CENTER FOR CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, New York 10012
212-614-6464
ccrjustice.org

October 3, 2022

Melanie Fontes Rainer
Director
Office for Civil Rights
U.S. Department of Health and Human Services ("HHS" or "the Department")
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue, S.W.
Washington, D.C. 20201

Re: Comment of the Center for Constitutional Rights in Response to Proposed Rulemaking: Nondiscrimination in Health Programs and Activities (Section 1557 NPRM), RIN 0945-AA17

Dear Director Fontes Rainer:

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, federal statutes, and local and international law. Since our founding in 1966, we have litigated landmark civil rights and human rights cases before the U.S. Supreme Court and other tribunals concerning government overreach and discriminatory state policies, including policies that disproportionately impact LGBTQI+ communities.

Today we write in our capacity as civil rights leaders to express our strong support for Section 1557 NPRM, RIN 0945-AA17, "Nondiscrimination in Health Programs and Activities," the rule change to Section 1557 of the Patient Protection and Affordable Care Act ("Section 1557") recently proposed by HHS (hereinafter the "proposed rule" or "rule").

Section 1557 is a landmark civil rights law prohibiting healthcare discrimination on the basis of race, color, national origin, sex, age, and disability, by carving out a broad set of exclusions that target vulnerable minorities. The regulations implemented by the Trump Administration in 2020 severely undermined Section 1557's application scope while gutting vital protections for transgender, non-binary, and gender nonconforming (hereinafter "trans") people, individuals with limited English proficiency ("LEP"), and people seeking reproductive health services. The proposed rule restores the full scope of Section 1557's powers to combat discrimination and ensure that LGBTQI+ people have unimpeded access to health insurance and life-saving medical treatment.

LGBTQI+ people suffer from significant health disparities, compounded by the barriers they encounter when trying to obtain critical health care services. The well-documented, pervasive discrimination experienced by LGBTQI+ people in healthcare settings plays a significant role in perpetuating and deepening these disparities. The proposed rule addresses these inequities by: extending nondiscrimination protections to a wider range of health care programs and providers; affirming that Section 1557 protects against discrimination based on gender identity, sexual

orientation, sex stereotypes, and sex characteristics (including intersex traits); protecting access to sexual and reproductive health services; ensuring that LEP individuals and people with disabilities are provided with the necessary language services and accommodations to allow them full access to health services; implementing a robust set of policy, procedure, and notice requirements to ensure individuals are aware of their rights and that covered entities appropriately conform to and carry out Section 1557's provisions; and prohibiting discrimination by religiously affiliated hospitals and providers, except in a narrow set of circumstances allowing for exemptions from providing health care.

The proposed rule provides the necessary regulatory framework to ensure that covered entities understand their obligations under Section 1557 and vulnerable individuals have equal access to crucial health care services. We strongly recommend that the proposed rule be finalized and implemented, subject to the minor suggested changes set forth below.

1. The Nondiscrimination Provisions of the Proposed Rule Strike Directly at Barriers to Healthcare Access that Deeply Harm LGBTQI+ People.

Healthcare discrimination against LGBTQI+ people is pervasive, long-standing, and deeply detrimental to the health and well-being of vulnerable individuals in need of quality medical services. A new report from the Center for American Progress ("CAP") warns that "[i]nterpersonal and structural discrimination in health care settings remains a significant problem for LGBTQI+ communities, especially transgender individuals, people with intersex traits, LGBTQI+ people of color, and LGBTQI+ people with disabilities, for whom obstacles to care and disparate health outcomes are even more pronounced."[1] The persistence of such discrimination in health care settings results in real damage to the "mental and physical health of LGBTQI+ communities . . . ."[2] Additionally, these practices perpetuate a vicious cycle of bad health outcomes by "engender[ing] avoidance behavior, delays, or denials of care that exacerbate health disparities among LGBTQI+ populations."[3]

The CAP report documents the currently reality of health care discrimination experienced by numerous LGBTQI+ individuals. A survey conducted by CAP in connection with the report found that "[f]ifteen percent of LGBQ respondents, including 23 percent of LGBQ respondents of color, reported experiencing some form of care refusal by a doctor or other health care provider in the year prior."[4] For trans respondents, the reported rates of health care refusal were even higher, especially for people of color. The survey found that 32 percent of all trans respondents, and 46 percent of trans respondents of color, reported experiencing at least one denial of care by a health care provider in the past year.[5]

As noted above, awareness and experience of discrimination in health care settings leads LGBTQI+ individuals to avoid or put off seeking critical care. LGBTQI+ individuals also

[1] Caroline Medina & Lindsay Mahowald, *Advancing Health Care Nondiscrimination Protections for LGBTQI+ Communities*, CTR. FOR AM. PROGRESS (Sept. 8, 2022), https://www.americanprogress.org/article/advancing-health-care-nondiscrimination-protections-for-lgbtqi-communities/.

