



**Testimony of Sasha J. Buchert
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**Testimony before the House Committee on Education and Labor
Civil Rights and Human Services Subcommittee**

**“On the Basis of Sex: Examining the Administration’s
Attacks on Gender-Based Protections”**

September 10, 2020

Chairwoman Bonamici, Ranking Member Cline, and distinguished members of the Committee, thank you for the opportunity to testify during this important hearing on behalf of Lambda Legal.

Lambda Legal Defense & Education Fund, Inc. (“Lambda Legal”) is the oldest and largest national legal organization dedicated to achieving full recognition of the civil rights of lesbian, gay, bisexual, transgender and queer (“LGBTQ”) people and everyone living with HIV through impact litigation, education and public policy work. Despite important legal and social progress, LGBTQ people and those living with HIV still face pervasive discrimination nationwide in employment, housing, public accommodations, education¹ and in health care services in particular.² The discrimination in health care ranges from denial of basic care to violations of personal autonomy regarding reproductive decisions, sexual health, gender expression, access to transition-related care and HIV care, and other matters. Because quality of life, and sometimes life itself, depends on access to quality health services, Lambda Legal long has prioritized protecting the rights of LGBTQ people to access health services and ensuring that medical professionals and healthcare facilities understand their responsibility to treat LGBTQ patients competently and fairly.

¹ See, e.g., Lambda Legal’s testimony in support of the Equality Act, H.R. 5, before the House Committee on Education and Labor (Apr. 22, 2019), https://www.lambdalegal.org/sites/default/files/legal-docs/downloads/20190422_lambda-legal-testimony-in-support-of-equality-act-for-house-committee-education-labor.pdf.

² See, e.g., Lambda Legal Comment re HHS Proposed Rule for Faith-Based Organizations (Feb. 18, 2020), <https://www.regulations.gov/document?D=HHS-OS-2020-0001-22659>; Lambda Legal, *When Health Care Isn’t Caring: Survey on Discrimination Against LGBT People and People Living with HIV* (2010) (“Lambda Legal, Health Care”), <http://www.lambdalegal.org/publications/when-health-care-isnt-caring>.

This testimony will focus on three different topics: the *Bostock* decision and its implications on other federal laws, the backdrop of this hearing, and a few of the most significant efforts made by the U.S. Department of Health and Human Services to roll back or eliminate LGBTQ patient protections.

I. *Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731 (2020).

I am pleased to provide testimony concerning the implications of the *Bostock* decision because Lambda Legal for years has worked to develop the case law demonstrating the logic and propriety of the sex discrimination analysis adopted by the Supreme Court in *Bostock*. Federal sex discrimination bans currently apply in the workplace, educational settings, housing, financial institutions, and health services and programs.³ As many of our cases have shown, the analysis approved in *Bostock* should apply with similar force regardless of the setting in which the particular sex discrimination ban applies.⁴

On June 15, 2020, the U.S. Supreme Court agreed with extensive lower court rulings when it held in *Bostock v. Clayton County* that an employer violates Title VII for discriminating against a person for being lesbian, gay, bisexual or transgender.⁵ Justice Gorsuch clarified in a 6-3 in a majority opinion that “it is impossible to discriminate against a person for being gay or transgender without discriminating on the basis of sex.”⁶ The Court looked to the text of Title VII and concluded that the employee’s sex is necessarily a “but-for” cause of the discrimination.

Although the *Bostock* decision clarifies the ruling does not address the implications of the decision on sex-segregated spaces such as bathrooms, locker rooms and dress codes,⁷ the lower courts have already begun issuing rulings addressing the impact of *Bostock* upon Title IX. For

³ See, e.g., 42 U.S.C. § 2000e-2 (prohibiting discrimination on the basis of sex in Title VII); 20 U.S.C. § 1681 (prohibiting discrimination on the basis of sex in Title IX); 15 U.S.C.A. § 1691 (prohibiting discrimination on the basis of sex in the Equal Credit Opportunity Act); 42 U.S.C.A. § 3604 (prohibiting discrimination on the basis of sex in the Fair Housing Act); 42 U.S.C. § 18116 (prohibiting discrimination on the basis of sex in the Affordable Care Act).

⁴ See, e.g., *Hively v. Ivy Tech Cmty. Coll., S. Bend*, 830 F.3d 698 (7th Cir. 2016), as amended (Aug. 3, 2016), *reh'g en banc granted, opinion vacated*, No. 15-1720, 2016 WL 6768628 (7th Cir. Oct. 11, 2016), and on *reh'g en banc sub nom. Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339 (7th Cir. 2017) (Title VII); *Wetzel v. Glen St. Andrew Living Cmty., LLC*, 901 F.3d 856 (7th Cir. 2018), *cert. dismissed sub nom. Glen St. Andrew Living Com. v. Wetzel*, 139 S. Ct. 1249, 203 L. Ed. 2d 269 (2019) (Fair Housing Act); *Adams by & through Kasper v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286 (11th Cir. 2020) (Title IX); See also *Tovar v. Essentia Health*, cv-16-100-DWF-LIB (D. Minn. Sept. 20, 2018) (health care plan that excluded health services related to gender dysphoria discriminated against transgender people in violation of the Affordable Care Act); *Boyden v. Conlin*, No. 17-cv-264-WMC, 2018 (W.D. Wis. Sept. 18, 2018) (state employee health plan’s refusal to cover transition-related care was sex discrimination in violation of Title VII, Section 1557 of the ACA, and the Equal Protection Clause); *Prescott v. Rady Children’s Hospital-San Diego*, 265 F. Supp. 3d 1090 (S.D. Cal. Sept. 27, 2017) (discrimination against transgender patients violates the ACA); *Cruz v. Zucker*, 195 F. Supp. 3d 554 (S.D.N.Y. 2016) (exclusion of transition-related health care violates the ACA); *Rumble v. Fairview Health Servs.*, No. 14-cv-2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015) (discrimination against patient based on transgender status constitutes sex discrimination under Section 1557 of the ACA).

