad interpretation” of the scope of covered health programs or activities, so as to include, for instance, “health education and health research programs.”³⁶ But HHS observes that “research projects are often limited in scope for many reasons, such as the principal investigator’s scientific interest, funding limitations, recruitment requirements, and other nondiscriminatory considerations,” and accordingly, “criteria in research protocols that target or exclude certain populations are warranted where nondiscriminatory justifications establish that such criteria are appropriate with respect to the health and safety of the subjects, the scientific study design, or the purpose of the research.”³⁷ By way of example, HHS cites a hypothetical study regarding the brain’s receptivity to certain auditory stimuli could permissibly exclude deaf participants.³⁸

We certainly agree that a broad definition of “health programs and activities” is essential. In considering what sex-based distinctions are permissible in such settings, our response is informed by the research community’s long history of neglecting women’s health concerns, both those that affect women exclusively and those that affect men and women. A recent report issued by a committee convened by the National Institute of Medicine noted that remedying such neglect has been a priority of government and the scientific community since 1985, and assessed

³⁶ U.S. Dep’t of Health and Hum. Servs., 80 Fed. Reg. 54175 (proposed Sept. 8, 2015) (to be codified at 45 C.F.R. pt. 92).

³⁷ *Id.*

³⁸ *Id.*

the progress made in those intervening years.³⁹ It found that recent efforts had “contributed to major progress” in breast cancer and cervical cancer, “contributed some progress” on depression, HIV/AIDS, and osteoporosis, and had made “little progress” with respect to unintended pregnancy, maternal morbidity and mortality, autoimmune diseases (including diabetes), alcohol and drug addiction, lung cancer, gynecological cancers other than cervical cancer (i.e., ovarian and endometrial cancers), colorectal cancer, non-malignant gynecological disorders, and Alzheimer’s disease, among others.⁴⁰

Plainly, a number of these conditions are unique to women and deserve further study; others occur in both men and women but, as the report explains, research efforts to date have focused on male subjects. Moreover, racial and socioeconomic differences among women that might magnify the risks of a particular disease are often ignored in conducting such research.

ii. Employment discrimination

We urge HHS to rescind the employment discrimination exception in the proposed rule.⁴¹ As currently written, Section 1557’s nondiscrimination directive applies to employment discrimination in just three contexts: (a) If the employer entity is “principally engaged in providing or administering health services or health coverage and receives Federal financial assistance,” Section 1557 applies to its employee benefits plan, too⁴²; (b) if an employer entity receives federal assistance for an employee health program or activity, Section 1557 applies to that program or activity, regardless of the nature of its business⁴³; and (c) if an employer entity is not “principally engaged in providing or administering health services or health insurance coverage,” *but* it receives federal assistance for a health program or activity that it administers, Section 1557 governs both that program or activity *and* the employer’s conduct toward employees who work in that area.⁴⁴

Neither the language nor the spirit of Section 1557’s directive warrants such selective applicability. Section 1557’s nondiscrimination provision is written broadly, and further incorporates both Title IX and Section 504 of the Rehabilitation Act – both of which cover employment discrimination. Moreover, Section 1557 was intended to remedy longstanding

³⁹ National Institute of Medicine, “Women’s Health Research: Progress, Pitfalls, and Promise” (2010), <http://www.nap.edu/catalog/12908/womens-health-research-progress-pitfalls-and-promise>.

⁴⁰ *Id.* at 275-79.

⁴¹ 80 Fed. Reg. 54191 (proposed Sept. 8, 2015) (to be codified at 45 C.F.R. pt. 92) (“[E]mployers that receive Federal financial assistance for any purpose could be held liable for discrimination in the employee health benefit programs they provide or administer, where those employers are not otherwise engaged in a health program or activity and where the use of Federal funds for employee health benefits is merely incidental to the purpose of the assistance. *We believe that claims of discrimination in such benefits, brought against employers that do not operate other health programs or activities, are better addressed under other applicable laws.*”) (Emphasis added.)

⁴² *Id.* at 54190.

⁴³ *Id.*

⁴⁴ *Id.* at 54190-91.

disparities in access to critical health services, disparities not remedied by existing antidiscrimination laws. (Indeed, if those “other applicable laws” *had* been sufficient, presumably the draft rule would not extend Section 1557 to cover *any* employer.) To apply Section 1557 selectively in the employment context guarantees a patchwork of rights for individuals working for covered entities, due to a lack of unanimity among the courts interpreting the antidiscrimination laws. For instance, a doctor working for a hospital falling within employer category (a), above, would be entitled to coverage for *in vitro fertilization* pursuant to Section 1557, while a doctor working for a private medical practice might not be considered entitled to such coverage.⁴⁵

Similarly, while an employer covered by Section 1557 would be required to abide by its provisions with respect to employees’ dependents, Title VII assures no such protection. For instance, an employer that objects to teenagers becoming parents could exclude coverage for maternity care for dependents without running afoul of Title VII’s ban on sex discrimination, while Section 1557 would prohibit such an exclusion. Other objections to certain healthcare for minors, from access to contraception to treatment for gender dysphoria, also would be beyond the reach of Title VII’s existing discrimination provision.

iii. Transition-related health insurance

Because transgender people have experienced and continue to experience multiple forms of discrimination in accessing care through health insurance, we strongly support § 92.207(b)’s approach of enumerating and prohibiting a range of insurance carrier and coverage program practices that discriminate against transgender individuals by arbitrarily singling them out for categorical denials of coverage for benefits provided to non-transgender people.

