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10 **UNITED STATES DISTRICT COURT**  
11 **EASTERN DISTRICT OF WASHINGTON**  
**AT YAKIMA**

12 STATE OF WASHINGTON,

NO. 2:19-cv-00183-SAB

13  
14 Plaintiff,

BRIEF OF NATIONAL  
CENTER FOR LESBIAN  
RIGHTS ET AL. AS AMICI  
CURIAE IN SUPPORT OF  
PLAINTIFF’S MOTION FOR  
SUMMARY JUDGMENT

15 v.

16 ALEX M. AZAR II et al.,

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18 Defendants.

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1 **ARGUMENT**

2 **I. THE FINAL RULE WILL HARM LGBTQ PATIENTS.**

3 The mission of the Department of Health and Human Services (“HHS”) is  
4 “to enhance and protect the health and well-being of all Americans,” which HHS  
5 fulfills “by providing for effective health and human services and fostering  
6 advances in medicine, public health, and social services.”<sup>3</sup> HHS has an important  
7 role in ensuring equal access to health care and ending discriminatory practices  
8 contributing to poor health outcomes and health disparities.<sup>4</sup> But the Final Rule

9 \_\_\_\_\_  
10 OCR-2018-0002-71044 (Equality California); HHS-OCR-2018-0002-71892  
11 (Empire Justice Center); HHS-OCR-2018-0002-69877 (Forge, Inc.); HHS-OCR-  
12 2018-0002-69268 (HIV Health Care Access Work Group, joined by Equality  
13 Federation); HHS-OCR-2018-0002-70389 (Family Equality Council); HHS-OCR-  
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15 Legal Advocates & Defenders); HHS-OCR-2018-0002-70848 (Human Rights  
16 Campaign); HHS-OCR-2018-0002-68010 (Movement Advancement Project);  
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21 71256 (New York State LGBT Health & Human Services Network, joined by  
22 Transgender Legal Defense and Education Fund, Inc.).

23 <sup>3</sup> U.S. Dep’t of Health & Hum. Servs., *About HHS*, [https://perma.cc/5DGR-  
24 TNMM](https://perma.cc/5DGR-TNMM).

<sup>4</sup> See NCLR Comment, *supra*, at 2-3 & n.3, 4 (discussing earlier efforts of HHS to  
reduce discrimination in health care by addressing practices such as segregation in



1 will do exactly the opposite. In particular, the Final Rule will harm LGBTQ  
2 patients, who already face significant barriers to health care, including pervasive  
3 and harmful discrimination in health care settings. It will invite discrimination and  
4 exacerbate the barriers LGBTQ people face in accessing care. The harm the Final  
5 Rule will cause to LGBTQ patients supports the grant of a permanent injunction.  
6 *See, e.g., eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)  
7 (articulating factors for permanent injunction).

8 **A. LGBTQ People Face Significant Barriers to Accessing Health**  
9 **Care, Including Pervasive and Harmful Discrimination in Health**  
10 **Care Settings.**

11 LGBTQ people face significant barriers to accessing health care, including  
12 higher rates of poverty,<sup>5</sup> unemployment,<sup>6</sup> and uninsurance<sup>7</sup> than people who are not

13 health care facilities based on race or disability, categorical insurance coverage  
14 denials of gender-affirming medical care, and insurance plans that discriminate  
15 against people living with HIV).

16 <sup>5</sup> *See* Lourdes Ashley Hunter et al., *Intersecting Injustice: Addressing LGBTQ*  
17 *Poverty and Economic Justice for All* 4-5, 63-76 (2018), [https://perma.cc/DC6H-](https://perma.cc/DC6H-228W)  
18 [228W](https://perma.cc/DC6H-228W); Human Rights Watch, “*You Don’t Want Second Best*”: *Anti-LGBT*  
19 *Discrimination in US Health Care* 17 (2018), <https://perma.cc/79KG-W3QU>.

20 <sup>6</sup> Rich Bellis, *LGBTQ Workers Still Face Higher Unemployment Rates*, Fast  
21 Company (Nov. 8, 2017), <https://perma.cc/X9LU-WPEP>; S.E. James et al., Nat’l  
22 Ctr. for Transgender Equality, *2015 U.S. Transgender Survey* 98 (2016),  
23 <https://perma.cc/86HL-NJC4>.

24 <sup>7</sup> Kellan Baker & Laura E. Durso, Ctr. for Am. Progress, *Why Repealing the*  
*Affordable Care Act Is Bad Medicine for LGBT Communities* (Mar. 22, 2017),  
<https://perma.cc/ZWH5-TXZK>.

1 LGBTQ. LGBTQ people also experience health disparities,<sup>8</sup> which are particularly  
2 severe for older adults, youth, transgender people, and people of color.<sup>9</sup>

3 As HHS's Healthy People 2020 initiative has recognized, these disparities  
4 are linked to stigma and discrimination: "LGBT individuals face health disparities  
5 linked to societal stigma, discrimination, and denial of their civil and human  
6 rights."<sup>10</sup> HHS has also stated that "[s]ocial determinants affecting the health of  
7 LGBT individuals largely relate to oppression and discrimination."<sup>11</sup> A recent

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9 <sup>8</sup> See, e.g., Inst. of Medicine, *The Health of Lesbian, Gay, Bisexual, and*  
10 *Transgender People: Building a Foundation for Better Understanding* 1 (2011),  
11 <https://perma.cc/G9RY-SBXN>.

12 <sup>9</sup> See, e.g., U.S. Dep't of Health & Hum. Servs., *Healthy People 2020, Lesbian,*  
13 *Gay, Bisexual, and Transgender Health*, <https://perma.cc/UQ43-E75T>; Karen I.  
14 Fredriksen-Goldsen et al., *Physical and Mental Health of Transgender Older*  
15 *Adults: An At-Risk and Underserved Population*, 54 *Gerontologist* 488 (2014),  
16 <https://perma.cc/RK3L-7MMS>; Karen I. Fredriksen-Goldsen et al., *Health*  
17 *Disparities Among Lesbian, Gay, and Bisexual Older Adults: Results from a*  
18 *Population-Based Study*, 103 *Am. J. Pub. Health* 1802 (2013),  
19 <https://perma.cc/27PX-BX7R>; U.S. Ctrs. for Disease Control & Prevention, *HIV*  
20 *and African American Gay and Bisexual Men*, <https://perma.cc/5X46-X9E5>.

