October 3, 2022

U.S. Department of Health and Human Services
Office for Civil Rights
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue SW
Washington, DC 20201
Attn: 1557 NRPM (RIN 0945-AA17)
Submitted via *regulations.gov*

Re: Notice of Proposed Rulemaking: Nondiscrimination in Health Programs and Activities (RIN 0945-AA17)

To Whom It May Concern:

We are grateful for the opportunity to provide comments to the Office for Civil Rights ("OCR") and the Centers for Medicare and Medicaid Services ("CMS") of the U.S. Department of Health and Human Services ("HHS") on the Notice of Proposed Rulemaking Regarding Nondiscrimination in Health and Health Education Programs or Activities (the "Proposed Rule"). S*ee* 87 Fed. Reg. 47,824 (Aug. 4, 2022).

The undersigned are scholars of law and public policy affiliated with the Williams Institute at the University of California at Los Angeles School of Law. The Williams Institute is a research center dedicated to conducting rigorous and independent academic research on sexual orientation and gender identity, including on health disparities facing LGBT people and legal protections against discrimination related to sexual orientation and gender identity.

I. LGBT People Experience Widespread Discrimination and Negative Health Outcomes

Research shows that the Proposed Rule will impact a significant population of LGBT people in the U.S. who experience discrimination in many domains of life, including in access to health care, and who experience documented disparities in physical, mental, and economic well-being.

A. LGBT People Are a Significant Population

LGBT people comprise approximately 4.5% of the U.S. adult population.[1] We estimate that approximately 11 million adults in the U.S. identify as LGBT, including approximately 1.3 million adults who are transgender.[2] In the U.S., younger populations are more likely to identify as LGBT. We estimate that at least 9.5% of the U.S. youth population (ages 13–17), or nearly 2 million youth, identifies as LGBT.[3] This estimate includes 300,000 youth in that age range who identify as transgender (1.4% of the youth population ages 13–17).[4] The number of youth identifying or perceived by their peers as gender nonconforming is likely much higher; a Williams Institute study found that 27% of California youth—approximately 796,000 students—identify or are perceived as gender nonconforming.[5]

LGBT adults in the U.S. are demographically diverse. Drawing from Gallup Daily Tracking data collected between 2015 and 2017, we estimated that 58% of LGBT adults are female.[6] In terms of racial and ethnic diversity, 21% of LGBT adults identify as Latino/a or Hispanic, 12% as Black, 3% as Asian or Pacific Islander, 1% as American Indian or Alaska Native, and 5% as more than one race.[7] And, in a recent study, we found that Latinx[8] people, American Indian or Alaska Native people, and biracial/multiracial groups appear more likely than White people to identify as transgender.[9]

The Census Bureau recently estimated, based on 2019 data from the American Community Survey, that approximately 980,000 households were headed by a same-sex couple.[10] The Census Bureau further determined that nearly 181,000 of those households were

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[1] KERITH J. CONRON & SHOSHANA K. GOLDBERG, WILLIAMS INST., ADULT LGBT POPULATION IN THE UNITED STATES 1 (2020), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Adult-US-Pop-Jul-2020.pdf [hereinafter: CONRON & GOLDBERG, LGBT ADULTS].

[2] JODY L. HERMAN, ANDREW R. FLORES & KATHRYN K. O'NEILL, WILLIAMS INST., HOW MANY ADULTS AND YOUTH IDENTIFY AS TRANSGENDER IN THE UNITED STATES? 4 (2022), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Pop-Update-Jun-2022.pdf [hereinafter: HERMAN ET AL., TRANSGENDER ADULTS].

[3] KERITH J. CONRON, WILLIAMS INST., LGBT YOUTH POPULATION IN THE UNITED STATES 2 (2020), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Youth-US-Pop-Sep-2020.pdf.

[4] HERMAN ET AL., TRANSGENDER ADULTS, *supra* note 2, at 4.

[5] BIANCA D.M. WILSON ET AL., CHARACTERISTICS AND MENTAL HEALTH OF GENDER NONCONFORMING ADOLESCENTS IN CALIFORNIA 2 (2017), https://williamsinstitute.law.ucla.edu/wp-content/uploads/GNC-Youth-CA-Dec-2017.pdf [hereinafter: WILSON ET AL., GENDER NONCONFORMING ADOLESCENTS].

[6] *LGBT Demographic Data Interactive*, WILLIAMS INST. (2019), https://williamsinstitute.law.ucla.edu/visualization/lgbt-stats/?topic=LGBT#demographic.

[7] *Id.*

[8] The term Latinx is a gender-neutral alternative to Latino or Latina and has been used by LGBTQ people, young people, and others as an inclusive term that embraces "a wide variety of racial, national, and even gender-based identifications." ED MORALES, LATINX: THE NEW FORCE IN AMERICAN POLITICS AND CULTURE (2018).

[9] HERMAN, FLORES &. O'NEILL, *supra* note 2, at 6.