Like anyone, transgender individuals need preventive care to stay healthy and acute care when they become sick. Some may also seek medical treatment to physically transition from their assigned birth sex to the sex that reflects their gender identity. Expert medical organizations such as the American Medical Association, the American Psychological Association, the American Psychiatric Association, the American Academy of Family Physicians, the Endocrine Society, the American College of Obstetricians and Gynecologists, and the World Professional Association for Transgender Health agree that transition-related care is medically necessary for transgender people who experience clinically significant distress related to a profound misalignment between their gender identity and their assigned birth sex.⁴⁶

⁴⁵ See, e.g., *Saks v. Franklin Covey*, 316 F.3d 337, 346, 349 (2d Cir. 2003) (Title VII, as amended by the Pregnancy Discrimination Act, does not mandate health insurance coverage for IVF).

⁴⁶ See Lambda Legal, *Professional Organization Statements Supporting Transgender People in Health Care* (2013), http://www.lambdalegal.org/sites/default/files/publications/downloads/fs_professional-org-statements-supporting-trans-health_4.pdf. See also American Academy of Physician Assistants, *Comprehensive Health Care Reform*

Despite the fact that the services used in care related to gender transition, including hormone therapy, mental health services, and surgeries, as well as anatomically appropriate preventive screenings, are regularly covered for non-transgender individuals, many insurance carriers categorically deny coverage of the same – and equally medically necessary – services for transgender people. The ACA has ameliorated several longstanding barriers to coverage for transgender people, such as unaffordable premiums and the insurer practice of limiting coverage by designating a transgender identity as a “pre-existing condition.” However, many plans, as well as many state Medicaid programs, continue to discriminate against transgender individuals by using categorical exclusions that target them for denials of coverage for medically necessary healthcare services that are routinely covered for non-transgender individuals. As a result of these insurer practices in conjunction with other drivers of uninsurance such as poverty, the uninsured rate among low- and middle-income transgender people was a staggering 59 percent in 2013.⁴⁷ Because they block access to vital healthcare services, transgender-specific insurance exclusions are also significant contributors to health disparities such as high rates of mental and behavioral health concerns, suicide attempts, experiences of abuse and violence, and HIV infection.⁴⁸

We appreciate HHS’s request for comments “as to whether the approach of § 92.207(b)(1)-(5) is over or under inclusive of the types of potentially discriminatory claim denials experienced by transgender individuals in their attempts to access coverage and care, as well as on how nondiscrimination principles apply in this context.” As more insurance carriers lift their categorical exclusions for care related to gender transition, we have seen many carriers continue to deny medically necessary care even in the absence of a categorical exclusion.

For example, many insurance carriers continue to deny medically necessary care for gender dysphoria by pointing to minor differences in the way a particular procedure is performed when used to treat gender dysphoria. By focusing on these minor differences, these insurance carriers have argued that the treatment for gender dysphoria is not “the same” as the treatment for other conditions. We urge HHS to refine the regulations to make clear that insurance carriers must provide nondiscriminatory coverage for services used to treat gender dysphoria if a substantially comparable service is covered for treating other conditions, even if the services are not identical in all respects.

In addition, we are concerned about the potential misapplication of the law that might result from the proposed statement in § 92.207(d) that nothing in the section is intended to restrict a covered entity from determining whether a service is medically necessary or meets coverage

(adopted 2005, updated 2013), <https://www.aapa.org/WorkArea/DownloadAsset.aspx?id=787>, (opposing “arbitrary condition-based exclusions”).

⁴⁷ Baker, Durso, & Cray, *supra* note 19, at 4.

⁴⁸ *See, e.g.*, National Institute of Medicine, *supra* note 39.

requirements in an individual case. In determining whether a service is medically necessary, the carrier should evaluate whether the service is medically necessary to treat gender dysphoria. A procedure such as breast augmentation that is not usually considered to be medically necessary for treatment of other conditions, may nevertheless be medically necessary in the context of gender dysphoria. Insurance carriers should not be permitted to declare categorically that a particular procedure is always cosmetic or not medically necessary. In some circumstances a nondiscriminatory policy based on medical necessity will require an insurance carrier to provide services for treating gender dysphoria that are not usually covered as medically necessary treatments for other conditions.