21 <sup>10</sup> U.S. Dep't of Health & Hum. Servs., *Healthy People 2020, supra*.

22 <sup>11</sup> *Id.* The CDC has similarly recognized that "[s]ocial inequality is often associated  
23 with poorer health status," and some health disparities are "associated with social  
24 and structural inequities, such as the stigma and discrimination that LGBT  
populations experience." U.S. Ctrs. for Disease Control & Prevention, *About LGBT*  
*Health*, <https://perma.cc/C3WD-NEKY>.

1 study found that individuals face significant barriers to health care as a result of  
2 discrimination based on a number of often intersecting factors, including  
3 transgender status, sexual orientation, race, and economic factors.<sup>12</sup> As described  
4 below, LGBTQ people experience widespread discrimination in health care  
5 settings, which causes severe and lasting harm.

6 Discrimination against LGBTQ people in health care settings is well-  
7 documented,<sup>13</sup> particularly with respect to transgender people, who “are often  
8 forced to navigate a healthcare system that is resistant at best and at times openly  
9 hostile toward transgender people’s needs.”<sup>14</sup> A 2010 study by Lambda Legal  
10 found that 56% of lesbian, gay, and bisexual respondents had experienced  
11 instances of discrimination in health care, such as refusal of health care, excessive

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12 <sup>12</sup> Ning Hsieh & Matt Ruther, *Despite Increased Insurance Coverage, Nonwhite*  
13 *Sexual Minorities Still Experience Disparities in Access to Care*, 36 *Health Affairs*  
14 1786 (2017).

15 <sup>13</sup> See, e.g., NCLR Comment, *supra*, at 4 & n.8; Shabab Ahmed Mirza & Caitlin  
16 Rooney, Ctr. for Am. Progress, *Discrimination Prevents LGBTQ People from*  
17 *Accessing Health Care* (Jan. 18, 2018), <https://perma.cc/X9TN-5Q3U>; James et al.,  
18 *supra*, at 93-125; Lambda Legal, *When Health Care Isn’t Caring: Lambda Legal’s*  
19 *Survey of Discrimination Against LGBT People and People with HIV* (2010),  
20 <https://perma.cc/B8TC-MJS4>; see also Inst. of Medicine, *supra*, at 61-67  
21 (discussing barriers LGBT people face in accessing health care).

22 <sup>14</sup> Kristie L. Seelman et al., *Transgender Noninclusive Healthcare and Delaying*  
23 *Care Because of Fear: Connections to General Health and Mental Health Among*  
24 *Transgender Adults*, 2.1 *Transgender Health* 18 (2017), [https://perma.cc/3CZZ-](https://perma.cc/3CZZ-JDWK)  
[JDWK](https://perma.cc/3CZZ-JDWK).

1 precautions used by health care professionals, and physically rough or abusive  
2 behavior by health care professionals.<sup>15</sup> Seventy percent of transgender and gender  
3 non-conforming respondents experienced the same, as had 63% of respondents  
4 living with HIV.<sup>16</sup> The study also found that respondents of color and low-income  
5 respondents experienced higher rates of discrimination and substandard care.<sup>17</sup>  
6 More recently, the 2015 U.S. Transgender Survey, a national survey of nearly  
7 28,000 people, found that 33% of respondents who saw a health care provider in  
8 the past year had at least one negative experience related to being transgender, with  
9 a higher percentage for transgender men, people with disabilities, and those who  
10 identified as American Indian, Black, Middle Eastern, or multiracial.<sup>18</sup> Types of  
11 negative experiences included: having to teach the provider about transgender  
12 people to get appropriate care, a provider asking unnecessary or invasive questions,  
13 being refused medical care, being verbally harassed in a health care setting, having  
14 a provider use harsh or abusive language when treating them, or being physically  
15 attacked or sexually assaulted in a health care setting.<sup>19</sup>

16 Outright refusals of care based on a patient's sexual orientation or gender  
17 identity are widespread, especially with respect to transgender people. A nationally  
18 representative study from the Center for American Progress in 2017 showed that  
19 among LGBTQ respondents who saw a health care provider in the past year, 29%  
20 of transgender respondents, and 8% of lesbian, gay, bisexual, and queer

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21 <sup>15</sup> Lambda Legal, *When Health Care Isn't Caring*, *supra*, at 5.

22 <sup>16</sup> *Id.* at 10.

23 <sup>17</sup> *Id.* at 11.

24 <sup>18</sup> James et al., *supra*, at 96 fig.7.3.

<sup>19</sup> *Id.*

1 respondents, said that a provider refused to see them because of their actual or  
2 perceived gender identity or sexual orientation.<sup>20</sup> Some denials of care involve  
3 specific services related to sexual orientation or transgender status, such as fertility  
4 or assisted reproductive services for a same-sex couple, or hormone therapy for a  
5 transgender person.<sup>21</sup> And some denials of care are for medical treatments that are  
6 completely unrelated to a person’s LGBTQ identity. For example, a respondent to  
7 a national survey of transgender people said, “I have been refused emergency room  
8 treatment even when delivered to the hospital by ambulance with numerous broken  
9 bones and wounds.”<sup>22</sup>

10 Many LGBTQ people have experienced a denial or delay of medical care  
11 due to a provider’s religious beliefs. In 2015, a lesbian couple in Michigan brought  
12 their six-day-old newborn to the pediatrician and were told the pediatrician would  
13 not see the infant because of the doctor’s religious objections.<sup>23</sup> A social worker

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14 <sup>20</sup> Mirza & Rooney, *supra*.