⁵ *Bostock v. Clayton Cty.*, No. 17-1618, 2020 WL 3146686 (June 15, 2020).

⁶ *Id.* at 1741.

⁷ *Id.* at 1753.

example, the 11th circuit recently held that denying a transgender boy access to the boys' restroom violated Title IX's prohibition against sex discrimination.⁸ The Court noted that Title IX's text (like Title VII) is controlling and that Title VII case law informs Title IX case law. Similarly, the 4th Circuit also recently struck down a discriminatory policy banning transgender students from using sex-segregated spaces in accordance with their gender identity.⁹ The Court noted that Title IX and Title VII should be interpreted consistently and that the policy violated Title IX.¹⁰ In addition, a district court in Idaho recently enjoined a state law that sought to prohibit transgender girls from competing in sex-segregated athletics in accordance with their gender identity.¹¹ These rulings are consistent with the long line of cases addressing sex-segregated spaces that were issued even before the *Bostock* decision holding that transgender people are protected under Title IX and that denying transgender people access to sex-segregated spaces violates Title IX.¹²

II. The backdrop of this hearing.

This hearing follows three and a half years of relentless attacks by the Trump-Pence administration designed to roll-back or eliminate protections for LGBTQ people in a wide range of contexts. There are too many examples to document here, but multiple systematic reports are available publicly.¹³ Representative examples include attacks against LGBTQ elders,¹⁴ LGBTQ students,¹⁵ LGBTQ workers,¹⁶ transgender service members and service members living with

⁸ *Adams by & through Kasper v. Sch. Bd. of St. Johns Cty.*, No. 18-13592, 2020 WL 4561817 (11th Cir. Aug. 7, 2020).

⁹ *Grimm v. Gloucester Cty. Sch. Bd.*, No. 19-1952, 2020 WL 5034430 (4th Cir. Aug. 26, 2020).

¹⁰ *Id.* at 21.

¹¹ *Hecox v. Little*, No. 1:20-CV-00184-DCN, 2020 WL 4760138 (D. Idaho Aug. 17, 2020).

¹² *See, e.g., Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017) (enjoining a school policy excluding a transgender boy from the boys' restroom because transgender students may bring sex-discrimination claims under Title IX and plaintiff was likely to succeed on his Title IX claim).

¹³ *E.g.*, Human Rights Campaign, *Trump's Timeline of Hate* <https://www.hrc.org/timelines/trump>; National Center for Transgender Equality, *The Discrimination Administration* <https://transequality.org/the-discrimination-administration>; GLAAD, *Trump Accountability Project* <https://www.glaad.org/trump>.

¹⁴ Health and Human Services Agency, Administration for Community Living Elimination of data collection survey for transgender elders on the National Survey of Older Americans Act, <https://www.federalregister.gov/documents/2018/02/20/2018-03390/agency-information-collection-activities-submission-for-omb-review-comment-request-redesign-of>.

¹⁵ John Riley, *Department of Education Issues New Guidance on Transgender Students*, (June 16, 2017); OCR Instructions to the Field re Complaints Involving Transgender Students <https://www.documentcloud.org/documents/3866816-OCR-Instructions-to-the-Field-Re-Transgender.html>

¹⁶ Office of the Attorney General Memo to U.S. Attorneys regarding the Revised Treatment of Transgender Discrimination Claims under Title VII of the Civil Rights Act of 1964 (Oct. 4, 2017), *available at* <https://www.justice.gov/ag/page/file/1006981/download>.

HIV,¹⁷ LGBTQ immigrants,¹⁸ transgender prisoners¹⁹ homeless transgender people,²⁰ and, as this testimony will detail, LGBTQ patients. In addition, one in three Trump appointees to appellate courts has a history of explicit anti-LGBTQ bias.²¹ For example, the Trump-Pence administration nominated one individual who described transgender children as “part of Satan’s plan”²² and another who was rated as “Not Qualified” by the American Bar Association because of his publicly expressed contempt for transgender people.²³

And in an administration that seems to issue attacks targeting LGBTQ people (and against transgender people in particular) on a weekly basis, there is no federal agency that has targeted LGBTQ people more than the U.S. Department of Health and Human Services (“HHS”), the agency tasked with enhancing the health and well-being of all Americans.²⁴ Instead of advancing the health and well-being of *all* Americans however, HHS has embarked on a series of rule changes that invite discrimination against LGBTQ people—and especially transgender people. HHS has repeatedly and improperly sought to elevate the interests of healthcare providers and institutions over the medical needs of patients. It has created a policy agenda focused not on enhancing the health and well-being of all Americans, but rather on emboldening providers and insurers to eliminate health care protections for LGBTQ people and others. In order to respond to these nonstop attacks Lambda Legal has filed six different lawsuits against HHS in the last three and a half years to block rule changes and other administrative actions that invite harm to LGBTQ people and other vulnerable communities.²⁵

These administrative changes have been undertaken despite the fact that LGBTQ people, and especially transgender people, have continued to experience serious and persistent barriers to