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

experience pervasive anxiety and stress in healthcare settings due to their fear of being denied care after revealing their gender identity, sexual orientation, or intersex status. According to 2022 survey data: 17 percent of LGBQ respondents expressed concern that revealing their sexual orientation would lead to a denial of care; 49 percent of trans respondents expressed concern that communicating their gender identity would lead to a denial of care; and 61 percent of intersex respondents reported concerns that disclosure of their intersex status would result in them being denied care.[6]

The damage inflicted upon LGBTQI+ individuals as a result of discrimination in healthcare settings extends far beyond disparate health outcomes. This is especially true for trans people of color, whose pervasive experiences of discrimination and societal exclusion thrust them all too frequently into the "discrimination-to-incarceration pipeline."[7] This "discrimination-to-incarceration pipeline" frequently "jettisons away trans people's futures, funnels them into prisons, and can even leave them dead."[8] "Key to understanding the discrimination-to-incarceration pipeline is understanding the pernicious ways that trans people—particularly people of color—experience discrimination in a manner that precipitates poverty, homelessness, and criminalization."[9]

Discrimination in receiving healthcare services, including transition-related healthcare, plays a significant role in pushing trans people into the discrimination-to-incarceration pipeline. Studies have shown that trans people who have access to transition-related healthcare experience vast and documented improvements to their mental and physical well-being.[10] In contrast, trans people who lack access to affirming healthcare services (including transition-related healthcare) are more susceptible to "depression, anxiety, suicidality, substance abuse, and even death."[11] But the barriers faced by trans people in accessing life-saving treatment are substantial. Many private health plans categorically deny coverage for transition-related healthcare. In many states, trans people who otherwise qualify for Medicaid find that transition-related health coverage is not available to them.[12] The pervasive denial of coverage for essential but expensive healthcare "drives some trans people to participate in criminalized economies in order to pay for their healthcare needs."[13]

The proposed rule works to disrupt the discrimination-to-incarceration pipeline by ensuring protections against discrimination on the basis of gender identity, sexual orientation, sex stereotypes, and sex characteristics (including intersex traits). The rule tracks relevant Supreme Court case law, in particular the decision in *Bostock v. Clayton County*,[14] which held that discrimination on the basis of sex encompasses discrimination on the basis of sexual orientation and gender identity, including trans status. Based on the holding in *Bostock*, we think that the rule's

---

[6] *Id.*

[7] Chinyere Ezie, *Dismantling the Discrimination-to-Incarceration Pipeline for Trans People of Color*, 18 U. ST. THOMAS L.J. (forthcoming).

[8] *Id.* (citation omitted).

[9] *Id.*

[10] *Id.* (citations omitted).

[11] *Id.* (citations omitted).

[12] *Id.* (citations omitted).

[13] *Id.* (citations omitted).

[14] 590 U.S. ___ (2020).

coverage for trans people is clear. However, we also support the inclusion of more specific language throughout the rule stating that discrimination based on "transgender status" is prohibited. The rule additionally correctly affirms that discrimination on the basis of sex also includes discrimination on the basis of sex characteristics, thus solidifying protections for individuals with intersex traits. By tracking these developments in the law, the proposed rule provides notice to enrollees and assurance to participants and beneficiaries that these bases unequivocally fall under the protection of Section 1557.

Importantly, the proposed rule explicitly states that the protections of Section 1557 extend to health insurance plans. Preventing insurers from discriminating against LGBTQI+ individuals is a critical step in allowing full and fair access to health services and ensuring that trans individuals are able to afford essential transition-related care.

2. The Proposed Rule Must Explicitly Name "Termination of Pregnancy" as a Form of Sex Discrimination.

The proposed rule takes important steps to protect access to sexual and reproductive health care. The denial of medication and treatment for pregnant people and people seeking other forms of reproductive health care, such as abortion, endangers lives and invites serious health consequences. With that in mind, we strongly support HHS' recognition of "pregnancy or related conditions" as a form of sex discrimination under Section 92.101(a)(2) of the proposed rule. However, in the wake of the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*[15] eliminating the constitutional right to abortion, HHS must do more to ensure access to life-saving reproductive health care. To that end, we urge HHS to explicitly include "termination of pregnancy" under Section 92.101(a)(2)'s definition of sex discrimination. By broadening the definition of sex discrimination to include "pregnancy or related conditions, including termination of pregnancy," HHS can support individuals seeking critical care in the face of widespread efforts to criminalize abortion.