15 <sup>21</sup> For example, a transgender woman reported that when she asked her long-time  
16 doctor for help obtaining hormone therapy, the doctor “looked at me, and then she  
17 kind of hemmed and hawed . . . and she said, ‘Well, I just don’t believe in that, and  
18 I can’t help you with that.’” Christine Grimaldi, *It’s ‘Scary,’ But Transgender*  
19 *Patients Are Fighting Trump’s Health-Care Discrimination Agenda*, Rewire.News  
20 (Mar. 13, 2018), <https://perma.cc/AHF3-YQKR>.

21 <sup>22</sup> Jaime M. Grant et al., Nat’l Ctr. for Transgender Equality & Nat’l Gay and  
22 Lesbian Task Force, *Injustice at Every Turn: A Report of the National Transgender*  
23 *Discrimination Survey* 73 (2011), <https://perma.cc/9TGG-4GA3>.

24 <sup>23</sup> Andrew Satter & Sarah McBride, Ctr. for Am. Progress, *Their Baby Was Denied*  
*Access to Care Because They Are Gay* (July 21, 2015), <https://perma.cc/WUR8->

1 told Human Rights Watch that a transgender child was accepted for treatment at a  
2 religiously affiliated psychiatric practice, but then turned away when the doctor  
3 learned the child was transgender.<sup>24</sup> As the social worker explained:

4 They accepted the person at first, but when they found out [the  
5 person] was a trans client, the doctor said we don't see trans clients  
6 here. They got in the door, but then got turned away. It often takes  
7 months to get an appointment here, and the family felt they had  
8 invested a lot of time to get in, and was then turned away.<sup>25</sup>

9 A lesbian in Mississippi reported that when she and her wife were seeking a  
10 fertility doctor in 2012, the receptionist said the doctor would not see them because  
11 "[i]t's his religious belief that he only treats straight married couples."<sup>26</sup> Human  
12 Rights Watch also reported that the mother of a gay teenager called her child's  
13 pediatrician and said, "we've seen you our whole life and our son is gay and we  
14 just wanted to make sure it wouldn't be an issue," to which the pediatrician replied,  
15 "you need to understand this is a Christian-based office and we may not be a good  
16 fit for your family any longer."<sup>27</sup> And at Catholic hospitals, based on religious  
17 directives, transgender men have experienced the abrupt cancellation of medically

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18 [UJFL](#); Abby Phillip, *Pediatrician Refuses to Treat Baby with Lesbian Parents and*  
19 *There's Nothing Illegal About It*, Wash. Post (Feb. 19, 2015),  
20 <https://perma.cc/V8ZQ-BWVK>.

21 <sup>24</sup> Human Rights Watch, "You Don't Want Second Best," *supra*, at 19.

22 <sup>25</sup> *Id.*

23 <sup>26</sup> Human Rights Watch, *All We Want Is Equality: Religious Exemptions and*  
24 *Discrimination Against LGBT People in the United States* 21 (2018),  
<https://perma.cc/XM5N-NC2G>.

<sup>27</sup> *Id.* at 22.

1 necessary, scheduled hysterectomies, even though those hospitals permit  
2 hysterectomies to be performed for patients who are not transgender.<sup>28</sup>

3 Denying necessary medical care for any reason, including a provider's  
4 religious beliefs, has direct health consequences for patients. As UCLA's Williams  
5 Institute stated in a comment on the proposed Rule, "[a]n individual who is denied  
6 care must, at a minimum, experience the inconvenience of seeking alternative  
7 providers for the service," which "can be especially critical for individuals who  
8 live in communities where no such alternatives are available or where reaching an  
9 alternative care provider can only be done with great cost and effort."<sup>29</sup> LGBTQ  
10 people often have to travel long distances to find LGBTQ-friendly providers or to  
11 receive specific care. For example, the U.S. Transgender Survey reported that 29%  
12 of respondents seeking transition-related care had to travel 25 miles or more to  
13 access it.<sup>30</sup> Human Rights Watch interviewed LGBTQ people who described  
14 driving across Michigan to find a friendly nurse practitioner or medical practice,  
15 driving from East Tennessee to North Carolina for regular hormone injections, and

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16 <sup>28</sup> *Minton v. Dignity Health*, First Am. Compl., No. 17-558259 (Cal. Super. Ct),  
17 <https://perma.cc/T2WP-GWE2>; *Knight v. St. Joseph Health*, Compl., No.  
18 DR190259 (Cal. Super. Ct.), <https://perma.cc/3EP5-XUFR>; *Conforti v. St. Joseph*  
19 *Healthcare Sys. Inc.*, Compl., No. 2:17-cv-00050-JAL-JAD (D.N.J.); *see also*  
20 NCLR Comment, *supra*, at 9 (describing call to NCLR help line from a  
21 transgender man whose hysterectomy was denied by a Catholic hospital).

22 <sup>29</sup> UCLA Williams Inst., Comment Letter on Proposed Rule on Protecting  
23 Statutory Conscience Rights in Health Care 9 (Mar. 27, 2018), HHS-OCR-2018-  
0002-72082.

24 <sup>30</sup> James et al., *supra*, at 99 fig.7.7.



1 traveling two hours each way to attend therapy or meet with a trans-affirming  
2 doctor in another state.<sup>31</sup> In the 2017 study from Center for American Progress,  
3 nearly one in five LGBTQ people, including 31% of transgender people, said that  
4 if they were turned away by a hospital, it would be “very difficult” or “not  
5 possible” to find the same type of service at another hospital.<sup>32</sup> The rate was much  
6 higher – 41% – for LGBTQ people living outside a metropolitan area.<sup>33</sup> For these  
7 patients, being turned away by a provider may result in being denied care  
8 entirely.<sup>34</sup>

9 Even when doctors or other providers do not turn them away, LGBTQ  
10 people experience other forms of discrimination in health care settings. In an  
11 example shared by Lambda Legal, a lesbian in Texas brought her two-year-old  
12 child to a pediatric dentist after the child fell and her tooth was knocked out.<sup>35</sup> The  
13 dentist asked who was the “real mother,” said “a child cannot have two mothers,”  
14 and told the mother that he would only see the “biological mother” (with a birth  
15 certificate as proof) before he would treat the child.<sup>36</sup> Such incidents are not  
16 isolated. The 2017 Center for American Progress study reported that among

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17 <sup>31</sup> Human Rights Watch, “*You Don’t Want Second Best*,” *supra*, at 14.