¹⁷ Office of the Deputy Secretary of Defense, Directive Memo with regard to Military Service by Transgender Persons (Mar. 12, 2019), available at <https://www.esd.whs.mil/Portals/54/Documents/DD/issuances/dtm/DTM-19-004.pdf>

¹⁸ Ben Kessler, *Dozens of House Members Demand Better Treatment of Transgender Asylum Seekers in ICE Custody* (Aug. 1, 2019), available at <https://www.nbcnews.com/politics/immigration/dozens-house-members-demand-better-treatment-transgender-asylum-seekers-ice-n1037471>

¹⁹ U.S. Department of Justice, Federal Bureau of Prisons, Change to the Transgender Offender Manual (May 11, 2018), available at <https://www.bop.gov/policy/progstat/5200-04-cn-1.pdf>

²⁰ See Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs Notice of Proposed Rulemaking, available at <https://www.federalregister.gov/documents/2020/07/24/2020-14718/making-admission-or-placement-determinations-based-on-sex-in-facilities-under-community-planning-and>.

²¹ See Lambda Legal, *Trump’s Judicial Assault on LGBT Protections* (2019), available at <https://www.lambdalegal.org/Trump-Judicial-Nominees-Report-2019>.

²² <https://www.cnn.com/2017/09/20/politics/kfile-jeff-mateer-LGBTQ-remarks/index.html>

²³ See Senate Judiciary Committee hearing of Pamela A. Bresnahan, Chair of the ABA Standing Committee on the Federal Judiciary, on why the ABA rated Steven Grasz as “Not Qualified,” Ranking Member Senator Dianne Feinstein asked Ms. Bresnahan, “What kind of issues were they that he could not separate himself from?” to which Ms. Bresnahan responded with “transgender rights” (at 4:28:55). Testimony available at <https://www.judiciary.senate.gov/meetings/11/15/2017/nominations>.

²⁴ <https://www.hhs.gov/about/strategic-plan/introduction/index.html#mission>

²⁵ *City and County of San Francisco v. Azar*, Nos. 20-15398, 20-15399, 20-16045, 20-35044 (N.D. Ca.); *Marouf v. Azar*, 1:18-cv-00378-APM (D.C.D.C.); *Rogers v. U.S. Department of Health and Human Services*, 6:19-cv-01567-TMC (D.C. So. Car.); *Family Equality v. Azar*, 1:20-cv-02403-MKV (S.D.N.Y.); *Whitman-Walker Clinic v. HHS*, 1:20-cv-01630-JEB (D.C.D.C.); *CTFC v. Azar*, 3:20-cv-06018 (N.D. Ca.).

quality health care and essential insurance coverage, and HHS received tens of thousands of public comments explaining how HHS’s proposed rule changes would facilitate increased harassment and discrimination.

Discrimination and related health disparities have been widespread problems for LGBTQ people and people living with HIV. In 2010, Lambda Legal a national survey to examine the refusals of care and other barriers to health care confronting LGBTQ people and people living with HIV, *When Health Care Isn’t Caring: Survey on Discrimination Against LGBT People and People Living with HIV*.²⁶ Of the nearly 5,000 respondents, more than half reported that they had experienced health care providers refusing to touch them, health care providers using harsh or abusive language, health care providers being physically rough or abusive, and health care providers blaming them for their health status.

Respondents of color and low-income respondents reported much higher rates of hostile treatment and denials of care. Nearly half of low-income respondents living with HIV reported that medical personnel refused to touch them, while the overall rate among those with HIV was nearly 36%. And while transgender respondents as a whole reported a care-refusal rate of almost 27%, low-income transgender respondents reported a rate of nearly 33%. People of color living with HIV and LGB people of color were at least twice as likely as whites to report experiencing physically rough or abusive treatment by medical professionals.

The Report of the 2015 U.S. Transgender Survey, a survey of nearly 28,000 transgender people nationwide, found that 33% “of respondents who had seen a health care provider in the past year reported having at least one negative experience related to being transgender, such as verbal harassment, refusal of treatment, or having to teach the health care provider about transgender people to receive appropriate care” and that “23% of respondents did not see a doctor when they needed to because of fear of being mistreated as a transgender person[.]”²⁷ These persistent experiences and delay in preventive treatment can lead many people to avoid seeing a doctor altogether, which inevitably leads to serious negative long-term health care outcomes.

III. Trump Administration HHS Rulemaking targeting LGBTQ People.

1. Nondiscrimination in Health and Health Education Programs or Activities Rulemaking; RIN 0945-AA11, AKA the Section 1557 Rule.²⁸

One of the most pernicious attacks from HHS came less than three months ago. On June 19, 2020 (well into the pandemic), HHS issued a Final Rule seeking to carve out LGBTQ people and other vulnerable populations from the nondiscrimination protections of the Affordable Care Act (Section 1557). Despite receiving over 150,000 public comments and having held numerous stakeholder EO 12866 meetings during which strong objections were presented, the Final Rule

²⁶ Lambda Legal, Health Care, *supra* note 2.

²⁷ James, S.E., Herman, J.L., Rankin, S., Keisling, M. Mottet, L., & Anafi, M. (2016) (p. 92). *The Report of the 2015 U.S. Transgender Survey*. Washington, DC: National Center for Transgender Equality.