[10] LAQUITTA WALKER & DANIELLE TAYLOR, U.S. CENSUS BUREAU, SAME-SEX COUPLE HOUSEHOLDS: 2019 (2021), https://www.census.gov/content/dam/Census/library/publications/2021/acs/acsbr-005.pdf. Using data from the Current Population Survey, the Census Bureau also estimated that as many as 191,000 children may be living with

raising children under the age of 18.[11] Separately, using a variety of data sources, we found in a recent study that 27% of LBQ women had a child under 18 in their household, with 32% of LBQ women of color having a minor child in their home.[12]

Most LGBT people live in states that do not have explicit laws prohibiting sexual orientation or gender identity discrimination in health care settings. In some states, protections against health care discrimination can be found under laws prohibiting discrimination in public accommodations.[13] However, over half of LGBT people live in states without protections from discrimination based on sexual orientation or gender identity in public accommodations.[14] Some of the largest populations of LGBT people in the U.S. are found in states which do not protect against sexual orientation or gender identity discrimination in public accommodations, [15] such as Texas and Georgia (858,000 and 356,000 LGBT people, respectively).[16]

B. LGBT People Experience Widespread Discrimination, Including in Health Care

Sexual orientation and gender identity ("SOGI") discrimination has been documented through a variety of sources, including studies of survey data, court cases, administrative complaints, and media reports. Below, we discuss evidence of discrimination experienced by LGBT people generally, and within the health care context specifically.

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same-sex parents. *Who is Living Together? Same-Sex Couples in the United States*, CENSUS.GOV (Nov. 19, 2019), https://www.census.gov/library/visualizations/2019/comm/living-together-same-sex.html.

[11] *Id.*

[12] BIANCA D.M. WILSON, ALLEGRA R. GORDON, CHRISTY MALLORY, SOON KYU CHOI & M.V. LEE BADGETT, WILLIAMS INST., HEALTH AND SOCIOECONOMIC WELL-BEING OF LBQ WOMEN IN THE US 8 (2021), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LBQ-Women-Mar-2021.pdf [hereinafter: WILSON ET AL., LBQ WOMEN].

[13] See e.g. MASS. GEN. LAWS ch. 272, § 92A (2022).

[14] KERITH J. CONRON & SHOSHANA K. GOLDBERG, WILLIAMS INST., LGBT PEOPLE IN THE US NOT PROTECTED BY STATE NON-DISCRIMINATION STATUTES (2020), https://williamsinstitute.law.ucla.edu/publications/lgbt-nondiscrimination-statutes/.

[15] *State Public Accommodation Laws*, NAT'L CONF. ON STATE LEGISLATURES (June 25, 2021), https://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx

[16] CONRON & GOLDBERG, LGBT ADULTS, *supra* note 1, at 1-2.

i. Evidence of LGBT Discrimination and Harassment Generally

Research has documented the discrimination and harassment that LGBT people experience in almost all aspects of public life,[17] including in employment,[18] education,[19] housing,[20] financial services,[21] government programs,[22] the judicial system,[23] and public accommodations.[24] Below we provide evidence from our research and from government studies to illustrate the types of discrimination and harassment LGBT people experience.

- **Employment.** In a 2021 nationally representative survey conducted by the Williams Institute, we found that 46% of LGBT workers experienced employment discrimination or harassment because of their sexual orientation or gender identity at

[17] *See, e.g.*, Letter from Williams Inst. Scholars to Members of the S. Comm. on the Judiciary (Mar. 22, 2021), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Testimony-Equality-Act-State-Governments-Mar-2021.pdf.

[18] *See, e.g.*, Letter from M.V. Lee Badgett, Professor of Econ., Univ. of Mass. Amherst, to Members of the S. Comm. on the Judiciary (Mar. 17, 2021), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Testimony-Equality-Act-LGBT-Employment-Mar-2021.pdf (discussing employment discrimination experienced by LGB and transgender people).

[19] *See* KERITH J. CONRON ET AL., WILLIAMS INST., EDUCATIONAL EXPERIENCES OF TRANSGENDER PEOPLE (2022), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Higher-Ed-Apr-2022.pdf [hereinafter: CONRON ET AL., TRANSGENDER PEOPLE]; KATHRYN O'NEILL ET AL., WILLIAMS INST., EXPERIENCES OF LGBTQ PEOPLE IN FOUR-YEAR COLLEGES AND GRADUATE PROGRAMS (2022), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTQ-College-Grad-School-May-2022.pdf; KERITH J. CONRON ET AL., WILLIAMS INST., COMMUNITY COLLEGE AND THE EXPERIENCES OF LGBTQ PEOPLE (2022), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTQ-Community-College-May-2022.pdf

[20] *See, e.g.*, DIANE K. LEVY ET AL., URBAN INST., A PAIRED-TESTED PILOT STUDY OF HOUSING DISCRIMINATION AGAINST SAME-SEX COUPLES AND TRANSGENDER INDIVIDUALS xiii (2017), https://www.urban.org/sites/default/files/publication/91486/2017.06.27_hds_lgt_final_report_report_finalized_0.pdf ; ADAM P. ROMERO ET AL., WILLIAMS INST., LGBT PEOPLE AND HOUSING AFFORDABILITY, DISCRIMINATION, AND HOMELESSNESS 4 (2020), https://williamsinstitute.law.ucla.edu/publications/lgbt-housing-instability/ [hereinafter: ROMERO ET AL., HOUSING AFFORDABILITY]; CHRISTY MALLORY & BRAD SEARS, WILLIAMS INST., EVIDENCE OF HOUSING DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY 1 (2016), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Housing-Discrimination-US-Feb-2016.pdf; BIANCA D.M. WILSON ET AL., WILLIAMS INST., LGBT RENTERS AND EVICTION RISK 2 (2021), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Eviction-Risk-Aug-2021.pdf.

[21] *See* Hua Sun & Lei Gao, *Lending Practices to Same-Sex Borrowers*, 116 PORC. NAT'L ACAD. SCI. U.S.A. 9293, 9293 (2019), https://www.pnas.org/doi/pdf/10.1073/pnas.1903592116.

