

August 13, 2019

Submitted via www.regulations.gov

Secretary Alex Azar
Department of Health and Human Services
Hubert H. Humphrey Building, Room 509F,
200 Independence Avenue SW,
Washington, DC 20201

Re: Section 1557 NPRM, RIN 0945-AA11, “Nondiscrimination in Health and Health Education Programs or Activities”

Dear Secretary Azar:

We are writing on behalf of the Transgender Law Center and Positively Trans in response to the Department of Health and Human Services (HHS) Notice of Proposed Rulemaking (hereinafter “proposed rule”) to express our staunch opposition to the proposed rules to amend regulations relating to section 1557 of the Affordable Care Act published in the Federal register on June 14, 2019.

Transgender Law Center (TLC) is the largest national trans-led organization advocating self-determination for all people. As an organization committed to keeping transgender and gender nonconforming people alive and thriving, we have a keen interest in ensuring that transgender people in this country are able to access lifesaving medical care and can do so without experiencing harassment or abuse.

Positively Trans (T+), developed and directed by Transgender Law Center Senior Strategist Cecilia Chung, is a constituent-led project grounded in the principle that we are all capable of forming our own network, telling our own stories, and developing our own advocacy strategies in response to inequities, stigma, and discrimination over punitive laws and lack of legal protections in our local communities. With the support of Elton John AIDS Foundation, TLC launched T+ as a response to the structural inequalities that drive the high rate of HIV/AIDS and poor health outcomes. By partnering with a National Advisory Board of community leaders, T+ seeks to mobilize and promote resilience of trans people most impacted by or living with HIV/AIDS, particularly trans women of color, through research, policy advocacy, legal advocacy, and leadership strengthening.

For the reasons detailed in the comments that follow, HHS should immediately withdraw its current proposal, and dedicate their efforts to advancing policies that safeguard the health and

safety of all people living in the United States through robust, good-faith compliance with the current regulations interpreting 1557.

Thank you for the opportunity to submit comments on this proposed rule. Please do not hesitate to contact us at Kris@transgenderlawcenter.org and Cecilia@transgenderlawcenter.org. We would be happy to provide further information.

Sincerely,

Kris Hayashi, *Executive Director of Transgender Law Center*
Cecilia Chung, *Director of Positively Trans*

Introduction:

Transgender Law Center (TLC) opposes the proposed rule published by the Department of Health and Human Services on June 14, 2019 pertaining to its interpretation of Section 1557 of the Patient Protection and Affordable Care Act (ACA) for the reasons detailed below. If finalized, this proposed rule would severely threaten transgender and gender non-conforming (hereinafter “TGNC”) patients’ access to all forms of health care, create confusion among patients and providers about their rights and obligations, and promote discrimination. The proposed rule would enable insurance companies to deny transgender people coverage for life saving health care services that they cover for non-transgender people. The rule would also make it harder for other people experiencing discrimination in health care to know and exercise their rights, including people with Limited English Proficiency (“LEP”) and people suffering from chronic health conditions, like HIV. The rule fails to take into consideration the monetary cost and cost of life that will occur as a result of the increased discrimination. Finally, the proposed rule ignores abundant court precedent that support the existing rule. TLC urges the Department of Health and Human Services (hereinafter “HHS” or “the Department”) to withdraw the proposed rule. Furthermore, given the imminent decision by the Supreme Court on *R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C.*, 139 S.Ct. 1599 (2019) *U.S. Granting Certiorari* in Part 884 F.3d 560, the Department should provide the public another opportunity to comment after the Court issues a decision.

I. The Proposed Rule Does Not Account For The Devastating Costs Of Discrimination Against TGNC People In Healthcare

A. TGNC People Face High Rates Of Discrimination Seeking Healthcare

Transgender people living in the United States face high rates of discrimination and mistreatment in all areas of life, including when seeking healthcare. A national survey of transgender people living in the U.S. in 2015 found that one-third (33%) of respondents who had seen a health care provider in the year prior 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.¹ Furthermore, the survey found that in the year prior, 23% of respondents did not see a doctor when they needed to because of fear of being mistreated as a transgender person.² A needs assessment survey of transgender people living with HIV in the United States found that 41% of respondents had gone six months or longer without medical care since their HIV diagnosis.³ Transgender people with HIV who were previously incarcerated or detained (51%) were significantly more likely to have gone

¹ Sandy E. James, et al., *The Report of the 2015 U.S. Transgender Survey*, NAT’L CTR. FOR TRANSGENDER EQUALITY, 93, (Dec. 2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf> (hereinafter “2015 U.S. Transgender Survey”) (hereinafter “2015 U.S. Transgender Survey”).

² *Id.*

³ Cecilia Chung, et al., *Positively Trans: Initial report of a national needs assessment of transgender and gender non-conforming people living with HIV*, 7, TRANSGENDER LAW CENTER, (2016), <http://transgenderlawcenter.org/wp-content/uploads/2016/02/PositivelyTrans-2015-7-border-FINAL.pdf>

without medical care for more than 6 months those never detained (35%).⁴ The most common reason respondents reported for going without healthcare for more than 6 months was previous or anticipated discrimination by a healthcare provider (29%).⁵ As such, TGNC people in the U.S. face significant barriers to accessing health care due, in significant part, to discrimination by providers.