3. The Proposed Rule's Diligent Effort to Ensure Equal Program Access on the Basis of Sex Would Benefit from Additional Clarity.

We strongly support the Department's inclusion of Section 92.206, which clarifies that covered entities such as hospitals, physical and mental health care providers, and pharmacies must maintain equal access to their health programs and activities without engaging in sex discrimination. Several minor changes suggested below will help clarify and strengthen the terms of the provision.

First, Section 92.206(b)(2) would be clearer if shortened as indicated below. We also support adding language to Sections 92.206(b)(1), (b)(2) and (b)(4) that further clarifies that "transgender status" is subject to protections. Finally, we recommend deleting the indicated language in 92.206(b)(4), as a provider could engage in a discriminatory denial of care even if a claimant cannot show that the care in question was on other occasions provided for other purposes. With these changes, the revised Section 92.206 would read as follows:

[15] 597 U.S. ___ (2022).

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

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

(2) Deny or limit a health care professional's ability to provide health services on the basis of an individual's sex assigned at birth, gender identity, **transgender status,** or gender otherwise recorded ~~if such denial or limitation has the effect of excluding individuals from participation in, denying them the benefits of, or otherwise subjecting them to discrimination on the basis of sex under a covered health program or activity~~;

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

4. The Proposed Rule Supports Immigrant Communities and Persons with Disabilities by Requiring Adequate Language Access Services and Reasonable Accommodations.

CCR strongly supports the provisions related to language access for LEP individuals as an important mechanism for reducing barriers to quality health care. Language access is essential to ensuring effective communication between individuals and the health care system, without which LEP individuals may not enroll in programs for which they are eligible, may not receive timely or comprehensive healthcare, and may not know their rights to free, timely and competent language services. The proposed rule addresses these issues by requiring covered entities to provide meaningful access to LEP individuals. Under the rule, covered entities must provide LEP individuals with a qualified interpreter and translator when providing language services, and must provide a human translator to review machine-translated materials in most instances.

The proposed rule also provides vital support for people with disabilities by strengthening and clarifying the nondiscrimination protections that afford them equal access to effective healthcare. Specifically, the rule restores broad language prohibiting benefit design discrimination on the basis of disability; mandates that covered entities provide effective and accessible communication for individuals with disabilities navigating various informational platforms such as website and mobile applications; and ensures structural accessibility and reasonable modifications for people with disabilities.

5. The Proposed Rule Sets an Appropriately Broad Scope for the Application of Section 1557.

We strongly support the restoration of Section 1557's application to all health programs and activities receiving federal funding through or administered by the Department or a Title I entity. This scope is consistent with the statutory language and the purpose of the Affordable Care Act ("ACA") to ensure broad access to health care coverage and services.

In the proposed rule, HHS asks for comment as to whether these nondiscrimination protections should be extended to other non-health programs and activities of the agency. We fully support the extension of analogous protections to these other programs in separate rulemaking and encourage HHS to develop a set of protections as extensive and robust as those proposed here for health programs and activities.

Because healthcare discrimination causes significant harm in all its forms, we also recommend that the proposed rule explicitly extend the protections of Section 1557 to health programs and activities administered by or receiving federal funding from agencies other than HHS. HHS is hardly the only federal agency funding entities that provide health care services to members of the public, so it is just as important that individuals who rely on these entities for healthcare services also be protected from the pernicious effects of discrimination. We encourage HHS to work with the Department of Justice and other agencies that administer such programs to develop a common rule to implement Section 1557. This rule would unequivocally establish that the ACA's nondiscrimination protections do extend to health programs and activities outside of HHS, providing clarity to covered entities, as well as program participants and beneficiaries, while promoting consistent enforcement.

6. The Proposed Rule's Revised Approach to Religious Exemptions Appropriately Limits the Circumstances in which Covered Entities Can Deny Care.