[22] *See, e.g.*, KERITH J. CONRON & BIANCA D.M. WILSON, WILLIAMS INST., LGBT YOUTH OF COLOR IMPACTED BY THE CHILD WELFARE AND JUVENILE JUSTICE SYSTEMS 4–5 (2019), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTQ-YOC-Social-Services-Jul-2019.

[23] *See, e.g.*, Letter from Todd Brower, Jud. Educ. Dir., Williams Inst., to Members of the S. Comm. on the Judiciary (Mar. 17, 2021), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Testimony-Equality-Act-Judicial-System-Mar-2021.pdf.

[24] *See* CHRISTY MALLORY & BRAD SEARS, WILLIAMS INST., EVIDENCE OF DISCRIMINATION IN PUBLIC ACCOMMODATIONS BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY 1 (2016), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Public-Accomm-Discrimination-Feb-2016.pdf [hereinafter MALLORY & SEARS, PUBLIC ACCOMMODATIONS]; LINDSAY MAHOWALD ET AL., CTR. FOR AM. PROGRESS, THE STATE OF THE LGBTQ COMMUNITY IN 2020 4 (2020), https://www.americanprogress.org/wp-content/uploads/2020/10/LGBTQpoll-report.pdf.

some point in their lives.[25] We also found that about one-third (31.1%) of LGBT respondents reported experiencing discrimination or harassment based on their sexual orientation or gender identity in the workplace within the past five years.[26] In addition, in a large LGB-inclusive[27] population-based national survey through the NIH-funded Generations study, we found that LGB people were more likely to report adverse employment experiences: 60% of LGB people reported ever having been fired from or denied a job compared to 40% of non-LGB people.[28]

- **Education.** The Centers for Disease Control and Prevention ("CDC") found in a 2019 national study that 32.0% of LGB high school students, compared with 17.1% of heterosexual students, reported being bullied on school property.[29] Additionally, 11.9% of LGB students—compared with 6.3% of heterosexual students—reported being threatened or injured with a weapon on school property.[30] Our analysis of data from the Access to Higher Education Survey found that over one-quarter of transgender people (26%) and nearly one in ten LGBQ cisgender people (9.4%) reported barriers hindering their academic success in a higher education program, which included experiencing unfair treatment, harassment, or bullying for being LGBTQ.[31] Significantly, LGBTQ people of color were nearly twice as likely to report unfair treatment impeding their academic success, as compared to white LGBTQ people (10.4% v. 4.4%).[32]

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[25] BRAD SEARS ET AL., WILLIAMS INST., LGBT PEOPLE'S EXPERIENCES OF WORKPLACE HARASSMENT AND DISCRIMINATION (2021), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Workplace-Discrimination-Sep-2021.pdf.

[26] *Id.*

[27] Consistent with the literature on sexual and gender minority people, "LGBTQ"—with the Q representing questioning or queer—is often used to capture individuals who identify their sexual orientation and/or gender identity using such terms, including those whose identities are less developed or more fluid. *See, e.g.*, Press Release, Williams Inst., 6% of Non-Transgender Sexual Minority Adults in the US Identify as Queer (Jan. 22, 2020), https://williamsinstitute.law.ucla.edu/press/sexual-minority-queer-press-release. However, few studies relevant to this comment include measures to allow for the identification and analysis of LGBT adults who specifically identify as queer or questioning; hence, we generally use "LGBT" when discussing sexual and gender minority adults unless supported by the underlying study.

[28] ILAN H. MEYER, WILLIAMS INST., EXPERIENCES OF DISCRIMINATION AMONG LESBIAN, GAY, AND BISEXUAL PEOPLE IN THE US 1 (2019), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGB-Experience-Discrim-Apr-2019.pdf [hereinafter: MEYER, EXPERIENCES OF DISCRIMINATION.

[29] Kathleen C. Basile et al., Ctrs. for Disease Control & Prevention, *Interpersonal Violence Victimization Among High School Students — Youth Risk Behavior Survey, United States, 2019*, 69 MORBIDITY & MORTALITY WKLY. REP. 28, 31 (2020), https://www.cdc.gov/healthyyouth/data/yrbs/pdf/2019/su6901-H.pdf. These results were noted as being statistically significant. *Id.*

[30] Michelle M. Johns et al., Ctrs. for Disease Control & Prevention, *Trends in Violence Victimization and Suicide Risk by Sexual Identity Among High School Students — Youth Risk Behavior Survey, United States, 2015–2019*, 69 MORBIDITY & MORTALITY WKLY. REP. 19, 23 (2020), https://www.cdc.gov/healthyyouth/data/yrbs/pdf/2019/su6901-H.pdf [hereinafter: Johns et al., *Sexual Identity*].

[31] CONRON ET AL., TRANSGENDER PEOPLE, *supra* note 19, at 3.

[32] KERITH J. CONRON, KATHRYN O'NEILL, MARIELLA ARREDONDO & RUBEEN GUARDADO, WILLIAMS INST., EDUCATIONAL EXPERIENCES OF LGBTQ PEOPLE OF COLOR: FINDINGS FROM A NATIONAL PROBABILITY SURVEY (forthcoming 2022).