B. The Proposed Rule Would Encourage Health Care Providers To Discriminate Against TGNC People Seeking Care –Proposed “45 C.F.R. 92.2 Nondiscrimination Requirements”

Despite the well documented high levels of discrimination and abuse that transgender people experience in health care settings, the proposed rule eliminates the current definition of “sex” that explicitly protects transgender people.⁶ Currently, the definition under the current regulations (hereinafter “2016 final rule”) encompasses claims brought by people of transgender experience for their gender identity and failing to conform to sex stereotypes.⁷ If enacted the proposed rule will encourage healthcare providers to discriminate more rather than bring them into compliance with prevailing law and best practices. The proposed rule cites no data on either the effect of the existing rule nor the effect the proposed rule, if enacted, would have on TGNC patients nationally to support this change.

C. The Proposed Rule Would Permit Insurance Companies To Expressly Discriminate Against TGNC People And Deny Us Life Saving Medical Care- Proposed “45 C.F.R. 92.3 Scope of Application”

The proposed rule appears to reduce which entities are subject to the non-discrimination protections of section 1557 such that it would no longer apply to many health insurance companies. Albeit confusing and convoluted, this proposal effectively eviscerates the only federal means of challenging unlawful denials of transition related health insurance coverage.

The plain language of Section 1557, as well as the 2016 final rule makes it clear that “any health program or activity” administered by an Executive agency is subject to the law’s provisions.⁸ However, in the proposed rule, HHS seeks to contravene the statute, positing that providing health care “differs substantially” from providing health insurance coverage.⁹ As such, HHS seeks to exempt a broad swath of health insurance companies from the application of Section 1557. This nonsensical result, if fully implemented, would significantly reduce the application of the law through regulation, and diminish TGNC people’s access to medically necessary treatment.

⁴ *Id.*

⁵ *Id.*

⁶ 45 C.F.R. §92.4 (2016), 45 C.F.R. §92.206 (2016), and 45 C.F.R. §92.207(b)(3)(2016).

⁷ *Id.*

⁸ 42 U.S.C. § 18116 (a) (2010); 45 C.F.R. §§ 92.1, 92.2, 92.4 (2016) (emphasis added).

⁹ Nondiscrimination in Health and Health Education Programs or Activities, 84 Fed. Reg. 27846 (June 14, 2019).

Not only is this change contrary to the stated purpose of the Affordable Care Act and to the plain language of Section 1557, but also, if fully implemented, it would be devastating to TGNC people across the country. Health insurance companies are tremendous gatekeepers to care and, without health insurance coverage, the cost of transition related care is prohibitive for many.

Transgender Law Center receives numerous inquiries about illegal denials of coverage for transition related care by health insurance companies because of blanket exclusions against such care regardless of medical necessity. Such blanket exclusions are currently unlawful under the Affordable Care Act, and many, in both public and private health insurance policies, have been successfully challenged using 1557. *See for eg. Cruz v. Zucker*, 195 F. Supp. 3d 554 (S.D. N.Y. 2016); *Boyden v. Conlin*, 341 F. Supp. 3d 979 (W.D. Wis. 2018); *Tovar v. Essentia Health* 857 F3d 771, 779 (8th Cir 2017); and *Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931 (W.D. Wis. 2018). By largely exempting health insurance companies from the non-discrimination provision, transgender people across the country would have no legal means to challenge such discriminatory policies. As a result, policies with blanket exclusions would remain unchecked and TGNC people nationally would have no recourse under federal law in the face of widespread discrimination, jeopardizing their lives without access to life saving care.

D. The Proposed Rule Completely Fails to Consider the Consequences of Increased Discrimination and Denial of Care for TGNC Communities

The proposed rule fails to take into consideration the monetary and health consequences of unchecked denials of life saving medical care for TGNC people who would have no recourse for discrimination under federal law if the proposed rule is put in place.

Prevailing medical and social science literature shows that transition related health care significantly improves psychosocial and health outcomes for TGNC people. Utilization of transition-related medical care has been associated with significantly lower rates of suicide, binge drinking, and non-injection drug use.¹⁰ One study of seventy one transgender patients, with over ten years of follow up, found significant improvements in all nine measures of the health symptom check list and global severity index, after receiving medically necessary care to treat their gender dysphoria.¹¹ A literature review of suicidality of transgender patients similarly found that suicidal ideation in pre-and post-operative participants decreased rates of suicidal ideation in transgender participants after surgery, in reviewed studies that compared.¹² A cross sectional study of transgender veterans who (1) had no treatment, (2) had hormone replacement therapy only, and (3) who had hormone replacement therapy as well as one surgery and (4) hormone replacement therapy and chest and genital surgery found a statistically significant

¹⁰ Eric C. Wilson, et. al, *Connecting the Dots: Examining Transgender Women's Utilization of Transition-Related Medical Care and Associations with Mental Health, Substance Use, and HIV*, 92 J. URB. HEALTH, 182, (2014),

https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4338120/pdf/11524_2014_Article_9921.pdf

¹¹ Ulrike Rupp, & Friedemann Pfafflin, *Long-Term Follow-Up Of Adults With Gender Identity Disorder*, 44 ARCHIVES OF SEXUAL BEHAV., 1321, (2015).