²⁸ *Lambda Legal Comments on proposed Rule Re: Nondiscrimination in Health and Health Education Programs or Activities Rulemaking; Delegations of Authority* (RIN 0945-AA11) (submitted Sep. 7, 2019) (“Lambda Legal 1557 Comment”), <https://beta.regulations.gov/document/HHS-OCR-2019-0007-154936>.

remained the same as the proposed rule with regard to the proposed removal of the 2016 definition of sex that clarified that discrimination on the basis of sex includes gender identity, sex-stereotyping and other bases, including termination of pregnancy.²⁹

The rule of law is a bedrock principle that ensures equal treatment and prospective clarity. HHS ignored this principle by choosing to recognize federal case law precedent they believed supported their position in rulemaking while ignoring case law precedent that does not support its policy preferences. For example, the Department waived off the overwhelming weight of countervailing authority holding that LGBTQ people are protected under the ACA and other federal law in the Final Rule,³⁰ and claimed that those Courts who have held that LGBTQ people are protected against discrimination on the basis of sex are creating “confusion as to the meaning of sex in civil rights law.”³¹

HHS’s most flagrant disregard for the rule of law is, of course, its spectacular failure to address U.S. Supreme Court case law precedent. HHS announced the Final 1557 Rule on Friday, June 12, 2020,³² and the U.S. Supreme Court issued the *Bostock* decision the following Monday. Following the issuance of the ruling, policy makers quickly informed HHS that the proposed rule conflicts with U.S. Supreme Court case law precedent and urged them to withdraw the rule in light of the decision.³³ HHS would not be deterred. Less than five days after the *Bostock* decision was issued, HHS barreled forward to publish the final rule on June 19, 2020—without a single mention of the *Bostock* decision.³⁴

²⁹ There were 155,955 public comments published in response to the proposed Nondiscrimination in Health and Health Education Programs or Activities NPRM, the vast majority of which addressed the provisions in the NPRM affecting LGBTQ people. <https://www.regulations.gov/document?D=HHS-OCR-2019-0007-0001>. Nonetheless, those provisions remained exactly the same as the proposed language. In addition, there were dozens of EO 12866 meetings with advocacy organizations. See <https://www.reginfo.gov/public/do/eom12866SearchResults?pubId=202004&rin=0945-AA11&viewRule=true>.

³⁰ See, e.g., *Tovar v. Essentia Health*, cv-16-100-DWF-LIB (D. Minn. Sept. 20, 2018) (holding that a health care plan that excluded health services related to gender dysphoria discriminated against transgender people in violation of the Health Care Rights Law (Section 1557 of the Affordable Care Act), which prohibits discrimination in health care); *Boyden v. Conlin*, No. 17-cv-264-WMC, 2018 (W.D. Wis. September 18, 2018) (holding that a state employee health plan refusal to cover transition-related care constitutes sex discrimination in violation of Title VII, Section 1557 of the ACA, and the Equal Protection Clause); *Flack v. Wisconsin Department of Health Services*, 18-cv-309, 2018 WL 3574875 (W.D. Wis. Jul. 25, 2018) (holding that Medicaid exclusion targeting transgender people constitutes sex discrimination under Affordable Care Act and Equal Protection Clause); *Prescott v. Rady Children’s Hospital-San Diego*, 265 F. Supp. 3d 1090 (S.D. Cal. Sept. 27, 2017) (holding that discrimination against transgender patients violates the Affordable Care Act); *Cruz v. Zucker*, 195 F. Supp. 3d 554 (S.D.N.Y. 2016) (holding that an exclusion for transition related health care violates the Affordable Care Act); *Rumble v. Fairview Health Servs.*, No. 14-cv-2037, 2015 WL 1197415 (D. Minn. Mar. 16, 2015) (holding that discrimination against hospital patient based on his transgender status constitutes sex discrimination under Section 1557 of the Affordable Care Act).

³¹ 85 FR 37180.

³² HHS Press Release, *HHS Finalizes Rule on Section 1557 Protecting Civil Rights in Healthcare, Restoring the Rule of Law, and Relieving Americans of Billions in Excessive Costs*, (June 12, 2020) available at <https://www.hhs.gov/about/news/2020/06/12/hhs-finalizes-rule-section-1557-protecting-civil-rights-healthcare.html>

³³ See <https://www.washingtonblade.com/content/files/2020/06/Final-Letter.pdf>.

³⁴ <https://www.federalregister.gov/documents/2020/06/19/2020-11758/nondiscrimination-in-health-and-health-education-programs-or-activities-delegation-of-authority>.

HHS blithely asserted in the Final Rule that the agency is “permitted to issue regulations on the basis of the statutory text and its best understanding of the law and need not delay a rule based on speculation as to what the Supreme Court might say about a case dealing with related issues.”³⁵ The Department’s refusal to grapple with the *Bostock* decision and other significant lower court case law precedent is breathtaking and manifests a stunning disregard for the rule of law and reveals a single-minded pursuit to strip life-saving protections from LGBTQ people and other vulnerable communities.

HHS has clarified that it wishes to impose a novel and restrictive legal interpretation of “sex” in the regulatory framework that would define “sex” as the “binary biological character of sex.”³⁶ Indeed, according to an internal memorandum leaked to the New York Times it appears that HHS actively sought to impose a similar definition throughout the Trump-Pence Administration.³⁷ As already discussed, a significant and growing number of lower courts have soundly rejected this imposition. Furthermore, the *Bostock* decision clarified that, *even if* “sex” were defined in the way in which HHS wishes it were defined in federal law, that discrimination against LGBTQ people would *still* violate Title VII because “sex” should be interpreted within Title VII’s statutory textual framework prohibiting certain actions “because of sex.”³⁸

Unsurprisingly, the repeal of the 2016 Rule’s clarification that LGBTQ people are protected against sex discrimination has already been enjoined by two different Courts since the Final Rule was issued.³⁹

Another troubling aspect of the 1557 Final Rule is the agency’s importation of the Title IX religious exemption into the Final Rule (a part of the Final Rule that was also recently enjoined).⁴⁰ In 2016, HHS rejected the request to include this exemption because there are already protections in Federal law that protect the religious beliefs of health care providers. The Department explained that the Title IX exemption is inappropriate in the health care setting because it is limited to educational institutions which are vastly different from health care settings and that “warrant different approaches.”⁴¹ The education context is different than the health care context because, for example, while students or parents select schools as matter of

³⁵ Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 FR 37160-01.