- **Housing.** LGBT people are significantly more likely than their heterosexual peers to be prevented from moving to or buying a home (15% to 9%, respectively), and as many as 22% report discrimination based on sexual orientation or gender identity when attempting to rent or buy housing at some point in their lives.[33] Likewise, in a study drawing from federal data on mortgages backed by the Federal Housing Administration, researchers found that same-sex male couples of every racial configuration were significantly less likely to have their applications accepted compared to white heterosexual couples,[34] even when the lender, county, loan amount, purpose of the loan, income of the applicants, and level of risk were all the same.[35]

Sexual orientation and gender identity discrimination are often experienced in conjunction with discrimination based on other personal characteristics, such as race and ethnicity.[36] In our recent study of employment discrimination against LGBT people, we found that LGBT employees of color were significantly more likely to report having been denied a job because of their LGBT status than white employees: 29.0% of LGBT employees of color reported that they had been denied a job at some point in their lives compared to 18.3% of white LGBT employees.[37] LGBT employees of color were also more likely to experience verbal harassment at work (35.6% vs. 25.9%).[38] Additionally, research suggests that particular subpopulations of LGBT people may be more likely to file certain types of discrimination claims. For example, in a study of over 9,000 charges filed with the Equal Employment Opportunity Commission or an analogous state or local agency, researchers noted particularly high filing rates of sexual orientation-based charges by African American workers and men, and gender identity-based charges by white workers and women.[39]

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[33] ROMERO ET AL., HOUSING AFFORDABILITY, *supra* note 20 at 19. *S*ee *also* MEYER, EXPERIENCES OF DISCRIMINATION, *supra* note 28; NPR, ROBERT WOOD JOHNSON FOUNDATION, & HARVARD T.H. CHAN SCHOOL OF PUBLIC HEALTH, DISCRIMINATION IN AMERICA: EXPERIENCES AND VIEWS OF LGBTQ AMERICANS (2017), https://www.npr.org/ documents/2017/nov/npr-discrimination-lgbtq-final.pdf.

[34] J. Shahar Dillbary & Griffin Edwards, *An Empirical Analysis of Sexual Orientation Discrimination*, 86 U. CHI. L. REV. 1, 53 (2019), https://lawreview.uchicago.edu/publication/empirical-analysis-sexual-orientation-discrimination.

[35] *Id.* at 5.

[36] *See* Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, Exec. Order No. 13,988, 86 Fed. Reg. 7023 (Jan. 20, 2021) (noting the Administration's intent "to address overlapping forms of discrimination" through its policy "to prevent and combat discrimination on the basis of gender identity or sexual orientation, and to fully enforce . . . laws that prohibit discrimination on the basis of gender identity or sexual orientation.).

[37] SEARS ET AL., *supra* note 25 at 11.

[38] *Id.*

[39] M. V. LEE BADGETT, AMANDA K. BAUMLE & STEVEN BOUTCHER, CTR. FOR EMP. EQUITY, EVIDENCE FROM THE FRONTLINES ON SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION (2018), https://www.umass.edu/employmentequity/evidence-frontlines-sexual-orientation-and-gender-identity-discrimination. *See also* Amanda K. Baumle, M. V. Lee Badgett & Steven Boutcher, *New Research on Sexual Orientation and Gender Identity Discrimination: Effect of State Policy on Charges Filed at the EEOC*, 67 J. HOMOSEXUALITY 1135 (2019), https://escholarship.org/uc/item/3941k76b.

LGBT people also report high incidences of harassment, violence, and assault. For example, using data from our Generations survey and the NIH-funded TransPop survey, we found that more than one-third of LGBTQ adults reported having been hit, beaten, or physically or sexually assaulted; been robbed or had property stolen; or had an object thrown at them at some point in their adult lives.[40] Similarly, more than half of LGBTQ people reported having experienced threats of violence, and approximately three out of four having been verbally insulted or abused.[41]

ii. Evidence of LGBT Discrimination in Health Care

Research shows that LGBT people report various challenges in attempting to access health care across the life course as compared to their non-LGBT peers, including direct experiences with discrimination by health care providers.[42] For example, a study of health care access in California based on data from the California Health Interview Survey found that "gay men, lesbian women, and bisexual women were more likely than straight men and women to report experiencing unfair treatment when getting health care."[43] Over 40% of lesbian women (44%) and bisexual women (45%) and one-third of gay men (32%) reported being treated unfairly when getting health care at some point in their lives.[44] These findings are consistent with results from national surveys: for example, one survey found that 56% of lesbian, gay, and bisexual respondents and 70% of transgender respondents reported experiencing at least one form of health care discrimination at some point in their lives.[45] A separate nationally representative survey by the Center for American Progress (the "CAP Study") found that 8% of lesbian, gay, and bisexual people and 29% of transgender people reported being refused care

[40] ILAN H. MEYER, BIANCA D.M. WILSON & KATHRYN O'NEILL, WILLIAMS INST., LGBTQ PEOPLE IN THE US: SELECT FINDINGS FROM THE GENERATIONS AND TRANSPOP STUDIES 17-18 (2021), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Generations-TransPop-Toplines-Jun-2021.pdf [hereinafter: MEYER, WILSON & O'NEILL, SELECT FINDINGS].
[41] *Id.*
[42] *See generally* SOON KYU CHOI & ILAN H. MEYER, WILLIAMS INST., LGBT AGING: A REVIEW OF RESEARCH FINDINGS, NEEDS, AND POLICY IMPLICATIONS (2016), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Aging-Aug-2016.pdf; David M. Frost, Keren Lehavot & Ilan H. Meyer, *Minority Stress and Physical Health Among Sexual Minority Individuals*, 38 J. BEHAV. MED. 1, 1 (2015), https://doi.org/10.1007/s10865-013-9523-8.; ILAN H. MEYER & DAVID M. FROST, WILLIAMS INST., MINORITY STRESS AND THE HEALTH OF SEXUAL MINORITIES (2013), https://williamsinstitute.law.ucla.edu/publications/minority-stress-health-sm/; SUSAN H. BABEY ET AL., GAPS IN HEALTH CARE ACCESS AND HEALTH INSURANCE AMONG LGBT POPULATIONS IN CALIFORNIA (2022), https://williamsinstitute.law.ucla.edu/publications/gaps-health-care-lgbt-ca/.
[43] BABEY ET AL., *supra* note 42.
[44] *Id.*
[45] LAMBDA LEGAL, WHEN HEALTH CARE ISN'T CARING 5 (2010), https://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-report_when-health-care-isnt-caring.pdf.