¹² Ellen Marshall, et. al, *Non Suicidal Self-Injury and Suicidality in Trans People: A Systematic Review of the Literature*. 28 INT'L REV. OF PSYCHIATRY, 58 (2016).

decrease in suicidal ideation within the past year and past two weeks of veterans who had had hormone replacement therapy and two surgeries compared with all other groups of participants.¹³

This is critical because compared to cisgender people transgender people experience high rates of anxiety, depression and suicidality.^{14,15,16} Research demonstrates that access to gender affirming medical care greatly improves psychosocial outcomes for transgender people. A systematic review found that the levels of psychiatric disorders, particularly depression, effecting transgender people are higher than the cisgender population—specifically because of social stigma, discrimination and difficulties accessing health care and social services as risk factors—participants psychiatric disorders improved following gender confirming medical intervention, “in many cases reaching normative values.”¹⁷ The review found that hormone replacement therapy and sex reassignment surgeries were a protective factor against poor psychosocial outcomes.

Experts agree that the mental health disparities faced by the transgender community, including rates of suicidal ideation, do not reflect inherent pathology, but rather are associated with high levels of discrimination and stigma. As the American Psychiatric Association has stated, “[b]eing transgender or gender variant implies no impairment in judgment, stability, reliability, or general social or vocational capabilities; however, these individuals often experience discrimination due to a lack of civil rights protections for their gender identity or expression.”¹⁸ Instead, studies of transgender people demonstrate that suicidal ideation and other mental health disparities are associated with denials of care and higher levels of discrimination.^{19,20} In other words, discrimination and stigma are causing mental health disparities for the transgender community.

¹³ Raymond Tucker, et. al, *Hormone Therapy, Gender Affirmation Surgery, And their Association with Recent Suicidal Ideation and Depression Symptoms in Transgender Veterans*, 48, PSYCHOL. MED., 2329, (2018).

¹⁴ Ellen Marshall, et. al, *Non Suicidal Self-Injury and Suicidality in Trans People: A Systematic Review of the Literature*. 28 INT’L REV. OF PSYCHIATRY, 58 (2016).

¹⁵ Noah Adams, et. al, *Varied Reports Of Adult Transgender Suicidality: Synthesizing And Describing The Peer Reviewed And Gray Literature*. 2 TRANSGENDER HEALTH, 60 (2016).

¹⁶ Cecilia Dhejne, et. al., *Mental Health and Gender Dysphoria: A review of the literature*. 28 INT’L REV. OF PSYCHIATRY, 44 (2016).

¹⁷ *Id.*

¹⁸ Am. Psychiatric Ass’n, *Position Statement on Discrimination Against Transgender and Gender Diverse Individuals* (2018).

¹⁹ John R. Blosnich, et al., *Impact of social determinants of health on medical conditions among transgender veterans*. 52 AM. J. OF PREVENTIVE MED., 491-498 (2017).

²⁰ Keren Lehavot, et. al, *Factors associated with suicidality among a national sample of transgender veterans*, 46 SUICIDE AND LIFE-THREATENING BEHAVIOR, 507-524 (2016) (finding elevated suicide ideation and attempt rates among transgender veterans and finding that higher suicide attempt and ideation rates were associated with experiences of discrimination within and outside of the military); Raymond P. Tucker, et. al, *Current and military-specific gender minority stress factors and their relationship with suicide ideation in transgender veterans*, 49 SUICIDE AND LIFE-THREATENING BEHAV., 155, 155-156 (2018) (finding that suicide ideation among transgender veterans in the past year and past two weeks is associated with higher levels of discrimination and rejection, including in military contexts).

In contrast, studies of transgender people have found that health disparities decrease substantially when transgender people have access to the health care they need without discrimination.²¹ These findings were echoed by former military Surgeon Generals in their assessment of the Department of Defense’s February 22, 2018 plan for implementing the ban on military service by transgender people. The Surgeon Generals’ report noted that “[e]xtensive research has confirmed that both stigma and the denial of medically necessary care can lead to suicidality” and that military policies such as the ban on transgender service members have in fact “contributed to stigma and deprivation of health care” and exacerbated the problem of suicidality—just as a discriminatory exclusion of health care for transgender veterans would continue to do.²² As such, transition related care is life saving for TGNC people.

Not only is health insurance coverage for medically necessary transition related care critical to the health outcomes of TGNC people, but research also demonstrates that it is cost effective for insurance companies to cover.²³ An analysis conducted in 2015 found that coverage of transgender affirming care had a low budget impact on U.S. society and recommended that insurance companies eliminate any blanket bans on such coverage.²⁴

The proposed rule completely fails to address the devastating impact this would have on patients, despite research that shows that access to transition related care is a matter of life or death for TGNC people. Additionally, the proposed rule does not take into account the research demonstrating costs savings for entities who provide access to transition related care. Finally,

²¹ See e.g. Walter O. Bockting, et al. *Adult development and quality of life of transgender and gender nonconforming people*. 23 CURRENT OPINION IN ENDOCRINOLOGY & DIABETES AND OBESITY, 188-197 (2016) (literature review finding that research points to a strong association between stigma and suicidality and depression among transgender people); Walter O. Bockting, et. al, *Stigma, mental health, and resilience in an online sample of the US transgender population*, 103 AM. J. OF PUB. HEALTH, 943-951 (2013); Kristen Clements-Nolle, K., et. al *Attempted suicide among transgender persons: the influence of gender-based discrimination and victimization*, 51 J. OF HOMOSEXUALITY, 53-69 (2006); Amy S. House et. al, *Interpersonal trauma and discriminatory events as predictors of suicidal and nonsuicidal self-injury in gay, lesbian, bisexual, and transgender persons*, 17 TRAUMATOLOGY, 75-85 (2011); 2015 U.S. Transgender Survey (experiences of violence, discrimination, rejection, and inadequate access to care were associated with higher levels of psychological distress and suicide in a national sample of 27,715 adults); Cherie Moody, & Nathan Grant Smith, *Suicide protective factors among trans adults*, 42 ARCHIVES OF SEXUAL BEHAV., 739-752 (2013); Amaya Perez-Brumer, et. al, *Individual- And Structural-Level Risk Factors Risk Factors For Suicide Attempts Among Transgender Adults*, 41 BEHAV. MED., 164-171 (2015) (study of 1,229 transgender individuals finding an association between social stigma and lifetime suicide attempts).