There may also be instances in which the process itself that the covered entity uses to determine whether a service is medically necessary or otherwise covered is discriminatory. For example, plans frequently assess coverage for a service needed by a transgender person according to their own standards of medical necessity rather than the latest version of the Standards of Care maintained by the World Professional Association for Transgender Health (WPATH), which are the accepted medical guidelines governing the provision of transition-related healthcare to transgender individuals. The WPATH Standards of Care reflect the expert, evidence-based consensus of medical professionals working in the field of transgender health. Medical necessity standards or protocols that are not rooted in the WPATH Standards of Care are likely to contain outdated, inaccurate, or blatantly discriminatory restrictions on coverage provided to transgender individuals.

The multifaceted nature of insurance discrimination against transgender individuals means that the provisions at § 92.207(b)(3), (4), and (5) are *all* vital to ensuring that transgender people are able to access the health coverage and care they need. We very strongly urge HHS to preserve all three of these provisions in the final rule, with the modifications suggested below.

RECOMMENDATIONS:

§ 92.208 Employer liability for discrimination

The final rule should state explicitly that *any* covered entity-employer must comply with Section 1557. In providing employee health benefit programs, covered entity-employers may not rely on stereotypes about appropriate services for minors, or condition such programs on the sex of the employee's spouse. For example, a covered entity discriminates on the basis of sex by providing health benefit programs to employees' different-sex spouses or domestic partners but not similarly situated same-sex spouses or domestic partners.

§ 92.207(b)(4) and (5)

The final rule should clarify that categorical exclusion of all health services related to gender transition, including gender reassignment surgeries and other services or procedures described in the most current version of the recognized professional standard of medical care for transgender individuals is prohibited.

§ 92.207(c)

The final rule should clarify that the discrimination provisions are not intended to determine, or restrict a covered entity from determining, whether a particular health service is medically necessary or otherwise meets applicable coverage requirements in any individual case, so long as the determination of medical necessity or meeting applicable coverage requirements is not itself discriminatory and does not result in discrimination.

b. Sex-Specific Programs and Activities

With regard to sex-segregated facilities, we strongly support § 92.206's recognition that Section 1557 requires covered entities to treat individuals consistent with their gender identity and to provide them with equal access to health programs and activities. This interpretation of Section 1557 as protecting the rights of transgender people to access facilities and programs consistent with their gender identity rests on strong legal footing. Denying transgender individuals access to sex-segregated facilities consistent with their gender identity amounts to treating them differently from non-transgender individuals based on a perceived inconsistency between their gender identity and sex assigned at birth – in other words, based on being transgender, and therefore based on sex. In effect, a service provider that denies equal access to services consistent with a person's lived gender is saying that a transgender man or woman must deny their core identity to access needed services. This is the essence of discrimination based on transgender status: restricting access to services based on an inconsistency between a person's gender identity and his or her assigned birth sex.⁴⁹

Discrimination in access to gender-specific facilities remains one of the most common, and most harmful, forms of sex-based discrimination against transgender people.⁵⁰ Denying access to gender-appropriate facilities singles out and humiliates transgender individuals, invites others to harass them, and places them in the untenable position of either enduring this humiliation or

⁴⁹ See, e.g., *Macy*, 2012 WL 1435995 (holding that under Title VII an employer may not take an adverse action “because the employer believe[s] that biological men should consistently present as men and wear male clothing”).

⁵⁰ For example, 22 percent of respondents in the 2011 National Transgender Discrimination Survey indicated that they were denied access to gender-appropriate restrooms in the workplace. Jaime M. Grant, et al., *Injustice at Every Turn: A report on the National Transgender Discrimination Survey* 56 (2011), http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf.

avoiding the use of such facilities and the associated medical care.⁵¹ The Occupational Safety and Health Administration cautions that denying access to appropriate restrooms “can lead to potentially serious physical injury or illness” caused when individuals delay or avoid restroom use altogether.⁵² Obstacles to living one’s life in a manner consistent with one’s gender identity can also increase risk for depression, anxiety, and suicidality. Ensuring that transgender people can access the facilities and programs that are right for them is one of the most significant achievements of the proposed rule.

Agencies across the federal government have already made it explicit that, under Title VII and other sex discrimination laws, equal opportunity includes equal access to gender-appropriate facilities, consistent with a person’s gender identity. The EEOC recently held that an employer’s refusal to provide equal access to workplace facilities that are consistent with an employee’s gender identity, solely because the employee is transgender, violates Title VII.⁵³ The Justice Department has also adopted this view in litigation and case resolutions under Title IX⁵⁴ and the implementation guidance under the Violence Against Women Act.⁵⁵ Numerous other federal agencies have also adopted this view, including the Office of Special Counsel in a 2014 decision;⁵⁶ the Department of Labor guidance for the Job Corps programs⁵⁷ and other employment and training programs,⁵⁸ and in proposed sex discrimination rules for federal contractors;⁵⁹ the Department of Education in guidance on single-sex classes and programs under Title IX;⁶⁰ and the Department of Housing and Urban Development in guidance for homeless shelters and transitional housing programs.⁶¹ To date, 13 states and the District of Columbia have, by regulations, guidance, case law, or specific statutory language, clarified that state laws

⁵¹ The 2011 National Transgender Discrimination Survey found that fear of discrimination, such as the denial of access to appropriate gender-specific facilities, led 28 percent of respondents to postpone or avoid seeking care when sick or injured and 33 percent of respondents to postpone or avoid seeking preventive care. *Id.* at 76.