18 <sup>32</sup> Mirza & Rooney, *supra*.

19 <sup>33</sup> *Id.*

20 <sup>34</sup> See NCLR Comment, *supra*, at 6-7 (describing challenges LGBTQ people face  
21 in accessing health care in rural communities).

22 <sup>35</sup> See Br. of Amici Curiae Lambda Legal Defense & Education Fund, Inc., Family  
23 Equality Council, et al. in Support of Respondents 18-19, *Masterpiece Cakeshop,*  
24 *Ltd. v. Colo. Civil Rights Comm’n*, No. 16-111, <https://perma.cc/SQ2F-XG5N>.

<sup>36</sup> *Id.*



1 lesbian, gay, bisexual, and queer respondents who had visited a doctor or health  
2 care provider in the year before the survey, 7% said that a doctor or other provider  
3 refused to recognize their family, including a child or same-sex spouse or partner;  
4 9% said that a doctor or other provider used harsh or abusive language when  
5 treating them; and 7% said they experienced unwanted physical contact (such as  
6 fondling, sexual assault, or rape) from a doctor or other health care provider.<sup>37</sup>  
7 LGBTQ people of color are more vulnerable than white LGBTQ people to  
8 discrimination and mistreatment. For example, Lambda Legal’s study found that  
9 lesbian, gay, or bisexual respondents of color were more than twice as likely as  
10 white respondents to have experienced physically rough or abusive treatment by  
11 medical professionals.<sup>38</sup>

12 Transgender people are particularly likely to experience discrimination and  
13 mistreatment in health care settings. In the 2017 Center for American Progress  
14 study, 23% of transgender respondents who had seen a doctor or other health care  
15 provider in the past year said a health care provider intentionally refused to  
16 recognize their gender identity and deliberately referred to them by the wrong  
17 name or pronouns.<sup>39</sup> As the mother of a transgender teenager told Human Rights  
18 Watch, “I said these are his name and his pronouns . . . . After the doctor left, [my son]  
19 cried for a solid ten minutes, and said I don’t want to come back here ever again.”<sup>40</sup>  
20 A respondent to the U.S. Transgender Survey shared, “I was consistently

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21 <sup>37</sup> Mirza & Rooney, *supra*.

22 <sup>38</sup> Lambda Legal, *When Health Care Isn’t Caring*, *supra*, at 12.

23 <sup>39</sup> Mirza & Rooney, *supra*.

24 <sup>40</sup> Human Rights Watch, “*You Don’t Want Second Best*,” *supra*, at 20.

1 misnamed and misgendered throughout my hospital stay. I passed a kidney stone  
2 during that visit. On the standard 1-10 pain scale, that's somewhere around a 9. But  
3 not having my identity respected, that hurt far more.”<sup>41</sup>

4 Providers' refusal to recognize a transgender patient's gender identity by  
5 deliberately refusing to use a transgender person's name and pronouns can also  
6 result in dangerous denials of care. NCLR and Transgender Law Center  
7 represented the mother of Kyler Prescott, a transgender boy who was admitted to a  
8 hospital inpatient psychiatric unit in San Diego because of his suicidal thoughts.  
9 *See Prescott v. Rady Children's Hospital-San Diego*, 265 F. Supp. 3d 1090, 1096  
10 (C.D. Cal. 2017). Although hospital staff assured Kyler's mother that Kyler's  
11 gender identity would be respected and that staff would refer to Kyler with male  
12 gender pronouns, staff repeatedly addressed and referred to Kyler as a girl. *Id.*  
13 (citing complaint). Kyler reported that one employee said, “Honey, I would call  
14 you he, but you're such a pretty girl.” *Id.* at 1097. “Despite concerns over Kyler's  
15 continuing depression and suicidal thoughts, Kyler's medical providers concluded  
16 that he should be discharged early from the hold at [the hospital] because of the  
17 staff's conduct.” *Id.* (citing complaint).

18 Transgender people are also disproportionately likely to experience  
19 mockery, harsh and abusive language, and unwanted physical contact from health  
20 care providers and office staff. The Center for American Progress found that that  
21 among transgender respondents who visited a doctor or other health care provider  
22 in the past year, 21% said a doctor or other health care provider used harsh or  
23 abusive language in treating them, and 29% said they experienced unwanted  
24 physical contact (such as fondling, sexual assault, or rape) from a doctor or other

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<sup>41</sup> James et al., *supra*, at 96.

1 health care provider.<sup>42</sup> A respondent to another national survey reported, “I was  
2 forced to have a pelvic exam by a doctor when I went in for a sore throat. The  
3 doctor invited others to look at me while he examined me and talked to them about  
4 my genitals.”<sup>43</sup> Human Rights Watch reported an incident where a transgender  
5 woman was being treated for cardiomyopathy, and a nurse “left the room[] and  
6 audibly told another nurse to come look at [the patient’s] breasts.”<sup>44</sup> Another  
7 transgender woman reported hearing “giggles” and “snickers” from nurses and  
8 office staff when she began to live openly as a transgender woman.<sup>45</sup>

9 Fear of discrimination in health care settings deters and delays LGBTQ  
10 people from seeking necessary medical care. For example, a mother told Human  
11 Rights Watch that her transgender son had not been to the dentist in two years due  
12 to fear of discrimination, and another interviewee said that her same-sex partner, a  
13 nurse, had never been to the gynecologist because she was afraid of how she might  
14 be treated.<sup>46</sup> In the U.S. Transgender Survey, 23% of respondents did not see a  
15 doctor in the past year when they needed to because of fear of being mistreated.<sup>47</sup>

16 As one respondent described:

17 Multiple medical professionals have misgendered me, denied to me  
18 that I was transgender or tried to persuade me that my trans identity  
19 was just a misdiagnosis of something else, have made jokes at my  
20 expense in front of me and behind my back, and have made me feel  
21 physically unsafe. I often do not seek medical attention when it is

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22 <sup>42</sup> Mirza & Rooney, *supra*.