²² Vice Admiral Donald C. Arthur, D. C., et. al, *DoD’s Rationale for Reinstating Transgender Ban is Contradicted by Evidence*, PALM CTR: BLUE PRINT FOR SOUND PUB. POLICY, 30 (2018),

²³ William V. Padula, et. al, *Societal Implications of Health Insurance Coverage for Medically Necessary Services in the U.S. Transgender Population: A Cost-Effectiveness Analysis*, 31 SOCIETY OF GENERAL INTERNAL MEDICINE, 394, (2015),

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4803686/>

²⁴ *Id.*

while the proposed rule goes to great lengths to discuss the speculated savings of allowing insurance companies to avoid informing patients about their rights, it completely ignores the tremendous cost of human life that it would cause.

E. The Proposed Rule Would Harm TGNC People Living With HIV By Decreasing Access To Prompt Diagnosis And Treatment

If enacted, the proposed rule will likely reduce treatment of HIV for TGNC people, which will negatively impact the health outcomes for TGNC people living with HIV and accelerate the spread of the epidemic.

A member of Positively Trans, a project of TLC for transgender people living with HIV knows the impact of health discrimination all too well. Victoria,²⁵ a transgender woman living in Louisiana attempted to see a doctor in her new home when she moved to a rural part of the state in order to obtain HIV medication.²⁶ The receptionist at the doctor's office treated Victoria with hostility and refused to use her preferred and traditionally feminine name when calling her up to see the doctor. Instead the receptionist insisted on using the name given to her at birth, which is traditionally masculine, disclosing her transgender status to all the other patients in the waiting room despite Victoria's request that the receptionist respect her privacy and dignity. Victoria was so humiliated and embarrassed that she left the office without seeing the doctor. After this experience, Victoria went five months without HIV medication because she feared something similar would happen again. As a result, her CD4 count decreased and her health worsened. It was only once she was able to connect with a non-profit organization that was transgender competent that she was able to receive the care she needed.

Victoria has used this traumatic experience to advocate for her community. She is now a patient navigator at a transgender health clinic that serves people living with HIV. Regrettably, Victoria says her story is not unique. She frequently hears from patients she assists that they face similar discriminatory scenarios when they attempt to access the care that is necessary to their health.

This is critical to the successful treatment of HIV, as the effectiveness of antiretroviral medication depends upon the consistency of its administration and how promptly it is started after sero-conversion. U.S. federal authorities recognize that poor adherence to HIV treatment is associated with less effective viral suppression. An unsuppressed viral load may risk the immediate health of HIV positive individuals and it will also risk creating treatment resistance. If

²⁵ "Victoria" is a pseudonym to protect the privacy of the Positively Trans member who contributed her story.

²⁶ The following personal story should be counted as its own comment even though it is incorporated in this one.

patients fail to respond to their given drug regimen, they are moved to second line drugs, which may be more expensive or difficult to manage.^{27, 28}

Ensuring that transgender people living with HIV have access to timely and affirming treatment increases the effectiveness of that treatment, decreases rates of transmission, and is cost savings. Evidence has shown that individuals living with HIV who keep adherence to HIV medicine as prescribed can stay virally suppressed and thus have effectively no risk of transmission to other people. In fact, Centers for Disease Control and Prevention's (CDC) HIV Treatment as Prevention Technical Fact Sheet reports a 96% reduction in HIV transmission risk among heterosexual mixed-status couples where the HIV-positive partner started antiretroviral therapy (ART) immediately after diagnosis versus those delaying ART initiation.²⁹

As discussed, *Supra.* Under I.A., research has shown that transgender people living with HIV delay seeking medically necessary treatment because of fear of discrimination and harassment.³⁰ Without the explicit protection of 1557, healthcare providers will be encouraged to discriminate further against transgender people. It follows that if there is no mechanism to curb discrimination against TGNC people, then those living with HIV will be more likely to forgo treatment that is essential to their wellbeing and to ending this epidemic.

In this way, the proposed rule contravenes President Trump's stated goal of ending the epidemic within 10 years during his state of the union address on February 5, 2019.³¹ The strategies identified by the executive administration's initiative to achieve this include "Diagnos[ing] all individuals with HIV as early as possible" and treating people living with HIV with antiretroviral medication "rapidly and effectively to reach sustained viral suppression."³² If TGNC people are not protected against discrimination when seeking healthcare, we know they are more likely to avoid healthcare settings as discussed, *Supra.*, delaying diagnosis and treatment.