entirely in the preceding twelve months because of their sexual orientation or gender identity.[46] Similarly, several studies utilizing data collected through the National Health Interview Survey have shown higher incidence of other barriers to accessing health care among LGB people compared to non-LGB people including costs, trouble finding a provider, not having a regular provider, and other obstacles.[47]

Transgender people may encounter unique challenges related to health care access beyond those reported by cisgender LGB people. For example, HHS summarized comments it received during rulemaking in 2020 by noting that:

> providers . . . used excessive precautions, avoided touching the patient, engaged in unnecessary physical roughness in pelvic examinations, made insensitive jokes, intentionally concealed information about options for different treatments, asked unnecessarily personal questions, referred to transgender patients by pronouns and terms of address based on their biological sex [assigned at birth] rather than their gender identity, and/or disclosed a patient's medical history without authorization.[48]

Data from the CAP Study indicate that 12% of transgender patients were refused care related to gender transition in the prior year.[49] Additionally, 23% of respondents to the 2015 U.S. Transgender Discrimination Survey ("USTS")—the largest survey of transgender people in the U.S. to date—reported that they did not seek needed care because they feared mistreatment.[50]

Non-exhaustive anecdotal evidence also illustrates unique experiences of LGBT discrimination in health care:

- Clinicians may fail to provide appropriate cancer screenings and counseling based on misconceptions about a patient's anatomy.[51] In one case, a transgender patient was not informed of his breast cancer diagnosis despite the provider reviewing the confirming test

[46] Shabab Ahmed Mirza & Caitlin Rooney, *Discrimination Prevents LGBTQ People from Accessing Health Care*, CTR. FOR AM. PROGRESS (Jan. 18, 2018), https://www.americanprogress.org/article/discrimination-prevents-lgbtq-people-accessing-health-care/.
[47] Williams Institute Scholars, Comment Letter on Review of the National Health Interview Survey (June 15, 2020), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Comment-NHIS-Jun-2020.pdf (including citations to studies on LGB populations that have used data from the National Health Interview Survey).
[48] Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37,160, at 37,191 (June 19, 2020).
[49] Mirza & Rooney, *supra* note 46.
[50] SANDY E. JAMES ET AL., NAT'L CTR. FOR TRANSGENDER EQUALITY, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 98 (2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf.
[51] Joshua Sterling & Maurice M. Garcia, *Cancer Screening in The Transgender Population: A Review Of Current Guidelines, Best Practices, And a Proposed Care Model*, 9 TRANSLATIONAL ANDROLOGY & UROLOGY 2771 (2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7807311/.

results, learning of the news only "accidentally" when the lab technician called to ask how he was doing with his diagnosis.[52]

- A same-sex couple reported that a pediatrician refused to evaluate their six-day-old child because of the parents' sexual orientation.[53]
- Patients have likewise reported that hospital staff refused to provide them with HIV medication upon discovering they have sex with men.[54]
- In one case, paramedics and emergency room providers delayed treatment after discovering a passenger in a car crash was a transgender woman of color, leading to her death.[55]
- A transgender teen who was admitted into hospital care for suicidal ideation and self-inflicted harm ultimately died by suicide after being repeatedly misgendered by hospital staff and ultimately discharged.[56]

C. Evidence Suggests Discrimination May Contribute to Negative Health Outcomes

Experiences of discrimination may result in health disparities between LGBT and non-LGBT populations, as articulated in the minority stress research literature.[57]

The minority stress model, which the Institute of Medicine has recognized as a core perspective for understanding LGBT health,[58] describes how LGBT people experience chronic stress stemming from their stigmatization. While certain stressors—such as loss of a job—are ubiquitous in society, experienced by LGBT and non-LGBT people alike, LGBT people are uniquely exposed to stress arising from anti-LGBT stigma and prejudice. Prejudice leads LGBT people to experience *excess* exposure to stress compared with non-LGBT people who are not exposed to anti-LGBT prejudice (all other factors being equal).