23 <sup>43</sup> Grant, *supra*, at 74.

24 <sup>44</sup> Human Rights Watch, “*You Don’t Want Second Best*,” *supra*, at 19.

<sup>45</sup> Grimaldi, *supra*.

<sup>46</sup> Human Rights Watch, “*You Don’t Want Second Best*,” *supra*, at 25-26.

<sup>47</sup> James et al., *supra*, at 98.

1 needed, because I'm afraid of what harassment or discrimination I  
2 may experience in a hospital or clinic.<sup>48</sup>

3 Those who have experienced discrimination in health care settings are even more  
4 likely to avoid or delay necessary medical care. As the Center for American  
5 Progress study found, LGBTQ people who had experienced discrimination in the  
6 past year were nearly *seven times more likely* than people who had not experienced  
7 discrimination in the past year to avoid doctor's offices.<sup>49</sup> A recent study of  
8 transgender people found "a significant association between delaying needed  
9 healthcare in the past year because of fear of discrimination and worse general  
10 health and mental health (current depression, suicidal ideation, and suicide  
11 attempts)."<sup>50</sup>

12 These examples show the range of harms resulting from discrimination  
13 against LGBTQ people in health settings, including the practical harms when  
14 specific medical care is delayed or denied, the emotional harm resulting from the  
15 experience of discrimination, and poor health outcomes. As UCLA's Williams  
16 Institute explained in a comment on the proposed rule, "refusals of service based  
17 on sexual orientation or gender identity are 'minority stressors' that can profoundly  
18 harm the health and well-being of LGBT people who are directly subject to these  
19 refusals of service."<sup>51</sup> In particular, "[w]hen a health care provider denies care or  
20 provides lesser care to an LGBT person because of their sexual orientation or  
21 gender identity – regardless of the intent behind the discrimination – it is a  
22 prejudice event, a type of minority stress, which has both tangible and symbolic

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23 <sup>48</sup> *Id.* at 96.

24 <sup>49</sup> *See* Mirza & Rooney, *supra*.

<sup>50</sup> Seelman et al., *supra*, at 25.

<sup>51</sup> UCLA Williams Inst. Comment, *supra*, at 8-9.

1 impacts on the LGBT patient.”<sup>52</sup> As noted above, HHS’s Healthy People 2020  
2 initiative has recognized that LGBTQ health disparities are linked to stigma and  
3 discrimination.<sup>53</sup> The U.S. Transgender Survey found that transgender people were  
4 nearly eight times more likely than the general population to be experiencing  
5 significant psychological distress, which was “associated with a variety of  
6 experiences of rejection, discrimination, and violence.”<sup>54</sup> In addition, *sixty percent*  
7 of respondents in a study of transgender and gender non-conforming people who  
8 had been refused medical care because of anti-transgender bias reported a lifetime  
9 suicide attempt, a rate significantly higher than the percentage of respondents as a  
10 whole.<sup>55</sup>

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13 <sup>52</sup> *Id.* at 9. This is consistent with research on “minority stress,” a framework for  
14 understanding high rates of poor mental health and other disparities in a minority  
15 population resulting from chronic stressors such as stigma and discrimination. *See,*  
16 *e.g.,* Seelman et al., *supra*, at 19 (reviewing studies); Carl G. Streed et al.,  
17 *Association Between Gender Minority Status and Self-Reported Physical and*  
18 *Mental Health in the United States*, 177 JAMA Internal Medicine 1210 (2017),  
19 <https://perma.cc/5XU9-VBC2>.

20 <sup>53</sup> U.S. Dep’t of Health & Hum. Servs., *Healthy People 2020*, *supra*.

21 <sup>54</sup> James et al., *supra*, at 105-07.

22 <sup>55</sup> Ann P. Haas et al., Am. Found. for Suicide Prevention & UCLA Williams Inst.,  
23 *Suicide Attempts among Transgender and Gender Non-Conforming Adults:*  
24 *Findings of the National Transgender Discrimination Survey* 12 & tbl.18 (2014),  
<https://perma.cc/R3B6-4EL5>.

1           **B.     The Final Rule Will Exacerbate Barriers to Health Care for**  
2           **LGBTQ People.**

3           The Final Rule will compound barriers to health care for LGBTQ people,  
4 particularly those who are transgender, by inviting health care workers to refuse  
5 services or referrals to LGBTQ people. HHS contemplates that more health care  
6 workers will raise religious- or conscience-related objections: it states that “[t]he  
7 Department expects that, as a result of this rule, more individuals, having been  
8 apprised of those rights, will assert them.” 84 Fed. Reg. at 23,250. And although  
9 HHS fails to adequately consider the costs to patients who will be denied care as a  
10 result of the Final Rule,<sup>56</sup> it acknowledges that “[d]ifferent types of harm can result  
11 from denial of a particular procedure based on an exercise of belief or conviction.”  
12 84 Fed. Reg. at 23,251. HHS provides no evidence for its unsupported assertion  
13 that Final Rule will generate “significant overall increases in access” to health care.  
14 *Id.* at 23,252. This speculation flies in the face of the well-documented experiences  
15 of LGBTQ people in health care settings and the wide-ranging, lasting harms that  
16 result from denials of care, as well as the fear of denials of care or other forms of  
17 discrimination. As discussed below, the Final Rule will result in an increase in  
18 refusals of care to LGBTQ patients, particularly transgender people, and  
19 ambiguous language in the Final Rule may be misinterpreted to permit wider,  
20 status-based discrimination against LGBTQ patients.

21           First, the Final Rule will harm transgender patients seeking medically  
22 necessary and, in some cases, lifesaving medical procedures to treat gender  
23 dysphoria, the medical diagnosis characterized by the distress that arises from  
24 incongruence between a person’s gender identity and the person’s assigned sex at

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<sup>56</sup> See generally Amicus Curiae Br. of Institute for Policy Integrity.