²⁷ Kenneth L. Schaecher, *The Importance of Treatment Adherence in HIV*, 19 AM. J. MANAG. CARE, 231, (Sept. 29, 2013),

https://www.ajmc.com/journals/supplement/2013/a472_sep13_hiv/a472_sep13_schaecher_s231

²⁸ Jane Mwangi, CDC Kenya (Centers for Disease Control and Prevention), *Our Research in Kenya: Finding Ways to Improve HIV Treatment Access and Outcomes*, <https://blogs.cdc.gov/global/2012/07/26/our-research-in-kenya-finding-ways-to-improve-hiv-treatment-access-and-outcomes/>

²⁹ CTRS FOR DISEASE CONTROL AND PREVENTION, *Evidence of HIV Treatment and Viral Suppression in Preventing the Sexual Transmission of HIV*, (Dec. 2018), <https://www.cdc.gov/hiv/pdf/risk/art/cdc-hiv-art-viral-suppression.pdf>

³⁰ Cecilia Chung, et al., *Positively Trans: Initial report of a national needs assessment of transgender and gender non-conforming people living with HIV*, 7, TRANSGENDER LAW CTR, (2016), <http://transgenderlawcenter.org/wp-content/uploads/2016/02/PositivelyTrans-2015-7-border-FINAL.pdf>

³¹ Donald J. Trump, *State of the Union Address* (Feb. 5, 2019).

³² U.S. DEP'T OF HUMAN SERV.'S, *What is 'Ending the HIV epidemic: A Plan for America*, (Jul. 8, 2019), <https://www.hiv.gov/federal-response/ending-the-hiv-epidemic/overview>

II. Eliminating Gender Identity And Sex Stereotyping From The Interpretation Of “Sex” Contradicts 20 Years Of Legal Precedent and Will Increase Confusion Among Patients and Providers Alike- Proposed “45 C.F.R. 92.2 Nondiscrimination Requirements”

The proposed rule eliminates gender identity from the definition of “sex” and suggests in its preamble that the interpretation of “sex” should not include gender identity or sex stereotyping. Such a characterization of “sex” not only will cause more confusion to interpret, but also flies in the face of twenty years of legal precedent. In eliminating the definition of sex, the Department relied solely on one legal decision, and that one decision is in clear conflict with decades of established case law.

Currently, section 1557 of the Patient Protection and Affordable Care Act (“ACA”) prohibits healthcare facilities who receive federal funding from discriminating on the basis of sex by incorporating the anti-discrimination provisions of several civil rights’ statutes.³³ As such, the jurisprudence interpreting these incorporated statutes applies to the protections under the ACA including those that interpret the meaning of “sex”.

Nearly three decades ago, the Supreme Court of the United States held that Title VII’s proscription of discrimination “because of ... sex” requires that gendered notions of how people “should” behave be irrelevant to employment decisions and prohibits employers from taking adverse employment actions based on an employee’s failure to conform to sex stereotypes. *Price Waterhouse v. Hopkins*, 490 U.S. at 240. *Oncale v. Sundowner Offshore Services, Inc.* lends further support to this interpretation by underscoring the ways that Title VII “evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment.” 523 U.S. at 78. In holding that Title VII prohibits same-sex harassment, the Court rejected the idea that Title VII only prohibits the type of sex discrimination that Congress specifically considered. The Court recognized that same-sex harassment was not “the principal evil” Title VII sought to address, but it was nevertheless prohibited by the statute, which can “go beyond the principal evil to cover reasonably comparable evils.” *Id.* at 79.

Federal courts that have considered the interplay between anti-discrimination statutes and discrimination against transgender people easily have found that such discrimination unlawfully relies on the very same gender-based considerations prohibited by the Supreme Court’s holding in *Price Waterhouse* and *Oncale*. Following those Supreme Court decisions, Federal Courts overwhelmingly agree that discrimination based on transgender status and sex stereotypes is

³³ 42 U.S.C.A. § 18116 (West) provides: “Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section 504, or such Age Discrimination Act shall apply for purposes of violations of this subsection.”

unlawful under the definition of “sex”. *See, e.g., Smith*, 378 F.3d at 575 (holding discrimination against transgender people “is no different from the discrimination directed against Ann Hopkins in Price Waterhouse, who, in sex-stereotypical terms, did not act like a woman”); *see also EEOC v. R.G. & G.R. Harris*, 884 F. 3d, 560, 572 (6th Cir., 20-18); *Chavez v. Credit Nation Auto Sales, LLC*, 641 F. App’x 883, 884 (11th Cir. 2016); *Glenn*, 663 F.3d at 1316; *Barnes v. City of Cincinnati*, 401 F.3d 729, 741 (6th Cir. 2005). The First, Sixth, Seventh, Ninth and Eleventh Circuits all have concluded that discrimination against transgender individuals based on gender nonconformity is impermissible sex discrimination under federal anti-discrimination statutes and the U.S. Constitution. *See Rosa*, 214 F.3d at 215–16; *R.G. & G.R. Harris*, 844 F.3d at 572; *Barnes*, 401 F.3d at 741; *Smith*, 378 F.3d at 575; *Whitaker*, 858 F.3d at 1047–50; *Chavez*, 641 F. App’x at 884; *Glenn*, 663 F.3d at 1316; *Schwenk*, 204 F.3d at 1200–02. The Tenth Circuit also left open an avenue for a transgender employee to bring a claim for discrimination under Title VII where they face adverse action based on their perceived nonconformity to sex stereotypes. *See Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1224 (10th Cir. 2007); *see also Tudor v. Se. Okla. State Univ.*, No. CIV–15–324–C, 2017 WL 4849118 (W.D. Okla. Oct. 26, 2017) (denying defendants’ motion for summary judgment on plaintiff’s claim that she was discriminated against based on her transitioning status in violation of Title VII). Numerous district courts across the country also have found that a transgender individual may bring claims under Title VII when they allege discrimination due to nonconformity with sex stereotypes. *See, e.g., EEOC v. A&E Tire, Inc.*, 325 F. Supp. 3d 1129, 1135 (D. Colo. 2018); *Parker v. Strawser Constr., Inc.*, 307 F. Supp. 3d 744, 755–60 (S.D. Ohio. 2018); *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1001, 1014 (D. Nev. 2016); *Fabian*, 172 F. Supp. at 527; *Finkle v. Howard Cty.*, 12 F. Supp. 3d 780, 788 (D. Md. 2014); *Lopez v. River Oaks Imaging & Diagnostic Grp., Inc.*, 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008); *Schroer*, 577 F. Supp. 2d at 305; *Mitchell v. Axcan Scandipharm*, No. Civ. A 05–243, 2006 WL 456173, at *2 (W.D. Pa. Feb. 17, 2006); *Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, No. Civ. 02–1531, 2004 WL 2008954, at *2–3 (D. Ariz. June 3, 2004); *Tronetti v. Healthnet Lakeshore Hosp.*, No. 03–cv– 0375, 2003 WL 22757935, at *4 (W.D.N.Y. Sept. 26, 2003).