³⁶ “Title VII case law has often informed Title IX case law with respect to the meaning of discrimination “on the basis of sex” and the reasons why “on the basis of sex” (or “because of sex.” As used in Title VII) does not encompass sexual orientation or gender identity under Title VII have similar force for the interpretation of Title IX. At the same time, as explained below, the binary biological character of sex (which is ultimately grounded in genetics) takes on special importance in the health context.” 85 FR 37168.

³⁷ <https://www.nytimes.com/2018/10/21/us/politics/transgender-trump-administration-sex-definition.html>.

³⁸ Furthermore, Justice Gorsuch acknowledged the difference between one’s sex assigned at birth and their “sex” (“[w]hen discriminating against a transgender person, the employer “unavoidably discriminates against persons with one sex identified at birth and another today.”).

³⁹ See *Walker v. Azar*, No. 20CV2834FBSMG, 2020 WL 4749859, at *9 (E.D.N.Y. Aug. 17, 2020) (enjoining the repeal of the 2016 definition of discrimination on the basis of sex); *Whitman-Walker Clinic, Inc. v. U.S. Dep’t of Health & Human Servs.*, No. CV 20-1630 (JEB), 2020 WL 5232076, at *1 (D.D.C. Sept. 2, 2020) (enjoining the repeal of the 2016 definition and the incorporation of the Title IX exemption).

⁴⁰ See *supra* note 39.

⁴¹ 81 FR 31379-80.

choice, individuals seeking health care have limited or no choice, especially patients who live in rural areas or where religious institutions have taken over hospitals.⁴²

The 2016 Final rule also clarified that a blanket religious exemption could result in denial or delay of care or the discouragement of care with serious “life threatening results.”⁴³ Furthermore, the inclusion of a religious exemption creates an imbalance in enforcement since the other enforcement statutes (Title VI, the Age Discrimination Act, and Section 504 of the Rehabilitation Act) do not have such exemptions.

Religiously affiliated hospitals take up a large and growing portion of the health care market,⁴⁴ and religious exemptions disproportionately harm LGBTQ people, who are often refused health care because of their sexual orientation or gender identity. For example, 8% of LGBQ people were refused health care because of their sexual orientation.⁴⁵ Similarly, 29% of transgender people were denied care because of their gender identity.⁴⁶ When LGBTQ people are denied care, it becomes difficult (and impossible for many) to find another provider, especially for those who live in rural areas and for transgender people. According to a 2018 study, 18% of LGBTQ people said it would be impossible to find the same type of service in another hospital.⁴⁷ These rates are dramatically higher for people living outside a metropolitan area, where 41% stated that if they were denied treatment that it would be very difficult if not impossible to find the same service at a different location.⁴⁸ The rule could encourage these entities to believe that their personal beliefs are a legitimate basis to limit or deny health care and engage in illegal discrimination, both harming patients and placing health care providers at risk of serious liability.

2. Protecting Statutory Conscience Rights in Health Care; Delegations of Authority; RIN 0945-ZA03, AKA, the “Denial of Care Rule.”⁴⁹

The Denial of Care Rule is another example of HHS flipping its mission on its head. Instead of seeking to improve the health of all Americans, HHS has chosen to prioritize rulemaking that focuses on health care providers rather than patients. In May of 2019, HHS issued a Final Rule improperly seeking to expand statutory religious exemptions sought to provide health care providers with a license to discriminate by exponentially expanding the number of individuals

⁴² *Id.* at 31380.

⁴³ *See supra* note 42.

⁴⁴ *See* Michael Hiltzik, *UC’s deal with Catholic Hospitals Threatens the Health of Women and LGBTQ Patients*, LA TIMES (Apr. 12, 2019), available at <https://www.latimes.com/business/hiltzik/la-fi-hiltzik-uc-dignity-health-discrimination-20190412-story.html>; Amy Littlefield, *Meet Another Religious Health System Restricting Reproductive Care* (Jan. 30, 2019) REWIRE.NEWS available at <https://rewire.news/article/2019/01/30/meet-another-religious-health-system-restricting-reproductive-health-care/>.

⁴⁵ *See supra* note 40.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Lambda Legal Comments on proposed Rule Re: Protecting Statutory Conscience Rights in Health Care; Delegations of Authority* (submitted Mar. 27, 2018) (“Lambda Legal Denial of Care Comment”), <https://beta.regulations.gov/document/HHS-OCR-2018-0002-72186>.

associated with the provision of health care who can object to performing their job duties, and the rule extended the exemptions to include additional forms of health care, essentially inviting health care providers to deny LGBTQ people health care treatment.⁵⁰ The rule cited examples of transition-related health care provided to transgender people as examples of care that providers should be able to deny based on their religious or moral beliefs.