1 birth.<sup>57</sup> Gender dysphoria is a serious medical condition: if untreated, it can lead to  
2 “clinically significant psychological distress, dysfunction, debilitating depression  
3 and, for some people without access to appropriate medical care and treatment,  
4 suicidality and death.”<sup>58</sup> It can, however, “in large part be alleviated through  
5 treatment.”<sup>59</sup>

6 The Final Rule, although ambiguous, appears to suggest that HHS may  
7 consider certain treatments for gender dysphoria as “sterilization.” But procedures  
8 performed for the purpose of sterilization are different from treatments or  
9 procedures performed for other purposes, such as surgical treatments to treat  
10 gender dysphoria that may also affect reproductive function. The Final Rule twice

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12 <sup>57</sup> See Am. Psychiatric Ass’n, *Diagnostic and Statistical Manual of Mental*  
13 *Disorders* 451-53 (5th ed. 2013).

14 <sup>58</sup> Am. Medical Ass’n, House of Delegates, Resolution 122 (A-08), Resolution on  
15 Removing Financial Barriers to Care for Transgender Patients 2 (2008),  
16 <https://perma.cc/D88W-AZTU>.

17 <sup>59</sup> World Prof’l Ass’n for Transgender Health, *Standards of Care for the Health of*  
18 *Transsexual, Transgender, and Gender-Nonconforming People* 1 (7th Version  
19 2011), <https://perma.cc/FYN2-YZQX>. While specific treatments must be  
20 determined on an individualized basis, treatments for gender dysphoria can  
21 include: mental health services, such as assessment, counseling, and  
22 psychotherapy; social transition (living one’s life in accordance with one’s gender  
23 identity); hormone treatment; and surgical procedures. *See id.* at 9-10; World Prof’l  
24 Ass’n for Transgender Health, *Position Statement on Medical Necessity of*  
*Treatment, Sex Reassignment, and Insurance Coverage in the U.S.A.* 3 (Dec. 21,  
2016), <https://perma.cc/N3SL-NZQ5>.



1 references *Minton v. Dignity Health*, No. 17-558259 (Cal. Super. Ct. Apr. 19,  
2 2017), a lawsuit by a transgender man who challenged a Catholic hospital’s sudden  
3 cancellation of his hysterectomy, which Mr. Minton was undergoing as part of his  
4 course of treatment for gender dysphoria. The hospital cancelled Mr. Minton’s  
5 scheduled hysterectomy when it learned Mr. Minton was transgender, although the  
6 hospital routinely permits hysterectomies to be performed for patients who are not  
7 transgender.<sup>60</sup> HHS lists the *Minton* case as an example of lawsuits “claiming that  
8 Federal or State laws require private religious entities to perform . . .  
9 sterilizations,” 84 Fed. Reg. 23,178, and also includes the case in its “overview of  
10 reasons” for the Final Rule, *id.* at 23,176 n.27. In response to comments seeking  
11 clarification on HHS’s interpretation of “sterilization” and treatment for gender  
12 dysphoria, HHS states that it will consider any complaints on a “case-by-case  
13 basis.” *Id.* at 23,205.

14 The Rule thus appears to invite health care workers – defined extraordinarily  
15 broadly to include even a person who schedules procedures, *see id.* at 23,186 – to  
16 refuse certain treatment to transgender people, even if the provider routinely  
17 performs the same procedure, such as a hysterectomy, for patients who are not  
18 transgender. This will be extremely harmful. As noted above, while denials of any  
19 kind of needed medical care can have negative consequences, denial of treatment  
20 for gender dysphoria can be particularly devastating. Even if a patient refused care  
21 ultimately obtains the procedure sought from another provider or at another  
22 facility, delays in gender-affirming medical care exacerbate the gender dysphoria  
23 that the medical care is designed to treat. In addition, as the American Medical  
24 Association has recognized, delaying treatment for gender dysphoria “can cause

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<sup>60</sup> *See Minton v. Dignity Health*, First Am. Compl., *supra*.



1 and/or aggravate additional serious and expensive health problems, such as stress-  
2 related physical illnesses, depression, and substance abuse problems, which further  
3 endanger patients' health . . . ."<sup>61</sup>

4         Second, the Final Rule contains additional ambiguous language that may be  
5 misconstrued by health care workers and patients as permitting status-based  
6 discrimination against LGBTQ people, which is contrary to law and per se  
7 harmful, in addition to harming patients who will be denied services or referrals as  
8 a result. In response to comments expressing concern that the Rule would purport  
9 to cover areas beyond the scope of the underlying statutes, including "HIV  
10 treatment, pre-exposure prophylaxis, and infertility treatment," HHS did *not* say  
11 that such areas are outside the scope of the Final Rule or the underlying statutes. 84  
12 Fed. Reg at 23,182. Rather, HHS states that if it receives a complaint regarding  
13 these procedures, it would "examine the facts and circumstances of the complaint  
14 to determine whether it falls within the scope of the statute in question and these  
15 regulations." *Id.* And in response to comments expressing concern that the rule  
16 could "impact counseling or referrals for LGBT *persons*," *id.* at 23,189 (emphasis  
17 added), HHS declined to clarify that the Final Rule does not authorize the denial of  
18 services based on a patient's sexual orientation or gender identity. Rather, HHS  
19 says it "does not pre-judge matters without the benefit of specific facts and  
20 circumstances," and that it will evaluate particular claims on a "case-by-case  
21 basis." *Id.* Nothing in the statutes underlying the Final Rule authorizes status-based  
22 discrimination based on a patient's sex, including sexual orientation and gender  
23 identity. Nor could it, as Section 1557 of the Affordable Care Act prohibits sex  
24 discrimination in health programs or activities receiving federal financial

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<sup>61</sup> Am. Medical Ass'n, *supra*, at 2.

1 assistance. 42 U.S.C. § 18116(a). Rather than clearly affirming that such  
2 discrimination is unlawful, HHS appears to leave open the possibility it would  
3 construe the statutes underlying the Final Rule in a way that would allow such  
4 mistreatment of LGBTQ people. This will only invite discrimination and  
5 discourage LGBTQ people from seeking necessary health care.