⁵² Occupational Safety and Health Administration, *A Guide to Restroom Access for Transgender Workers* 1 (2015), www.osha.gov/publications/OSHA3795.pdf.

⁵³ *Lusardi v. McHugh*, EEOC Doc. 0120133395, 2015 WL 1607756 (EEOC Apr. 1, 2015). *See also EEOC v. Deluxe Financial Services, Inc.*, No. 15-cv-02646-ADM-SER (D. Minn. filed June 4, 2015).

⁵⁴ Statement of Interest of the United States, *G.G. ex rel. Grimm*, No. 4:15-cv-54, *supra* note 12; Statement of the United States, *Tooley*, No. 2:14-cv-13466, *supra* note 12; Resolution Agreement between the Arcadia Unified School District, the U.S. Department of Education, Office for Civil Rights, and the U.S. Department of Justice, Civil Rights Division (OCR No. 09-12-1020) (DOJ No. 169-12C-70) (July 24, 2013); Resolution Agreement between the Downey Unified School District and the U.S. Department of Education, Office for Civil Rights (OCR Case No. 09-12-1095 Oct. 8, 2014).

⁵⁵ *See* U.S. Dep’t of Justice, *Frequently Asked Questions: Nondiscrimination Grant Conditions in the Violence Against Women Reauthorization Act of 2013*, at 9 (Apr. 9, 2013).

⁵⁶ Report of Prohibited Personnel Practice, OSC File No. MA-11-3846 (Jane Doe) (Aug. 28, 2014).

⁵⁷ Job Corps Program Instruction Notice No. 14-31, Ensuring Equal Access for Transgender Applicants and Students to the Job Corps Program (May 1, 2015)

⁵⁸ Training and Employment Guidance Letter No. 37-14, (May 29, 2015).

⁵⁹ Discrimination on the Basis of Sex, *supra* note 28.

⁶⁰ U.S. Dep’t of Educ., *Questions and Answers on Title IX and Single-Sex Elementary and Secondary Classes and Extracurricular Activities* 25 (Dec. 1, 2014).

⁶¹ U.S. Dep’t of Hous. and Urban Dev., Notice CPD-15-02: Appropriate Placement for Transgender Persons in Single-Sex Emergency Shelters and Other Facilities (Feb. 20, 2015).

prohibiting gender identity discrimination require that transgender individuals have access to sex-segregated facilities consistent with their gender identity.

The proposed rule rightly recognizes that, to meet their obligations under § 92.206, healthcare providers must treat individuals according to their self-identified gender. Applying this principle to individuals with a gender identity that is not male or female does not mean isolating or refusing access to such individuals. While a covered entity may voluntarily provide an alternative accommodation upon request, non-binary individuals have the right to access generally available programs and facilities that are most consistent with their stated gender identity.⁶² We strongly encourage HHS to strengthen § 92.206 with explicit protections for non-binary people who need access to gender-specific programs and facilities, and to affirm that non-binary individuals, like all individuals, should be permitted to determine which facilities are appropriate for them.

We also strongly support the recognition in § 92.206 that health services ordinarily associated with one gender may not be denied or limited based on the fact that an individual's sex assigned at birth, gender identity, or gender otherwise recorded in a medical record is different from that gender. As the preamble to the proposed rule notes, while individuals generally have the right to be treated according to their gender identity, in the context of healthcare, individuals sometimes need clinical services typically associated with another gender, such as a mammogram, a cervical Pap test, or a prostate exam.⁶³ Providing such services, where clinically appropriate, recognizes the patient's individual medical needs rather than inaccurately – and in an inherently discriminatory manner – basing the availability of medically necessary healthcare services solely on gender.

HHS has also asked for comment on the circumstances under which sex-specific programs and activities are nondiscriminatory and thus permissible under Section 1557. These circumstances are narrow. Consistent with Section 1557's broad nondiscrimination purpose, sex-specific programs may be permissible only when they are narrowly tailored and necessary to accomplish an essential health purpose. The following are examples of sex-based distinctions we believe "should be permitted in the context of health programs and activities" (aside from those concerning a medical condition demonstrably occurring only in one sex, such as ovarian cancer or prostate cancer): A study intended to remedy sex-specific gaps in scientific knowledge attributable to past exclusion from research (for instance, women were mostly absent from research into new drug treatments for HIV/AIDS, and those treatments have been shown to have toxic effects on women, such as putting them at greater risk for anemia and pancreatitis, necessitating further targeted research); a study concerning why a medical condition affecting

⁶² See Job Corps Program Instruction Notice No. 14-31, *supra* note 57.