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[52] Susan Donaldson James, *Trans Man Denied Cancer Treatment; Now Feds Say It's Illegal*, ABC NEWS (Aug. 07, 2012), https://abcnews.go.com/Health/transgender-bias-now-banned-federal-law/story?id=16949817.
[53] HUMAN RIGHTS WATCH, YOU DON'T WANT SECOND BEST: ANTI-LGBT DISCRIMINATION IN US HEALTH CARE 22–23 (2018), https://www.hrw.org/report/2018/07/23/you-dont-want-second-best/anti-lgbt-discrimination-us-health-care.
[54] Mirza & Rooney, *supra* note 46.
[55] SARAH MCBRIDE ET AL., CTR. FOR AM. PROGRESS, WE THE PEOPLE: WHY CONGRESS AND U.S. STATES MUST PASS COMPREHENSIVE LGBT NONDISCRIMINATION PROTECTIONS 14 (2014), https://cdn.americanprogress.org/wp-content/uploads/2014/12/LGBT-WeThePeople-report-12.10.14.pdf.
[56] Mirza & Rooney, *supra* note 46.
[57] *See, e.g.*, Ilan H. Meyer, *Minority Stress and Mental Health in Gay Men*, 36 J. HEALTH & SOC. BEHAV. 38, 38 (1995), https://www.jstor.org/stable/2137286; *cf.* Ilan H. Meyer, Sharon Schwartz & David M. Frost, *Social Patterning of Stress and Coping: Does Disadvantaged Social Statuses Confer More Stress and Fewer Coping Resources?* 67 SOC. SCI. & MED. 368, 371 (2008), https://pubmed.ncbi.nlm.nih.gov/18433961/ (examining "social stress theory").
[58] INSTITUTE OF MEDICINE, THE HEALTH OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE: BUILDING A FOUNDATION FOR BETTER UNDERSTANDING 20 (2011), https://www.ncbi.nlm.nih.gov/books/NBK64806.

Excess stress exposure confers an elevated risk for certain mental and physical health conditions.[59] For example, one study found that LGB people who had experienced a prejudice-related stressful life event were about three times more likely than those who did not experience such an event to have suffered a serious physical health problem over a one-year period.[60]

Stigma and stress related to SOGI discrimination have also been shown to affect mental health and wellbeing. One study found that state policies that target stigmatized individuals for social exclusion had a deleterious effect on the mental health of LGB people.[61] Another study found that living in stigmatizing communities may increase vulnerability to stigma related stressors and risk for suicidality among transgender people.[62] A third study focused on transgender veterans noted that "even after adjusting for key sociodemographic characteristics, transgender patients living in states with employment policies that include transgender status or gender identity had significantly lower odds of having a medical visit for mood disorders or self-directed violence than did their peers living in states without such legal protections."[63]

Survey data provide further evidence of the relationship between discrimination and negative well-being. According to a 2017 nationally representative survey, among LGBT people who experienced SOGI discrimination in the workplace and other settings in the past year, 68.5% reported that discrimination at least somewhat negatively affected their psychological well-being; 43.7% reported that discrimination negatively impacted their physical well-being; 47.7% reported that discrimination negatively impacted their spiritual well-being; 52.8% reported that discrimination negatively impacted their work environment; and 56.6% reported that it negatively impacted their neighborhood and community environment.[64]

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[59] *See, e.g.*, Susan D. Cochran & Vickie M. Mays, *Sexual Orientation and Mental Health*, *in* HANDBOOK OF PSYCHOLOGY AND SEXUAL ORIENTATION 204, 208–09 (Charlotte J. Patterson & Anthony R. D'Augelli eds., 2013); Walter Bockting et al., *Adult Development and Quality of Life of Transgender and Gender Nonconforming People*, 23 CURRENT OP. ENDOCRINOLOGY, DIABETES & OBESITY 188 (2016), https://pubmed.ncbi.nlm.nih.gov/26835800/; Michael L. Hendricks & Rylan J. Testa, *A Conceptual Framework for Clinical Work with Transgender and Gender Nonconforming Clients: An Adaptation of the Minority Stress Model*, 43 PROF. PSYCH.: RES. & PRAC. 460 (2012), https://psycnet.apa.org/record/2012-21304-001; Gregory M. Herek & Linda D. Garnets, *Sexual Orientation and Mental Health*, ANN. REV. CLINICAL PSYCH. 353 (2007), https://www.annualreviews.org/doi/abs/10.1146/annurev.clinpsy.3.022806.091510; Vickie M. Mays & Susan D. Cochran, *Mental Health Correlates of Perceived Discrimination Among Lesbian, Gay, and Bisexual Adults in the United States*, 91 AM. J. PUB. HEALTH 1869 (2001), https://pubmed.ncbi.nlm.nih.gov/11684618/.

[60] Frost, Lehavot & Meyer, *supra* note 42.

[61] Mark L. Hatzenbuehler, *Structural Stigma and the Health of Lesbian, Gay, and Bisexual Populations,* 23 CURRENT DIRECTIONS PSYCH. SCI. 127 (2014).

[62] Amaya Perez-Brumer et al., *Individual and Structural Level Risk Factors for Suicide Attempts among Transgender Adults*, 42 BEHAV. MED. 3, 164-171 (2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4707041/.

[63] John R. Blosnich et al., *Mental Health of Transgender Veterans in US States with and Without Discrimination and Hate Crime Legal Protection,* 106 AM. J. PUB. HEALTH 534 (2016).

[64] Sejal Singh & Laura E. Durso, *Widespread Discrimination Continues to Shape LGBT People's Lives in Both Subtle and Significant Ways*, CTR. FOR AM. PROGRESS (May 2, 2017), https://www.americanprogress.org/issues/lgbtq-rights/news/2017/05/02/429529/widespread-discrimination-continues-shape-lgbt-peoples-lives-subtle-significant-ways.