We strongly support the proposed rule's revised approach to religious exemptions. Refusals to provide health care on religious grounds actively harm the health and well-being of LGBTQI+ people and women.[16] Religious refusals impair access to important sexual and reproductive health services including abortions and gender-affirming care. These refusals and restrictions "are based on religious or moral belief and not on standard of care."[17] Forcing patients to seek out care from another provider can lead to serious health consequences. The delay in receiving care may cause irreparable harm, and the stress of being denied care and fear of facing similar denials in the future can lead individuals to postpone or avoid necessary medical care. The 2020 regulations improperly ignored those harms and privileged providers' religious beliefs over the rights of individuals to receive the care they need. The proposed rule makes clear that while providers may exercise clinical judgment when determining if a particular service is appropriate for an individual patient, they may not refuse gender-affirming care based on a personal belief that such care is never clinically appropriate.

The proposed rule correctly omits Title IX's religious exemption, which had been incorporated into the 2020 regulations. This exemption has no place in a health care nondiscrimination rule and its implementation exceeds the scope of HHS's authority. The ACA references Title IX only to identify the ground of discrimination it addresses (sex discrimination) and its enforcement mechanisms, not to incorporate Title IX more broadly. Most of the Title IX exemptions are inapplicable in the context of health care services. Title IX's extremely broad

[16] *See, e.g.,* Amy Chen & Hayley Penan, *Health Care Refusals & How They Undermine Standards of Care Part II: The Impact of Health Care Refusals, Discrimination, and Mistreatment on LGBTQ Patients and Families*, NAT'L HEALTH LAW PROGRAM (June 13, 2022), https://healthlaw.org/health-care-refusals-how-they-undermine-standards-of-care-part-ii-the-impact-of-health-care-refusals-discrimination-and-mistreament-on-lgbtq-patients-and-families.

[17] *Id.*

religious exemption would wreak havoc if applied to the ACA by allowing health care providers to deny essential health care services based on disapproval of a particular group or for other non-medical reasons, thereby putting the health and well-being of already vulnerable individuals at risk. Patients faced with urgent or emergent care needs often have no ability to choose an alternate provider when confronted with an institution that withholds care from them based on religious doctrine, even if the patient is aware of such restrictions (which is not typically the case). Numerous federal laws already allow health care providers to invoke a conscience objection to providing certain kinds of care, making an additional religious exemption unnecessary.

We support the case-by-case approach put forward in Section 92.302, which demands consideration of the potential harm to third parties when determining whether to grant an exemption. This approach is required by the Establishment Clause in the First Amendment to the Constitution, which prohibits the government from granting religious exemptions from neutral laws if doing so would shift burdens to third parties.

7. The Proposed Rule's Policy, Procedure, and Notice Requirements Appropriately Ensure that Covered Entities Comply with Section 1557's Provisions and Individuals are Aware of their Rights.

CCR strongly supports the proposed rule's directive that covered entities establish and enforce written nondiscrimination policies that cover the full range of protections articulated in Section 1557. By mandating the creation of a robust set of policies and procedures, covered entities will have a stronger grasp of their obligations under Section 1557. Additionally, the rule requires civil rights training for staff that interact with the public to ensure they effectively carry out their duties while adhering to Section 1557's critical nondiscrimination provisions.

We also strongly support the nondiscrimination notice requirements in Section 92.10 aimed at ensuring that program participants and beneficiaries are aware of their rights. This provision ensures that individuals understand the protections against discrimination that they are afforded by law, and provides a process for filing complaints and seeking redress if, or when, a covered entity falls out of compliance.

It is worth pointing out that the description of unlawful sex discrimination that appears in this section differs slightly from the language on sex discrimination presently found in Section 92.101. We recommend that, for the sake of clarity and consistency, the more expansive definition in Section 92.101 be used.

Additionally, we request that the final rule require that any entity that receives a religious exemption under proposed Section 92.302 disclose the existence and scope of such exemption in its required notices. Allowing entities to tell participants, beneficiaries, and the public generally that the entity does not discriminate in circumstances where it has been expressly granted permission to do so would be inaccurate and misleading.

In conclusion, the Center for Constitutional Rights reaffirms its full support for the proposed rule while simultaneously offering suggestions—the suggestions reflected in this comment—to clarify and strengthen the rule even further. At a time when LGBTQI+ people and

other vulnerable groups are confronting increasingly bold and vicious attacks on their personhood and fundamental rights, the protections enshrined in Section 1557 are more important than ever. The proposed rule, particularly with the suggested amendments, will ensure that Section 1557 operates as it was designed, weeding out all forms of corrosive discrimination while ensuring fair and equal access to healthcare for all.

Sincerely,

A. Chinyere Ezie
Senior Staff Attorney
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, NY 10012