⁶³ See, e.g., World Prof. Ass'n for Transgender Health, *Standards of Care for the Health of Transsexual, Transgender and Gender-Nonconforming People* 65-66 (2012); Am. College of Obstetricians and Gynecologists, Committee Opinion No. 512: Health Care for Transgender Individuals, 118 *Obstetrics & Gynecology* 1454 (2011).

both men and women causes higher morbidity or mortality in one sex than in the other; and an initiative studying the most effective ways of communicating to women new medical findings about women's health, so as to maximize benefit and minimize confusion.

Where such programs are necessary, however, care must also be taken to ensure that comparable services are made available regardless of gender. For example, men's affliction with a medical condition typically associated with women – such as breast cancer, osteoporosis, auto-immune disorders, and Alzheimer's – should not preclude research into and coverage of treatment for such conditions.

RECOMMENDATIONS:

Clarify § 92.206(a) by adding a provision to ensure that any otherwise lawful gender-specific or sex-segregated facility or program, shall not deny any individual, including an individual who identifies with a gender other than male or female, access to the gender-specific health facility or program that the individual determines is most appropriate for them.

We also recommend revising § 92.206 to clarify that sex-specific health programs and activities are permissible only when necessary to accomplish an essential health purpose, and where comparable services are made available to individuals regardless of gender, and regardless of the sex-based prevalence of a given condition.

4. No Exceptions to the Prohibition on Sex Discrimination Can or Should Be Added to Section 1557

By reference to Title IX (which prohibits sex discrimination in federally funded education programs), the proposed rule provides critically important protections from discrimination on the basis of sex for the first time in federally funded healthcare programs. The proposed rule appropriately does not incorporate any of the exceptions from Title IX, and nothing in the text of Section 1557 or other federal law supports or permits adding additional exemptions into the regulations. However, the preamble to the proposed rule seeks comment as to whether any exceptions should be added.⁶⁴ HHS further asks if the rule “appropriately protects . . . religious beliefs” and if any additional exception should be included to protect religious beliefs.⁶⁵ We strongly believe such exceptions are neither permissible nor appropriate.

⁶⁴ Nondiscrimination in Health Programs and Activities, 80 Fed. Reg. 54172, 54173 (proposed Sept. 8, 2015) (to be codified at 45 C.F.R. pt. 92).

⁶⁵ *Id.*

Section 1557 purposefully does not by import any exceptions from Title IX, or from any of the referenced statutes. Rather, it references Title VI, Title IX, Section 504, and the Age Discrimination in Employment Act solely for the grounds on which they prohibit discrimination (race, color, national origin, sex, disability, and age) and for their enforcement mechanisms.⁶⁶ Section 1557's ban against discrimination in health programs or activities includes a single exception – that it applies “[e]xcept as otherwise provided” by Title I of the ACA. The plain language of the statute bars any interpretation that would suggest that the Title IX exceptions or any other additional exceptions apply to the prohibition of sex discrimination.⁶⁷ We also fully endorse the preamble's reasoning that Title IX's exceptions, which are narrowly focused on the educational context, make little sense in the context of health programs and activities.⁶⁸ For all these reasons, the final rule should not incorporate Title IX's exceptions into the prohibition against discrimination on the basis of sex.

Likewise, there is nothing in the text of Section 1557 that provides authority for HHS to create an exemption on the basis of religious or moral objection. As noted above, the statute incorporates protections from existing federal nondiscrimination statutes, but not the exemptions contained in those laws, and explicitly stipulates that Section 1557 may not invalidate state laws that provide additional protections against discrimination, demonstrating clear intent by Congress to improve access to healthcare services – without exception.

Indeed, Congress was well-aware that claims about infringements on religious liberty have long been used to resist efforts to achieve equality. For example, individuals and institutions once claimed religious objections to integration as well as equal pay laws:

- In 1964, three African-American residents of South Carolina brought a suit against Piggie Park restaurants, and their owner, Maurice Bessinger, for refusal to serve them. Bessinger argued that enforcement of the Civil Rights Act of 1964's public

⁶⁶ The Supreme Court held in a similar context that the incorporation by reference of protections from one civil rights statute into another does not mean that the limitations of the first apply to the second. *See Consol. Rail Corp. v. Darrone*, 465 U.S. 624, 635 (1984) (holding that Section 504's reference to Title VI's remedies, procedures, and rights did not import limitations from Title VI not expressly provided in Section 504).