Past experiences of discrimination have also been shown to result in hypervigilance and the expectation of negative regard from non-LGBT people,[65] which may affect access to care and the quality of care received. Among respondents to our Generations and TransPop studies, one-third of sexual minorities and almost two-thirds of transgender people reported worrying about being negatively judged in interactions with a health care provider.[66] Another study based on national, probability-based survey data found that 18% of LGBTQ people reported avoiding health care due to perceived discrimination.[67] In addition, 8% of all LGBT respondents in the CAP Study avoided or postponed needed medical care because of disrespect or discrimination from health care staff; that figure rose to 14% among those who had experienced discrimination on the basis of their SOGI in the past year.[68] The reports of discrimination were not distributed equally among LGBT respondents, with 22% of transgender people surveyed reporting avoiding care within the past year because of SOGI-based discrimination.[69]

Being required to seek out alternative sources of care if denied access by one provider due to discrimination may be particularly challenging for LGBT people. In the CAP Study, 18% of LGBTQ people overall and 41% of those LGBTQ people living outside metropolitan areas ranked finding the same type of care at another location "very difficult" or "not possible."[70]

D. LGBT People Experience Significant Health Disparities

Evidence shows that LGBT people experience physical and mental health disparities, which the minority stress model suggests could be connected to or exacerbated by anti-LGBT discrimination. Disparities are especially pronounced among LBQ women, gender minority individuals, and LGBT people of color.

Physical Health

Many LGBTQ people report poor physical health. Data from our Generations and TransPop studies show that one in five (20.8%) LGBTQ people report that their general health is fair or poor.[71] Subpopulations of LGBTQ people who are likely to experience marginalization based on multiple characteristics, including women, transgender people, and people of color, are more likely than other populations to report fair or poor health. In the same studies, we further found that LBQ women (24.0%) and transgender people (25.9%) were more likely to report fair

[65] Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations*, 129 PSYCH. BULL. 674, 681–682 (2003), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2072932/.
[66] MEYER, WILSON & O'NEILL, SELECT FINDINGS, *supra* note 40, at 27.
[67] Logan S. Casey et al., *Discrimination in the United States: Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Americans*, 54 HEALTH SERV. RES. 1454 (2019).
[68] *Id.*
[69] *Id.*
[70] Mirza & Rooney, *supra* note 46.
[71] MEYER, WILSON & O'NEILL, SELECT FINDINGS, *supra* note 40, at 30.

or poor general health than GBQ men (13.9%).[72] In addition, in our study of differences across LGBT people by race, more than a quarter (27%) of LGBT adults of color reported that their overall health was only fair or poor, compared to 22% of white LGBT adults.[73]

Research also indicates that LGBT people are more likely to report that their health is fair or poor than non-LGBT people.[74] An analysis of data from the TransPop study found that transgender adults were more likely to report that their health was fair or poor, and reported experiencing poor health days more frequently, than cisgender adults.[75] Similarly, in our study of LBQ women, we found that nearly 29% of LBQ women described their health as only fair or poor, compared to 19% of straight women, with a higher proportion of LBQ women of color describing their health as only fair or poor compared with white LBQ women.[76]

Research also shows that a substantial percentage of LGBT people experience serious health conditions, including life-threatening conditions.[77] Our Generations and TransPop studies found that among LGBTQ people, 18.0% had asthma, 16.3% had high blood pressure, 10.2% had diabetes, 6.0% had heart disease, and 3.0% had cancer.[78] An analysis of TransPop data also found that transgender people were more likely than cisgender people to report having emphysema and ulcers.[79] Furthermore, series of reports by the Williams Institute focused on the well-being of LGBT people at the intersection of race found that LGBT people of every race

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[72] *Id.*

[73] BIANCA D.M. WILSON, LAUREN BOUTON & CHRISTY MALLORY, WILLIAMS INST., RACIAL DIFFERENCES AMONG LGBT ADULTS IN THE U.S.: LGBT ADULTS AT THE INTERSECTION OF RACE 1 (2022), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Race-Comparison-Jan-2022.pdf [hereinafter WILSON, BOUTON & MALLORY, RACIAL DIFFERENCES].

[74] Ethan C. Cicero et al., *The Health Status of Transgender and Gender Nonbinary Adults in the United States*, 15 PLoSONE e0228765 (2020); Gilbert Gonzales & Carrie Henning-Smith, *Health Disparities by Sexual Orientation: Results and Implications from the Behavioral Risk Factor Surveillance System*, 42 J. COMMUNITY HEALTH 1163 (2017). *C.f.* Ilan H. Meyer et al., *Demographic Characteristics and Health Status of Transgender Adults in Select US Regions: Behavioral Risk Factor Surveillance System, 2014,* 107 AM. J. PUB. HEALTH 582 (2017) (finding that transgender individuals are more likely to report fair or poor general health and higher prevalence of myocardial infarction, but similar rates of other health conditions as cisgender people).

[75] Jamie L. Feldman et al., *Health and Health Care Access in the US Transgender Population Health (TransPop) Survey*, 9 ANDROLOGY 1707 (2021).

[76] WILSON ET AL., LBQ WOMEN, *supra* note 12, at 8.

[77] KATHRYN O'NEILL, WILLIAMS INST., HEALTH VULNERABILITIES TO COVID-19 AMONG LGBT ADULTS IN CALIFORNIA 8 (2020), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-COVID-CA-Health-May-2020.pdf [hereinafter: O'NEILL, LGBT ADULTS & COVID-19]; ILAN H. MEYER & SOON KYU CHOI, WILLIAMS INST., VULNERABILITIES TO COVID-19 AMONG OLDER LGBT ADULTS IN CALIFORNIA 1–2 (2020), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Older-LGB-COVID-CA-Apr-2020.pdf [hereinafter: MEYER & CHOI, OLDER LGBT ADULTS & COVID-19].