6 **CONCLUSION**

7 Amici urge the Court to grant Plaintiff's motion for summary judgment and  
8 permanently enjoin the Final Rule.

9 Dated: September 20, 2019

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## APPENDIX

The **National Center for Lesbian Rights (NCLR)** is a national nonprofit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, transgender, and queer people and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBTQ people and their families in cases across the country involving constitutional and civil rights. NCLR has a particular interest in eradicating discrimination against LGBTQ people in health care settings and represents LGBTQ people in cases relating to access to health care in courts throughout the country.

**Bay Area Lawyers for Individual Freedom (BALIF)** is a bar association of approximately 500 lesbian, gay, bisexual, transgender, queer and intersex (“LGBTQI”) members in the San Francisco Bay Area legal community. BALIF promotes the professional interests and social justice goals of its members and the legal interests of the LGBTQI community at large. For nearly 40 years, BALIF has actively participated in public policy debates concerning the rights of LGBTQI people and has authored and joined amicus efforts concerning matters of broad public importance.

The **Center for Constitutional Rights (CCR)** is a national, not-for-profit legal, educational, and advocacy organization dedicated to protecting and advancing rights guaranteed by the United States Constitution and international law. Founded in 1966 to represent civil rights activists in the South, CCR has litigated numerous landmark civil and human rights cases on behalf of individuals impacted by arbitrary and discriminatory state policies, including policies that disproportionately impact LGBTQI communities of color.

1           Founded in 1999, **Equality California (EQCA)** is the nation’s largest  
2 statewide lesbian, gay, bisexual, transgender, and queer (“LGBTQ”) civil rights  
3 organization. Equality California brings the voices of LGBTQ people and allies to  
4 institutions of power in California and across the United States, striving to create a  
5 world that is healthy, just, and fully equal for all LGBTQ people. We advance civil  
6 rights and social justice by inspiring, advocating, and mobilizing through an  
7 inclusive movement that works tirelessly on behalf of those we serve. Equality  
8 California frequently participates in litigation in support of the rights of LGBTQ  
9 persons.

10           **Equality Federation** is the strategic partner to state-based equality  
11 organizations advocating on behalf of LGBTQ people. Since 1997, we have  
12 worked throughout the country with our member organizations to make legislative  
13 and policy advances on critical issues including marriage, nondiscrimination, safe  
14 schools, and healthy communities.

15           The **Empire Justice Center** is a New York-based, multi-issue, multi-  
16 strategy, public interest law firm founded in 1973 that is focused on changing the  
17 systems within which poor and low-income families live, including those  
18 marginalized based upon sexual orientation, gender identity, and gender  
19 expression. We believe in the critical importance of eliminating discrimination and  
20 harassment in all forms and ensuring that all people do not face discriminatory  
21 barriers when seeking health care or in any public benefit or public  
22 accommodation. Our core practice includes ensuring the legal and civil rights of  
23 lesbian, gay, bisexual, transgender, queer, and intersex (LGBTQI) individuals and  
24 their families and ensuring full and equal access to health care and services. We  
advance our work through impact litigation and direct legal services, policy  
advocacy, training, and education.

1           **Family Equality** (formerly Family Equality Council) is a national  
2 organization that advances lived and legal equality for LGBTQ families and those  
3 who wish to form them. Since its founding in 1979, Family Equality has worked to  
4 change attitudes, laws, and policies through advocacy and public education to  
5 ensure that all families, regardless of creation or composition, are respected, loved,  
6 and celebrated in all aspects of their life. Given the profound impact that health  
7 care has on an individual and their family, Family Equality has an ongoing interest  
8 in ensuring that LGBTQ people have equal access to quality health care services  
9 and are able to receive health care from welcoming and affirming providers.

10           **FORGE, Inc.** is a 25-year-old, national transgender anti-violence  
11 organization. The people we work with are survivors of all types of crime and  
12 trauma, and frequently need both acute and long-term medical care, which they are  
13 all too often denied.

14           **FreeState Justice, Inc. (FreeState)** is Maryland’s statewide legal advocacy  
15 organization that seeks to improve the lives of lesbian, gay, bisexual, transgender,  
16 and queer (“LGBTQ”) people. FreeState advocates for LGBTQ Marylanders by  
17 combining direct legal services with education and outreach to ensure that the  
18 LGBTQ community receives fair treatment in the law and in society. As such,  
19 FreeState has a particular interest in ensuring the equal treatment of LGBTQ  
20 individuals seeking to access health care.

21           Through strategic litigation, public policy advocacy, and education, **GLBTQ**  
22 **Legal Advocates & Defenders (GLAD)** works in New England and nationally to  
23 create a just society free of discrimination based on gender identity and expression,  
24 HIV status, and sexual orientation. GLAD has litigated widely in both state and  
federal courts in all areas of the law in order to protect and advance the rights of  
lesbians, gay men, bisexuals, transgender individuals, and people living with HIV

1 and AIDS. Since its founding in 1978, GLAD has zealously advocated for LGBTQ  
2 people and people living with HIV/AIDS who have been profoundly harmed by  
3 discrimination in access to health care by hospitals, health care providers, and  
4 insurers.

5 The **Human Rights Campaign (HRC)**, the largest national lesbian, gay,  
6 bisexual, transgender, and queer (“LGBTQ”) advocacy organization, envisions an  
7 America where LGBTQ people are ensured of their basic equal rights, and can be  
8 open, honest, and safe at home, at work, and in the community. Equal treatment  
9 when seeking health care is among these basic rights.

10 **Legal Voice**, founded in 1978 as the Northwest Women’s Law Center, is a  
11 non-profit public interest organization in the Pacific Northwest dedicated to  
12 protecting the rights of women, girls, and LGBTQ people through litigation,  
13 legislative advocacy, and the provision of legal information and education. Legal  
14 Voice’s work includes decades of advocacy in the courts and in the Washington  
15 Legislature to advance the rights of LGBTQ people and their families to ensure  
16 that they are free from discrimination based on their sex, sexual orientation, and  
17 gender identity or expression. Legal Voice has participated as counsel and as  
18 *amicus curiae* in numerous cases throughout the Northwest and the country, and  
serves as a regional expert and advocate in the area of gender equality.