⁶⁷ While the proposed regulations incorporate “exceptions” from Title VI, Section 504, and the Age Act set out at 45 C.F.R. §§ 80.3(d), 84.4(c), 85.21(c), 91.12 through 91.15, and 91.17 through 91.18, these incorporated provisions by and large do not actually set out exceptions from the relevant antidiscrimination mandates. Rather, they clarify that certain programs targeted to meet the particular needs of specific protected groups within the protected class are not properly considered discrimination. *See, e.g.*, 45 C.F.R. § 84.4(c) (“The exclusion of nonhandicapped persons from aids, benefits, or services limited by Federal statute or executive order to handicapped persons or the exclusion of a specific class of handicapped persons from aids, benefits, or services limited by Federal statute or executive order to a different class of handicapped persons is not prohibited by this part.”) This is different in kind from, for example, Title IX's exception completely carving out educational institutions training individuals for military service from its otherwise applicable nondiscrimination mandate. *See* 20 U.S.C. 1681(a)(4).

⁶⁸ Nondiscrimination in Health Programs and Activities, *supra* note 64.

accommodations provision violated his religious freedom “since his religious beliefs compel[ed] him to oppose any integration of the races whatever.”⁶⁹

- In 1976, Roanoke Valley Christian Schools added a “head of household” supplement to their teachers’ salaries – but only to heads of household as determined by scripture. For Roanoke Valley, that meant married men. According to the church pastor affiliated with the school, “[w]hen we turned to the Scriptures to determine head of household, by scriptural basis, we found that the Bible clearly teaches that the husband is the head of the house, head of the wife, head of the family.”⁷⁰ When sued under the Equal Pay Act, Roanoke Valley claimed a right to an exemption from equal pay laws because its “head-of-household practice was based on a sincerely-held belief derived from the Bible.”⁷¹
- In the 1980s, Bob Jones University, a religiously-affiliated college in South Carolina, wanted an exemption from a rule denying tax-exempt status to schools that practice racial discrimination. The “sponsors of the University genuinely believe[d] that the Bible forbids interracial dating and marriage,” and it was school policy that students engaged in interracial relationships, or advocacy thereof, would be expelled.⁷² Bob Jones’s lesser known co-plaintiff, Goldsboro Christian Schools, even opposed integration of the classroom. According to their interpretation of the Bible, “[c]ultural or biological mixing of the races is regarded as a violation of God’s command.”⁷³

In each of these cases, institutions tried to opt out of laws advancing equality, and each time their claims were rejected. We all have a right to our religious beliefs, but just as it was not a violation of religious freedom to require segregated institutions to integrate,⁷⁴ or schools to pay their employees equally despite their gender,⁷⁵ in the face of religious objections, it is not a violation of religious freedom to prohibit sex discrimination in the provision of healthcare services.⁷⁶

⁶⁹ *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 944 (D.S.C. 1966), *aff’d in part and rev’d in part on other grounds*, 377 F.2d 433 (4th Cir. 1967), *aff’d and modified on other grounds*, 390 U.S. 400 (1968).

⁷⁰ *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1392 (4th Cir. 1990).

⁷¹ *Id.* at 1397.

⁷² *Bob Jones Univ. v. United States*, 461 U.S. 574, 580 (1983).

⁷³ *Id.* at 583 n.6.

⁷⁴ *Piggie Park Enters., Inc.*, 256 F. Supp. at 945.

⁷⁵ *Shenandoah Baptist Church*, 899 F.2d 1389 (holding that a religious school that gave extra payments to married male teachers, but not married women, based on the religious belief that men should be “heads of households” could be held liable under equal pay laws); *see also EEOC v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986) (holding that a religious school that gave male employees family health benefits but denied such benefits to similarly situated women because of the sincerely held belief that men are the “heads of households” violated Title VII).

⁷⁶ More recently, the majority opinion in *Burwell v. Hobby Lobby Stores, Inc.* makes it clear that religious liberty should not be used as a “shield” to escape legal sanction for discrimination in hiring on the basis of race because such prohibitions further a “compelling interest in providing an equal opportunity to participate in the workforce without regard to race” and are narrowly tailored to meet that “critical goal.” 134 S. Ct. 2751, 2783 (2014). The same principles apply here.

In fact, it is particularly troubling that HHS would consider adding an exception *only* with respect to sex discrimination. Women and LGBT people deserve the same access to healthcare services as any other individual, and yet still face significant discrimination and barriers to care. Permitting discrimination only for the prohibition on sex discrimination not only is contrary to statutory intent and exceeds HHS's authority, but also wrongly creates a hierarchy of nondiscrimination protections and protected classes, thus undermining the central promise of Section 1557.

Congress drafted Section 1557 specifically to prohibit discrimination in healthcare programs and activities so that all individuals, including women and LGBT people, could have equitable access to healthcare. Prior to Section 1557, there were no broad federal protections against sex discrimination in healthcare. Section 1557 was intended to provide robust protection against discrimination on the basis of sex, as evidenced by not only the first of its kind protection provided by Section 1557 itself, but also by Congress's particular focus on addressing sex discrimination throughout the ACA.⁷⁷ Several ACA provisions were enacted specifically to correct insurer practices that discriminated against women either on their face or in their effect.⁷⁸ Establishing strong and effective regulations implementing and enforcing Section 1557 is key to ending sex discrimination in healthcare, including outright denials of healthcare services.