The purported justification for this rule was that HHS had supposedly received a “significant” number of complaints (358) from November 2016-to 2018. In the course of the litigation however, it came to light that almost 80% of those complaints were related to vaccinations which HHS itself admits is not relevant to the rulemaking and 22 were duplicates, leaving a handful of complaints to justify significant rulemaking.⁵¹ The same justification was provided to create an entirely new Division within HHS.⁵²

In addition, HHS in this case (as with the other rulemaking discussed here) ignored the evidence of discrimination impacting LGBTQ people and would cause harm and perversely argued that enforcement of the rule would increase the number of health care providers and would incentivize other health care providers to remain.⁵³ As one Court held in response however, that would just increase the likelihood that LGBTQ people and others would be turned away by those same providers.⁵⁴

This rule, like the 1557 Rule, also chose to ignore the rule’s conflict with other federal protections.⁵⁵ Unsurprisingly, the rule was vacated entirely last fall by three different federal courts and the cases are currently under appeal.⁵⁶

⁵⁰ Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 FR 23170 (May 21, 2019), available at <https://www.federalregister.gov/documents/2019/05/21/2019-09667/protecting-statutory-conscience-rights-in-health-care-delegations-of-authority> (expanding existing conscience protections to include health care treatment for transgender people).

⁵¹ See *City & Cty. of San Francisco v. Azar*, 411 F. Supp. 3d 1001 (N.D. Cal. 2019), appeal dismissed, No. 20-15398, 2020 WL 3053625 (9th Cir. June 1, 2020); *New York v. United States Dep’t of Health & Human Servs.*, 414 F. Supp. 3d 475 (S.D.N.Y. 2019); *Washington v. Azar*, 426 F. Supp. 3d 704 (E.D. Wash. 2019).

⁵² <https://www.hhs.gov/conscience/index.html>

⁵³ <https://www.federalregister.gov/documents/2019/05/21/2019-09667/protecting-statutory-conscience-rights-in-health-care-delegations-of-authority> (“Because enforcement of the rule will remove barriers to entry into the health care professions, it is reasonable to assume that the rule may, in fact, induce more people and entities to enter or remain in the health care field. On a broad level, this effect is reasonably likely to increase, not decrease, access to care, including—and perhaps especially—in underserved communities.” [Cite].

⁵⁴ See *City & Cty. of San Francisco v. Azar*, 411 F. Supp. 3d 1001 (N.D. Cal. 2019), appeal dismissed, No. 20-15398, 2020 WL 3053625 (9th Cir. June 1, 2020); *New York v. United States Dep’t of Health & Human Servs.*, 414 F. Supp. 3d 475 (S.D.N.Y. 2019); *Washington v. Azar*, 426 F. Supp. 3d 704 (E.D. Wash. 2019).

⁵⁵ Title VII and EMTALA.

⁵⁶ See *City & Cty. of San Francisco v. Azar*, 411 F. Supp. 3d 1001 (N.D. Cal. 2019), appeal dismissed, No. 20-15398, 2020 WL 3053625 (9th Cir. June 1, 2020); *New York v. United States Dep’t of Health & Human Servs.*, 414 F. Supp. 3d 475 (S.D.N.Y. 2019); *Washington v. Azar*, 426 F. Supp. 3d 704 (E.D. Wash. 2019).

3. Health and Human Services Grants Regulation; RIN 0991-AC16, AKA the “Grants Rule.”⁵⁷

In yet another repudiation of its purpose and mission, HHS issued the proposed new “Grants Rule” on November 19, 2019, which seeks to eliminate express nondiscrimination protections for LGBTQ people and other vulnerable communities seeking HHS programs and services. The proposed rule eliminates the enumerated list of non-merit nondiscrimination factors of age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation that are identified in 45 C.F.R. 75.300(c) and replaces it with language stating that discrimination is prohibited by “federal statute.”⁵⁸ As with the 1557 Final Rule, this proposed rule ignores existing case law that clarified that LGBTQ people are protected under federal nondiscrimination law. But the *Bostock* decision eliminated any doubt that discriminating against LGBTQ people is discrimination on the basis of sex. HHS’s decision to limit protections to those enumerated under a “federal statute” again undermines case law precedent, and although the Final Rule has not been issued, we are concerned the Department will again flout even U.S. Supreme Court case law in its mission to deny protections. For all of the characteristics, there should be more clarity, not less, because the beneficiaries are people in need of services and support who often are less able than many people to have accurate information about the law.

HHS grants approximately \$525 billion dollars a year to various entities that provide vital services to millions of people across the country.⁵⁹ HHS’s budget funds a wide array of programming that includes major health initiatives, including grants for child welfare agencies, HIV/AIDS prevention, programs servicing older Americans (such as Meals on Wheels), programs serving youth experiencing homelessness, programs serving early childhood programs (such as Head Start) trafficking prevention, refugee assistance, and many other important programs.

By repealing and replacing these explicit protections with a reference to “federal statute,” HHS forces program recipients and participants of HHS programs and services to revert to the nondiscrimination protections found in underlying authorizing federal program authorizing statutes. This approach (again) fails to acknowledge that LGBTQ people are protected under sex discrimination laws through case law precedent, including the *Bostock* decision, and forces programs and participants to rely upon a crazy quilt of unpredictability. The proposed rule

⁵⁷ *Lambda Legal Comments on proposed Rule Re: Health and Human Services Grants Regulation* (submitted Dec. 19, 2019) (“Lambda Legal Grants Rule Comments”), <https://beta.regulations.gov/document/HHS-OS-2019-0014-118164>.