Thus, following Supreme Court’s precedents in *Price Waterhouse* and *Oncale*, the overwhelming consensus of federal courts holds that employers cannot discriminate against transgender employees because of the employee’s failure to conform to sex stereotypes or gender norms. Protections against sex discrimination “are afforded to everyone, [therefore] they cannot be denied to a transgender individual.” *Glenn v. Brumby*, 663 F.3d 1312, 1319 (11th Cir. 2011). The analysis cannot, and should not, change just because the plaintiff alleging discrimination is transgender. After all, “[b]y definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth.” *Whitaker v. Kenosha Unified Sch. Dist. No. 1*, 858 F.3d 1034, 1048 (7th Cir. 2017).³⁴

This overwhelming precedent is not limited to Title VII but other civil rights laws as well. *See Evancho v. Pine-Richland Sch. Dist.*, 237 F. Supp. 3d 267, 292 (W.D. Pa. 2017) (granting a preliminary injunction for likelihood of success on equal protection claims to transgender

³⁴ Though a panel of the Fifth Circuit disagreed with this line of cases in *Wittmer v. Phillips 66 Co.*, 915 F.3d 328 (5th Cir. 2019), its statements are merely *dicta*, in that it affirmed the district court on other grounds. *Wittmer* is also misguided because it relied on case law that had already been overturned. *See Wittmer*, 915 F.3d at 330.

plaintiffs against school board’s policy prohibiting bathroom use); *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, No. 16-CV-943-PP, 2016 WL 5239829, at *4 (E.D. Wis. Sept. 22, 2016), *aff’d sub nom. Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017) (granting plaintiff a preliminary injunction to allow him to use the boys restroom, finding likelihood of success on the merits); and *Karnoski v. Trump*, No. C17-1297-MJP, 2018 WL 1784464, at *11 (W.D. Wash. Apr. 13, 2018) (finding that transgender people are a suspect class and classifications must survive strict scrutiny) reversed on other grounds by *Karnoski v. Trump*, 926 F.3d 1180 (9th Cir. 2019).

In the proposed rule, the Department states it’s elimination of the definition of “sex” is based on “the preliminary injunction issued by the court in *Franciscan Alliance*, that held that parts of the Final Rule exceeded the Department’s authority under the PPACA, the Department has determined that (in addition to exceeding its statutory authority) parts of the regulation are duplicative, unduly burdensome, and confusing to the regulated community.”³⁵ Such a reasoning is unsupportable by law because the sole district court decision the Department relies upon is a complete outlier against the overwhelming consensus among federal courts that civil rights protections include impermissible discrimination against transgender people because of their sex as discussed, *Supra*. Furthermore, the cited decision is not controlling precedent nationally because it is only a district court decision from the Northern District of Texas. Not to mention that it is not a decision on the merits, only a preliminary injunction, making its authority and weight even more tenuous. The proposed rule completely omits *any* mention of the majority position held by District and Circuit Federal Courts on the issue. *See for eg. Rumble v. Fairview Health Services*, 2015 WL 1197415, at *25 (D.Minn.,2015) (denying defendants’ motion to dismiss of transgender plaintiff’s claim under 1557); *Prescott v. Rady Children’s Hosp.-San Diego*, 265 F. Supp. 3d 1090 (S.D. Cal. 2017) (holding that a medical facility violated the Act by misgendering a transgender patient who made out a cognizable claim for sex discrimination under sex stereotyping theory); *Cruz v. Zucker*, 195 F. Supp. 3d 554 (S.D. N.Y. 2016), on reconsideration, 218 F. Supp. 3d 246 (S.D. N.Y. 2016) (state Medicaid regulations that categorically banned cosmetic surgery for persons diagnosed with gender dysphoria violated the federal Medicaid Act and discrimination on the basis of gender identity was sex discrimination, within the meaning of the Affordable Care Act); *Boyden v. Conlin*, 341 F. Supp. 3d 979 (W.D. Wis. 2018) (granting summary judgment to plaintiffs holding Wisconsin’s categorical ban on insurance coverage of transition related care for state employees unlawful under the ACA and Title VII); *Tovar v. Essentia Health* 857 F3d 771, 779 (8th Cir 2017) (reversed and remanded the dismissal of a claim for discrimination for transgender status under the ACA brought by the mother of a transgender child who was refused insurance coverage of hormone replacement therapy by her employer provided health plan due to a discriminatory blanket ban of coverage for transition related care); *Flack v. Wis. Dep’t of Health Servs.*, 328 F. Supp. 3d 931 (W.D. Wis. 2018) (granting a preliminary injunction of Wisconsin’s blanket Medicaid exclusion of transition related care noting a reasonable likelihood of success on the merits of plaintiff’s affordable care act claim). Rather, the proposed rule dismisses this widely recognized line of relevant