A new religious exemption to nondiscrimination requirements would undermine the spirit of the ACA and would put the health and well-being of vulnerable patients at risk. Indeed, pre-existing federal refusals laws already cause serious harm to women's health and well-being by permitting individuals and institutions to withhold essential healthcare, coverage, and information – such as abortion services, payment, and even referrals – from patients.⁷⁹ To expand the reach of refusals

⁷⁷ *E.g.*, 156 Cong. Rec. H1632-04 (daily ed. March 18, 2010) (statement of Rep. Lee) (“While health care reform is essential for everyone, women are in particularly dire need for major changes to our health care system. Too many women are locked out of the health care system because they face discriminatory insurance practices and cannot afford the necessary care for themselves and for their children.”); 156 Cong. Rec. H1891-01 (daily ed. March 21, 2010) (statement of Rep. Pelosi) (“It’s personal for women. After we pass this bill, being a woman will no longer be a preexisting medical condition.”); 155 Cong. Rec. S1026-01 (daily ed. Oct. 8, 2009) (statements of Sen. Mikulski) (“[H]ealth care is a women’s issue, health care reform is a must-do women’s issue, and health insurance reform is a must-change women’s issue because . . . when it comes to health insurance, we women pay more and get less.”); 155 Cong. Rec. S10262-01 (daily ed. Oct. 8, 2009) (statement of Sen. Boxer) (“Women have even more at stake. Why? Because they are discriminated against by insurance companies, and that must stop, and it will stop when we pass insurance reform.”); 156 Cong. Rec. H1854-02 (daily ed. March 21, 2010) (statement of Rep. Maloney) (“Finally, these reforms will do more for women’s health . . . than any other legislation in my career.”).

⁷⁸ *See, e.g.*, 42 U.S.C. § 300gg(a) (2015) (allowing rating based only on family size, tobacco use, geographic area, and age); 45 C.F.R. § 147.104(e) (2015) (prohibiting discrimination in marketing and benefit design, including on the basis of sex).

⁷⁹ *See, e.g.*, 42 U.S.C. § 300a-7 (2012); 42 U.S.C. § 238n (2012); Consolidated Appropriations Act, 2010, Pub. L. No. 111-117, § 508d, 123 Stat. 3034, 3280 (2009).

already allowed in federal law would only further stigmatize vulnerable patients and effectively prevent patients from being able to access essential reproductive health services at all.

An institutional exemption to Section 1557, for example, could allow religiously affiliated hospitals to not only refuse to provide transition-related treatment for transgender people, but to also permit a hospital to prevent surgeons who otherwise have admitting privileges from being able to provide transition-related care in the hospital.⁸⁰ Transition-related care is not only medically necessary, but for many transgender people it is lifesaving. These exemptions could also bolster discriminatory institutional policies that reach beyond patient care. For example, some institutions, including large religiously-affiliated employers, are also consistently denying same-sex spousal healthcare benefits. While federal courts and the EEOC have determined that these denials are unlawful sex discrimination under Title VII, the inclusion of an institutional exemption within the final rule could appear to authorize these otherwise discriminatory refusals.

Additional exemptions would also expose LGBT people and same-sex couples to a variety of procedure-based individual discrimination, as well as categorical refusals of care. Such exemptions could, for example, sanction the refusal to provide fertility treatments to individuals or same-sex couples based on religious belief.⁸¹ This kind of discrimination can either increase the cost and emotional toll of family building, or, in some circumstances, such as where only one provider or clinic is covered under a person's health plan, operate as a complete barrier to parenthood. As another example, counselors could refuse care to LGBT people, including vulnerable youth, based on religious objection, thereby exacerbating existing high rates of suicide, depression, and other mental health issues in the LGBT community.⁸²

Exemptions for religiously-affiliated insurance providers would have a similarly pernicious impact on the LGBT community. For example, if such an exemption were included within these regulations, an insurance company could refuse to cover Pre-Exposure Prophylactics or PrEP or Post-Exposure Prohylactics (PEP) because of a religious belief. Both PrEP and PEP have been shown to be highly effective in preventing HIV infection. Denying access to this treatment would adversely impact vulnerable, highest risk populations including gay and bisexual men and transgender women.

Given these harms and the lack of any statutory authority, HHS must not create any additional exemptions that would permit providers, health plans, or other covered entities to discriminate on the basis of sex. We do not permit such exemptions in the context of race or other forms of

⁸⁰ For example, complaints have been filed against Catholic hospitals for refusing to allow doctors to provide care to transgender patients that the doctors are regularly allowed to provide for non-transgender people. *See, e.g., Compl., Hastings v. Seton Med. Ctr.*, No. CGC-07-470336 (Cal. Sf. Super. Ct. Dec. 19, 2007) (case settled).

⁸¹ *N. Coast Women's Care Med. Group, Inc. v. San Diego Cty. Superior Court*, 189 P.3d 959 (Cal. 2008).