⁵⁸ <https://www.federalregister.gov/documents/2019/11/19/2019-24385/office-of-the-assistant-secretary-for-financial-resources-health-and-human-services-grants>. The proposed rule eliminates the enumerated list of non-merit nondiscrimination factors of age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation that are identified in 45 C.F.R. 75.300(c) and replaces it with language stating that discrimination is prohibited by “federal statute.” Section 45 C.F.R. 75.300(d) requires that “In accordance with the Supreme Court decisions in *United States v. Windsor* and in *Obergefell v. Hodges*, all recipients must treat as valid the marriages of same-sex couples. This does not apply to registered domestic partnerships, civil unions or similar formal relationships recognized under state law as something other than a marriage.” The NPRM replaces this provision by stating, “HHS will follow all applicable Supreme Court decisions in administering its award programs.”

⁵⁹ See Health and Human Services, A Closer Look at HHS Total Assistance, *available at* <https://taggs.hhs.gov/TotalAssist> (last visited on Dec. 15, 2019).

would fall especially hard on LGBTQ people and people living with HIV because it lacks the clarity of the current rule and blurs the lines between permissible and impermissible conduct. Many of the legal protections will remain, but the Department sends a dangerous message to grantees that they may discriminate.

The rule would likely fall hardest on children if it were finalized and enforced. There are more than 125,000 children who cannot safely return to their families of origin, waiting to be adopted into stable and loving homes.⁶⁰ It is deeply troubling that HHS seeks to allow agencies to turn away competent and loving foster and adoptive parents and thereby jeopardizing an opportunity of permanency for tens of thousands of youth simply because a prospective family does not comport with the belief system of a federally funded grantee.

It is clear that HHS was seeking a way to provide child welfare agencies with a license to discriminate even before issuing the Grants Rule. For example, in 2017, a same-sex family contacted a religiously affiliated child placement agency in order to become foster parents on behalf of a refugee. The agency informed the couple they were not qualified and that prospective foster parents must “mirror the holy family.”⁶¹ The couple immediately filed a complaint with the Office of Refugee Resettlement at HHS and filed a complaint, but the agency failed to respond. Lambda Legal sued HHS on behalf of the plaintiffs on February 20, 2018 and the Court presiding over the case recently denied a motion to dismiss the case.⁶²

In another example, HHS granted a waiver to South Carolina Governor McMaster on January 13, 2019, allowing Miracle Hill Ministries, by far the state’s largest child welfare agency, a waiver from prohibition of discrimination in 45 CFR 75.300(c).⁶³ In May of 2019, a same-sex couple submitted an online application to become foster parents and were rejected because they “feel a religious obligation to partner with foster parents who share our beliefs and who are active in the Christian church.”⁶⁴ Lambda Legal sued HHS for sanctioning this discrimination and again, a Court recently rejected HHS’s motion to dismiss.⁶⁵

There are also serious concerns with regard to procedural defects in the rulemaking. On November 19, 2019, HHS issued an NPRM that closed on December 19, 2020. HHS failed to publish the 121,039 public comments until July 16, 2020—over six months after the comment period closed following one major rulemaking.⁶⁶ In the same rulemaking HHS issued a Notice of Nonenforcement along with the proposed rule that sought to skirt the notice and comment period

⁶⁰ See U.S. Dep’t of Health and Human Servs., Admin. For Children and Families, Admin. On Children, Youth and Families, Children’s Bureau, AFCARS Report 26 (2018).

⁶¹ <https://www.lambdalegal.org/in-court/cases/marouf-v-azar>.

⁶² *Marouf v. Azar*, 391 F. Supp. 3d 23 (D.D.C. 2019).

⁶³ <https://www.cwla.org/wp-content/uploads/2019/01/HHS-Response-Letter-to-McMaster.pdf>.

⁶⁴ See Lambda Legal, *Rogers v. United States Department of Health and Human Services* <https://www.lambdalegal.org/in-court/cases/rogers-v-us-department-health-human-services>.

⁶⁵ *Rogers v. United States Dep’t of Health & Human Servs.*, No. 6:19-CV-01567-TMC, 2020 WL 4743162 (D.S.C. May 8, 2020).

⁶⁶ The notice and comment period ended on December 19, 2019, but the 121,039 comments that were submitted were not uploaded until on or around July 16, 2020. See <https://www.regulations.gov/document?D=HHS-OS-2019-0014-0001>.

in order to stop an existing rule that had gone through a proper notice and comment period from going into effect. The Final Rule has not been published but is imminent.

4. The Adoption and Foster Care Analysis and Reporting System (AFCARS) Rule; 0970-AC72.

One less discussed repudiation of its mission is the attempts by HHS to eliminate data collection regarding LGBTQ people and other vulnerable communities. For example, HHS issued a Final Rule on May 12, 2020 that proposes to eliminate sexual orientation data collection about youth in out-of-home care and prospective LGB foster parents.⁶⁷

HHS justifies this ending of sexual orientation data collection based on a vague, unsubstantiated conclusion—unsupported by empirical evidence—that the collected data would be inaccurate and could lead to breaches of confidentiality because a case worker would be gathering the information.⁶⁸

The child welfare profession has acknowledged the importance of collecting sexual orientation and gender identity and expression (“SOGIE”) information about children, along with other critical information about each child’s circumstances, in order to tailor an individualized case plan. In 2013, the Center for the Study of Social Policy, Legal Services for Children, the National Center for Lesbian Rights, and Family Builders by Adoption issued a set of professional guidelines addressing all aspects of managing SOGIE information in child welfare systems.⁶⁹ The guidelines address the need to collect SOGIE information in order to develop case plans and track outcomes in individual cases, and to engage in agency planning and assessment.