³⁵ 84 FR 27846, 27905 (June 14, 2019).

jurisprudence by mischaracterizing the current 2016 final rule that codifies it, as a “relatively novel legal theory” rather than a theory developed through decades of case law.³⁶

A. The Proposed Rule, If Fully Adopted, Will Increase Confusion And Result In Costly And Burdensome Litigation

Not only is the Department’s position unjustifiable under prevailing law, but it’s stated justification for doing so to allegedly minimize confusion is equally unpersuasive.³⁷

The final and current rule, as enacted in 2016, provides a clear definition of “sex” leaving no room for confusion. This proposed rule, not only eliminates any definition of sex but also suggests in its preamble that interpreting the prohibition against sex discrimination is limited to claims based upon biological characteristics. The preamble argues at length that because the National Institute of Health’s grant funding proposals for scientific research used various definitions of “sex” that were based upon biological characteristics that is confusing for HHS to maintain the definition of “sex” provided by the final rule.³⁸ This reasoning is completely misplaced. Most notably it fails to recognize the distinction between scientific and legal definitions. The examples of sexed biological markers discussed within the aforementioned grant proposals, including DNA and cell physiology differences, have *never* been focal point for the legal community to interpret prohibitions against sex discrimination under law. Analogously, while race has been recognized for scientific purposes as a social construct without significant scientific basis, our laws protect against race discrimination because of our country’s long history of racism and race-based discrimination. It would be utterly absurd to suggest scientific and legal communities adopt the same definition of race or that because there is no scientific basis for race that it is confusing to prohibit discrimination on the basis of it. Similarly, the Department’s reliance on the limited application of scientific understandings of “sex as a biological variable” have no place in anti-discrimination law.³⁹

However, eliminating a definition of “sex” as proposed will no doubt cause more confusion, not less. It is accepted within the legal community that definitions provide guidance and clarity for interpreting law. Therefore, it follows that removing a definition will cause more, not less, confusion. Moreover, eliminating a definition of “sex” but simultaneously also suggesting in the preamble that such an interpretation should not encompass the definition that has been developed through the long line of case law as discussed, *Supra*. Under II., is plainly contradictory and also decidedly unclear. This conundrum will undoubtedly necessitate litigation to clarify how it should be interpreted, creating more work for the courts, not less. Despite the Department’s proffered concern over the cost of implementing the 2016 final rule, the proposed rule’s cost-benefit analysis notably omits any mention of the costs that the ensuing litigation will likely incur.

³⁶ 84 Fed. Reg. 27846, 27875 (June 14, 2019)

³⁷ 84 Fed. Reg. 27846, 27905 (June 14, 2019).

³⁸ 84 Fed. Reg. 27846, 27879 (June 14, 2019).

³⁹ 84 Fed. Reg. 27846, 27881 (June 14, 2019).

III. The Proposed Rule If Adopted Will Incur Costs To The Government And Public That Are Unaccounted For In Its Regulatory Impact Analysis

People who have access to a regular primary care physician are more likely than those who do not to receive recommended preventive services and timely care for medical conditions before they become more serious and more costly to treat.⁴⁰ Research shows that having a regular doctor is also associated with fewer preventable emergency department visits and fewer hospital admissions,⁴¹ as well as with greater trust in and adherence to physicians' treatment recommendations.⁴² These are some of the underlying reasons that Congress enacted the Affordable Care Act in the first place. Namely, the ACA was intended to improve health care for all Americans through expanded coverage, increased accountability, lower costs, and improved quality of care.⁴³ Since its enactment, research shows that the Affordable Care Act has, indeed, reduced uninsured emergency room visits.⁴⁴

As discussed above, the proposed rule, if adopted, would deter TGNC people from seeking lifesaving medical care, including preventative care, for fear of uncurbed discrimination by health care providers. As such, TGNC patients without primary care would result in an increase in emergency room visits. This would not only undermine the spirit and purpose of the ACA, but also would result in increased costs for the healthcare system including hospitals and the government, which absorb and subsidize the costs of uninsured patients. Nowhere in the proposed rule are such costs accounted for or projected.

⁴⁰ Andrew B. Bindman, et al., *Primary Care Receipt of Preventive Services*, 11, J. OF GEN. INTERNAL MED., 269–76 (May 1996); and Lynn A. Blewett, et al., *When a Usual Source of Care and Usual Provider Matter: Adult Prevention and Screening Services*, 23 J. OF GEN. INTERNAL MED., 1354–60 (Sept. 2008).

⁴¹ Suezanne Tangerose Orr, et al., *Emergency Room Use by Low-Income Children with a Regular Source of Health Care*, 29 MED. CARE, March 1991 283–86; Barbara Starfield, *Primary Care: Concept, Evaluation and Policy*, 7 OXFORD U. PRESS, 80-81, (1992); Linda J. Weiss and Jan Blustein, *Faithful Patients: The Effect of Long-Term Physician– Patient Relationships on the Costs and Use of Health Care by Older Americans*, 86 AM. J. OF PUB. HEALTH, 1742–47 (Dec. 1996); and James M. Gill, et. al, *The Effect of Continuity of Care on Emergency Department Use*, 9 ARCHIVES OF FAMILY MED., 333–38 (April 2000).