⁸² *Compare Keeton v. Anderson-Wiley*, 664 F.3d 865 (11th Cir. 2011), *with Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012).

discrimination. A statute designed to protect women and LGBT individuals against sex discrimination should not be used to relegate them to second class citizenship.

5. *Clarify Civil Rights Protections to Ensure that Citizen Children and other Eligible Members of Mixed-Status Immigrant Families Are Not Deterred from Securing Coverage*

Nearly one in four children younger than age eight has an immigrant parent.⁸³ More than nine out of every 10 of these children are U.S. citizens, and nearly half of these children live in “mixed-status” families,⁸⁴ frequently including a parent who is undocumented. Families with mixed immigration statuses are deterred from seeking health coverage for eligible individuals within the household far too often. A variety of factors are at play, including the discriminatory impact of irrelevant and inappropriate questioning regarding the immigration status or Social Security numbers of parents applying for coverage not for themselves, but for their children. It is critical that HHS ensure that mixed status households are protected against the discriminatory impact of inappropriate questioning. At stake is the health of millions of children; over three million children with only undocumented parents are estimated to be eligible for Medicaid/CHIP or Marketplace subsidies under the ACA.⁸⁵

HHS and the Department of Agriculture recognized in their “Tri-Agency Guidance,” that “[t]o the extent that states’ application requirements and processes have the effect of deterring eligible applicants and recipients who live in immigrant families from enjoying equal participation in and access to those benefit programs based on their national origin, states inadvertently may be violating Title VI.”⁸⁶ HHS should expressly reiterate here its authority under Title VI to address disparate, effect-based discrimination. The regulations should make clear that HHS intends to exercise oversight for protecting confidentiality and limiting the inappropriate collection, use, and disclosure of personally identifiable information from non-applicants, such as Social Security numbers or citizenship or immigration status information – practices that are unnecessary to program administration and that deter ineligible immigrants from applying for health coverage on behalf of eligible family members.

RECOMMENDATION:

Amend § 92.101(a)(1) as follows: Except as provided in Title I of the ACA, an individual shall not, on the basis of race, color, national origin, sex, age, or disability, be excluded **or deterred**

⁸³ Karina Fortuny, et al., The Urban Institute, *Young Children of Immigrants* 1 (August 2010).

⁸⁴ *Id.* at 5.

⁸⁵ Stacey McMorrow, Genevieve M. Kennedy, & Christine Coyer, The Urban Institute, *Addressing Coverage Challenges for Children Under the Affordable Care Act* (2011),

<http://www.urban.org/research/publication/addressing-coverage-challenges-children-under-affordable-care-act>.

⁸⁶ U.S. Dep’t Health and Human Servs. And U.S. Dep’t of Agriculture, *Policy Guidelines Regarding Inquiries into Citizenship, Immigration Status and Social Security Numbers in State Application for Medicaid, State Children’s Insurance Program (SCHIP), Temporary Assistance for Needy Families (TANF), and Food Stamp Benefits*.

from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any health program or activity to which this part applies.

6. Meaningful Access for Individuals with Limited English Proficiency

We strongly support the NPRM's specific requirements to ensure meaningful access to care for individuals with limited English proficiency. In particular, we support the definition of qualified interpreter, and we suggest including a definition of a qualified translator. Further, we strongly support including specific thresholds for translating written documents to ensure minimum standards exist that would directly aid evaluating compliance and enforcement. We also support requirements regarding taglines but recommend that covered entities include taglines in the top 15 languages in their state/service area rather than the proposal to only include the top 15 languages nationally. In many states, the top 15 languages nationally will not be useful for informing local limited English proficient communities.

7. Disability-Based Discrimination

We strongly support the NPRM's approach of prohibiting discrimination in health-related insurance and other health-related coverage. We urge HHS to provide clear guidance on what constitutes disability-based discrimination in these contexts. One key form of discrimination is the unnecessary segregation of people with disabilities, as prohibited by Title II of the ADA and the Olmstead Decision.

In the past, states have provided higher reimbursement rates for services in segregated settings (such as nursing homes and hospitals) than for similar services in integrated settings, and health plans have offered personal care services and mental health treatment in greater amounts in segregated settings than in home and community settings. Both are strong drivers toward isolating people with disabilities in institutions instead of integrating them in home and community based services.

In addition, health plans have failed to cover core services commonly needed by people with intellectual disabilities or durable medical equipment (such as wheelchairs or ventilators) commonly needed by people with physical disabilities. The Department should make explicit that such discrimination is prohibited by Section 1557.

Conclusion

We greatly appreciate the efforts by HHS to end discrimination in healthcare. Once put in place through a final rule, these protections will positively impact the health and well-being of millions of people in the United States. We look forward to our continued work with HHS to ensure swift implementation of the final rule.

Sincerely,

A handwritten signature in black ink that reads "Karin Johanson". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Karin Johanson
Director, Washington Legislative Office