HHS also eliminated data collection on transgender Elders Survey in the National Longitudinal Survey of Older Americans Survey.⁷⁰ Transgender older adults often lack access to culturally competent aging programs and services. Having confronted discrimination from entities traditionally relied upon for support, transgender adults frequently are reticent to access the aging network. As the Administration on Aging found in 2001, LGBT older adults are 20% less likely than their non-LGBT peers to access governmental aging services such as housing assistance, meal programs, food stamps, and senior centers.⁷¹ If transgender seniors are not counted and their voices accordingly can’t be taken into account in the design and delivery of these essential services, they will continue to avoid those services that they desperately need.

⁶⁷ Adoption and Foster Care Analysis and Reporting System, 84 Fed. Reg. 16572, 16576 (April 19, 2019) (to be codified at 45 C.F.R. pt. 1355), available at <https://www.federalregister.gov/documents/2019/04/19/2019-07827/adoption-and-foster-care-analysis-and-reporting-system> [hereinafter “2019 NPRM”].

⁶⁸ *Id.*

⁶⁹ Shannan Wilber, *Guidelines for Managing Information Related to the Sexual Orientation and Gender Identity and Expression of Children in Child Welfare Systems*, FAMILY BUILDERS BY ADOPTION (2013), <http://cssr.berkeley.edu/cwscmsreports/documents/Information%20Guidelines%20P4.pdf>.

⁷⁰ <https://www.federalregister.gov/documents/2018/02/20/2018-03390/agency-information-collection-activities-submission-for-omb-review-comment-request-redesign-of>.

⁷¹ See Choi and Meyer, *supra*, n.1, at 6.

The Department has also repeatedly attempted to erase information about LGBTQ people in numerous ways. For example, the Department altered its website to remove language referencing protections for LGBTQ people and gave instructions given to the CDC not to use the word “transgender.”⁷²

5. Ensuring Equal Treatment of Faith-Based Organizations Rule; RIN 0991-AC13.⁷³

In yet another abdication of the agency’s purpose and mission, HHS again engaged in rulemaking that would accrue to the benefit of health care providers and to the detriment of LGBTQ people and other vulnerable patients. HHS proposed a rule in January of 2020 that seeks to remove the current obligations placed on faith-based organizations who participate and receive federal funding through HHS programs.⁷⁴ More specifically, the proposed rule would eliminate the current obligation faith-based social service providers have to ensure that participants of its programs are informed of their rights and the obligation to refer the participant to an alternative provider. The rule also extends religious exemptions for taxpayer funded faith-based social service providers and employers that seek to allow them to discriminate.

While freedom of religion is a fundamental right protected by our Constitution and federal laws, it does not give anyone the right to use religious or moral beliefs as grounds for violating the rights of others. Instead, the Constitution commands that any religious or moral accommodation must be “measured so that it does not override other significant interests” or “impose unjustified burdens on others.”⁷⁵

The rule also undermines HHS’s national and local efforts to reduce LGBTQ health disparities. For example, HHS’s “Healthy People 2020 Initiative” and the Institute of Medicine have called for steps to be taken to address LGBT health disparities.

This rule would have a chilling effect on the full and unbiased provision of health care, including to members of the LGBTQ community in a manner that conflicts with ethical, legal and constitutional standards. It conflicts with legal and ethical protections for patients, potentially putting their health and even lives at risk. It is ill conceived and has no place in federal health policy.

⁷² E.g., Lena H. Sun and Juliet Eilperin, *CDC Gets List of Forbidden Words: Fetus, Transgender, Diversity* (Dec. 15, 2017) WASHINGTON POST, available at https://www.washingtonpost.com/national/health-science/cdc-gets-list-of-forbidden-words-fetus-transgender-diversity/2017/12/15/f503837a-e1cf-11e7-89e8-edec16379010_story.html?utm_term=.6784ccec03e.

⁷³ *Lambda Legal Comments on proposed Rule Re: Ensuring Equal Treatment of Faith-Based Organizations* (submitted Feb. 18, 2020) (“Lambda Legal Faith-Based Organizations Comment”), <https://beta.regulations.gov/document/HHS-OS-2020-0001-22659>.

⁷⁴ <https://www.federalregister.gov/documents/2020/01/17/2019-26923/ensuring-equal-treatment-of-faith-based-organizations>.

⁷⁵ See *Cutter v. Wilkinson*, 544 U.S. 709, 710; 719 (2005) (holding that a religious accommodation must “not override other significant interests” and that “courts must take adequate account of the burden a requested accommodation may impose on nonbeneficiaries.”).

. . . .

Although the Trump-Pence administration has worked nonstop to roll back protections for LGBTQ people, the reality is that court after court—including the U.S. Supreme Court—have clarified that LGBTQ people are protected under federal law. And those attacks continue to be struck down by the federal courts. But those attacks do not come without a cost. The rules spur both mistreatment of patients and lawsuits, placing health care providers in legal jeopardy by falsely signaling it is perfectly fine to discriminate. Similarly, the rulemaking will lead to confusion, and most concerning, the rulemaking has fostered discrimination against LGBTQ patients. Equally concerning is that the rulemaking will discourage people from seeking the health care they need. Many LGBTQ people already avoid care because of fear of discrimination. The impact of these rules, of course, falls hardest on those already marginalized including people of color, people with disabilities, people living with low incomes, and LGBTQ people.

The Trump-Pence U.S Department of Health and Human Services has turned its mission on its head. Instead of advancing health care and access for all, the Department has relentlessly pursued policies that seek to empower health care providers to limit health care access and equity for women and LGBTQ people.