⁴² Kevin. Fiscella, et al., *Patient Trust: Is It Related to Patient-Centered Behavior of Primary Care Physicians?* 42 MED. CARE, 1049–55 (Nov. 2004).

⁴³ Congressional Budget Office, *Letter to the Hon. Nancy Pelosi*, (Mar. 18, 2010), https://www.cbo.gov/sites/default/files/hr4872_0.pdf

⁴⁴ Adam J. Singer, *U.S. Emergency Department Visits and Hospital Discharges Among Uninsured Patients Before and After Implementation of the Affordable Care Act*, 2 JAMA NETWORK OPEN, (Apr. 19 2019); Tina Hernandez-Boussard et. al, *The Affordable Care Act Reduces Emergency Department Use By Young Adults: Evidence From Three States*, 33 HEALTH AFF (MILWOOD), 1648–1654 (Sep. 2014).

IV. The Public Should be given a new opportunity to comment after The Supreme Court Issues a Decision on *R.G. & G.R. Harris Funeral Homes v. EEOC & Aimee Stephens*

The Supreme Court of the United States has granted the petition for certiorari to hear *R.G. & G.R. Harris Funeral Homes v. EEOC & Aimee Stephens*⁴⁵ to decide whether Title VII protects people under sex stereotyping theory of *Price Waterhouse v. Hopkins*, 490 U.S. at 240.⁴⁶ As discussed, *Supra*. Under II., there is a long line of cases that supports this theory. While the applicability of such decision and Title VII are distinct from the ACA, it will inevitably bear upon the agency's interpretation of it, as 1557 incorporates other civil rights statutes including Title IX's prohibition against sex discrimination. As such, it would be flippant and premature for the Department to make a final rule without soliciting additional public comment on proposed changes until after the Supreme Court issues its decision. Oral argument for that case is scheduled for October 8, 2019, less than two months from the date that the comment period closes. The Department waited years to issue the instant notice of proposed rulemaking. It would be imprudent and a waste of resources to finalize a rule that will overlap in many critical respects with the Court's decision, without allowing the public to weigh in on a change that will have such significant consequences for so many people in this country.

V. The Proposed Rule Fails to Demonstrate the Need to Repeal or Reconsider Provisions Around Limited English Proficiency

TLC strongly opposes any changes to the 2016 final rule as it relates to nondiscrimination notices, taglines and language access plans. Currently, the final rule includes notice provisions to ensure that LEP patients understand their rights. We disagree with the proposed rule's analysis that these important protections were not justified, or that they were overly burdensome, or created inconsistent requirements.

Notice of nondiscrimination provisions are a vital component of healthcare access by informing the public of their legal rights. The notice requirement is consistent with the long history of civil rights regulations requiring the posting of notice of rights, including Titles VI of the Civil Rights Act, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973 and the Age Discrimination Act of 1975, which all require that recipients of federal financial assistance to notify the public of their non-discrimination provisions.⁴⁷

Additionally, taglines are well-supported by existing federal and state regulations, guidance and practice. Taglines are a cost-effective approach to ensure that covered entities are not overly burdened. Finally, we oppose removing all references to language access plans because under the 2016 Final Rule, they are voluntary, not required by law and only a factor to be considered. We oppose changes in the proposed rule that would shift the inquiry of meaningful access away from

⁴⁵ *R.G. & G.R. Harris Funeral Homes, Inc. v. E.E.O.C.*, 139 S.Ct. 1599 (2019) *U.S. Granting Certiorari* in Part 884 F.3d 560 (2019).

⁴⁶ SCOTUSBLOG <https://www.scotusblog.com/case-files/cases/r-g-g-r-harris-funeral-homes-inc-v-equal-opportunity-employment-commission/>

⁴⁷ Nondiscrimination in Health Programs and Activities Proposed Rule, 80 Fed. Reg. 54172-54221 (Sept. 8, 2015), <https://www.govinfo.gov/content/pkg/FR-2015-09-08/pdf/2015-22043.pdf>.

the individual LEP person to that of the regulated entity because doing so would weaken the standard.

While the Proposed Rule provides details on the potential financial impact of limiting these protections on covered entities, namely insurance companies, it fails to consider the harmful financial and health consequences for the over 25 million LEP people who need these protections in order to access care.⁴⁸ Justifying the need for these limitations must also include an analysis of the impact on those who most use these important provisions and the effectiveness of the services in helping people access care. For example, the proposed rule does not assess the additional costs that would result from removing taglines and notices in required languages, such as the cost of increased emergency room visits because LEP patients do not fully understand their rights or can't effectively communicate with their health care providers.

V. Conclusion

For the foregoing reasons, TLC and Positively Trans staunchly oppose the proposed rule and urge the Department to instead direct its resources towards vigorous enforcement of the current final regulations, which support the spirit and letter of the Affordable Care Act as enacted by Congress. Additionally, should the Department move forward with rule making, we find it necessary to have another opportunity to submit public comment after the Supreme Court issues a decision interpreting the applicability of Title VII to TGNC people.

⁴⁸ The Disparities Solutions Center, Mongan Institute for Health Policy, Massachusetts General Hospital, Boston, MA, *Improving Patient Safety Systems for Patients With Limited English Proficiency: A Guide for Hospitals*, 3, 9, 14, (Sept. 2012), <https://www.ahrq.gov/sites/default/files/wysiwyg/professionals/systems/hospital/lepguide/lepguide.pdf>