19 The **LGBT Bar Association of New York** is a non-profit bar organization  
20 based in New York, New York, that is dedicated to promoting equality and access  
to justice for members of the LGBTQ community.

21 **Movement Advancement Project (MAP)** works to ensure that all people  
22 have a fair chance to pursue health and happiness, earn a living, take care of the  
23 ones they love, be safe in their communities, and participate in civic life. MAP  
24

1 provides independent and rigorous research, insight, and communications that help  
2 speed equality and opportunity for all.

3 **National Center for Transgender Equality (NCTE)** is a national social  
4 justice organization founded in 2003 and devoted to advancing justice,  
5 opportunity, and well-being for transgender people through education and  
6 advocacy on national issues. NCTE works with policymakers and communities  
7 around the country to develop fair and effective public policy, including in the area  
8 of health care access for transgender people.

9 The **National LGBTQ Task Force** is the nation's oldest national LGBTQ  
10 advocacy group. As a progressive social justice organization, the Task Force works  
11 to achieve full freedom, justice, and equality for Lesbian, Gay, Bisexual,  
12 Transgender, and Queer (LGBTQ) people and their families. The Task Force trains  
13 and mobilizes activists across the nation to combat discrimination against LGBTQ  
14 people in every aspect of their lives, including housing, employment, health care,  
15 retirement, and basic human rights. Recognizing that LGBTQ persons of color are  
16 subject to multifaceted discrimination, the Task Force is also committed to racial  
17 justice. To that end, the Task Force hosts the Racial Justice Institute at its annual  
18 Creating Change Conference, which equips individuals with skills to advance  
19 LGBTQ freedom and equality.

20 The **National Trans Bar Association (NTBA)** is a non-profit professional  
21 association of attorneys promoting equality both in the legal profession and under  
22 the law. In addition to working directly with transgender and gender non-  
23 conforming legal professionals, NTBA seeks to educate and advocate for  
24 legislative change that expands formal legal protections and access to legal  
representation for transgender and gender non-conforming people.



1           **One Colorado** is the state’s leading advocacy organization for LGBTQ  
2 Coloradans and their families. The mission of the organization is to secure  
3 protections and advance opportunities for LGBTQ Coloradans and their families.

4           **OutFront Minnesota (OFM)** is the largest advocacy organization for  
5 lesbian, gay, bisexual, transgender, and queer people in the Northstar State. OFM  
6 is dedicated to making Minnesota a place where people can be who they are, love  
7 whom they love, and live without fear of discrimination, harassment, or violence.

8           **QLaw**, the LGBTQ+ Bar Association of Washington, is an association of  
9 LGBTQ+ legal professionals and their friends. QLaw serves as a voice of  
10 LGBTQ+ lawyers and other legal professionals in the State of Washington on  
11 issues relating to diversity and equality in the legal profession, in the courts, and  
12 under the law. QLaw works to educate the public, the legal profession, and the  
13 courts about legal issues of particular concern to the LGTBQ+ community.

14           **SAGE** is the country’s oldest and largest organization dedicated to  
15 improving the lives of LGBT older people. In conjunction with 30 affiliates in 22  
16 states and Puerto Rico, SAGE offers supportive services and consumer resources  
17 to LGBT older people and their caregivers, advocates for public policy changes  
18 that address the needs of LGBT older people, and provides training for agencies  
19 and organizations that serve LGBT older people. Pursuant to a grant from the  
20 Department of Health and Human Services’ Administration for Community Living  
21 (ACL), SAGE—in collaboration with 18 leading organizations nationwide—  
22 operates the National Resource Center on LGBT Aging (NRC), which is the  
23 country’s first and only technical assistance resource center aimed at improving the  
24 quality of services and supports offered to LGBT older people. The NRC provides  
training, technical assistance, and educational resources to aging providers, LGBT  
organizations, and LGBT older people. To date, the NRC and our training arm,



1 SAGECare, have trained more than 50,000 professionals in every state and the  
2 District of Columbia. In addition, the NRC has published, and made widely  
3 available, best practice guides, including, “Inclusive Services for LGBT Older  
4 Adults, A Practical Guide to Creating Welcoming Agencies.”

5 The **San Francisco LGBT Center (the Center)** connects San Francisco’s  
6 diverse LGBT community to opportunities, resources, and each other to achieve  
7 our vision of a stronger, healthier, and more equitable world for LGBT people and  
8 our allies. The Center provides free services to community members in the areas of  
9 health and wellness, economic development, and youth services as well as  
10 opportunities for LGBT people to connect and organize to secure equal rights for  
11 LGBT people.

12 **Transgender Law Center (TLC)** is the largest national trans-led  
13 organization advocating self-determination for all people. Grounded in legal  
14 expertise and committed to racial justice, TLC employs a variety of community-  
15 driven strategies to keep transgender and gender nonconforming (“TGNC”) people  
16 alive, thriving, and fighting for liberation. TLC believes that TGNC people hold  
17 the resilience, brilliance, and power to transform society at its root, and that the  
18 people most impacted by the systems TLC fights must lead this work. TLC builds  
19 power within TGNC communities, particularly communities of color and those  
20 most marginalized, and lays the groundwork for a society in which all people can  
21 live safely, freely, and authentically, regardless of gender identity or  
22 expression. TLC works to achieve this goal through leadership development and  
23 by connecting TGNC people to legal resources. It also pursues impact litigation  
24 and policy advocacy to defend and advance the rights of TGNC people, transform  
the legal system, minimize immediate threats and harms, and educate the public  
about issues impacting our communities.

1           **Transgender Legal Defense and Education Fund, Inc. (TLDEF)** is a  
2 national civil rights organization committed to achieving full recognition of  
3 transgender persons’ civil rights in the United States. Since its founding in 2003,  
4 TLDEF has represented transgender persons who have experienced health care  
5 discrimination through advocacy, administrative appeals, administrative charges of  
6 discrimination, and impact litigation.

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