[78] MEYER, WILSON & O'NEILL, SELECT FINDINGS, *supra* note 40, at 29.

[79] Feldman et al., *supra* note 75.

reported similar or higher rates of serious health conditions compared to non-LGBT people, including asthma, cancer, heart attack, and diabetes.[80]

These findings are consistent with those of other studies based on large government datasets. For example, an analysis of data from the Behavioral Risk Factor Surveillance System (BRFSS) collected between 2014 and 2020 found that LGB people are at higher odds than non-LGB people of having asthma, arthritis, diabetes, kidney disease, hypertension, cardiovascular disease, heart attack, stroke, and chronic obstructive pulmonary disease.[81] Another analysis of BRFSS data collected in 2014 and 2015 found that lesbian and bisexual women were more likely to report worse physical outcomes such as activity limitations, arthritis, asthma, and chronic obstructive pulmonary disease compared to heterosexual women.[82]

Similar trends have been documented regarding HIV risk and incidence – with gay and bisexual men of color and transgender people over-represented in diagnosis. For example, the CDC estimates that among the 34,800 new HIV diagnoses in the U.S. in 2019, 70% (24,500) were attributed to individuals reporting male-to-male sexual contact.[83] Among those reporting such contact—or in other words, gay, bisexual, and other men who have sex with men ("MSM")—CDC research indicates that race likely also plays a role in HIV incidence, with Black MSM as the most likely to report being impacted by HIV among groups monitored through CDC data sources.[84] The CDC also estimated that 2% of new HIV diagnoses in 2019 were among transgender people.[85] Research on the overall burden of HIV on transgender populations indicates that 25% to 28% of transgender people in the U.S. are living with HIV.[86]

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[80] SOON KYU CHOI, BIANCA D.M. WILSON & CHRISTY MALLORY, WILLIAMS INST., BLACK LGBT ADULTS IN THE US 21 (2021), https://williamsinstitute.law.ucla.edu/publications/black-lgbt-adults-in-the-us/; BIANCA D.M. WILSON, LAUREN BOUTON & CHRISTY MALLORY, WHITE LGBT ADULTS IN THE US 20 (2022); https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-White-SES-Jan-2022.pdf; BIANCA D.M. WILSON, LAUREN BOUTON & CHRISTY MALLORY, AMERICAN INDIAN AND ALASKAN NATIVE LGBT ADULTS IN THE US 24 (2021); HTTPS://WILLIAMSINSTITUTE.LAW.UCLA.EDU/WP-CONTENT/UPLOADS/LGBT-AIAN-SES-OCT-2021.PDF; BIANCA D.M. WILSON, CHRISTY MALLORY, LAUREN BOUTON & SOON KYU CHOI, LATINX LGBT ADULTS IN THE US 24 (2021); https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Latinx-SES-Sep-2021.pdf; SOON KYU CHOI, BIANCA D.M. WILSON, LAUREN BOUTON & CHRISTY MALLORY, WILLIAMS INST., AAPI LGBT ADULTS IN THE US 230 (2021), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-AAPI-SES-May-2021.pdf [hereinafter, collectively: RACE & WELLBEING SERIES].

[81] Manasvi Pinnamaneni et al., *Disparities in Chronic Physical Health Conditions in Sexual Minority People Using the United States Behavioral Risk Factor Surveillance System*, 28 PREVENTATIVE MED. REP. 1 (2022).

[82] Gonzales & Smith, *supra* note 74, at 1169.

[83] *HIV and Gay and Bisexual Men: HIV Incidence*, CTRS. FOR DISEASE CONTROL & PREVENTION (Sept. 16, 2021), https://www.cdc.gov/hiv/group/msm/msm-content/incidence.html.

[84] *HIV and African American Gay and Bisexual Men*, CTRS. FOR DISEASE CONTROL & PREVENTION (Jan. 11, 2022) https://www.cdc.gov/hiv/group/msm/bmsm.html.

[85] *HIV and Transgender People: HIV Diagnoses*, CTRS. FOR DISEASE CONTROL & PREVENTION (Apr. 13, 2022), https://www.cdc.gov/hiv/group/gender/transgender/hiv-diagnoses.html.

[86] Jeffrey S. Becasen et al., *Estimating the Prevalence of HIV and Sexual Behaviors among the US Transgender Population: A Systematic Review and Meta-Analysis, 2006-2017*, 109 J. AM. PUBLIC HEALTH e1 (2019).

Our recent research on the impact of the COVID-19 pandemic on U.S. adults also suggests that LGBT people of color and gender minority people disproportionately experienced its impacts,[87] which could inform their ongoing health care needs.

Mental Health

Research shows a high prevalence of suicide attempts and ideation, as well as depression and anxiety, among LGBT people.[88] For example, our analysis of data from the Generations and TransPop studies found that three-quarters (75.6%) of LGBTQ people reported suicidal ideation over the course of their lives, with nearly one-third (29.9%) having made a suicide attempt.[89] In terms of mental health outcomes, three-quarters (75.6%) of LGBTQ people reported experiencing moderate psychological distress or serious mental illness over the 30 days prior to the survey, with 28.2% reporting serious mental illness.[90]

Other research establishes that LGBT people are more likely to report negative mental health outcomes than non-LGBT people. Across our reports examining LGBT wellbeing at the intersection of race, we found that LGBT adults of every race were more likely to have been diagnosed with depression than non-LGBT adults.[91] For example, 26% of Black LGBT adults have been diagnosed with depression, compared to 15% of Black non-LGBT adults.[92] These findings are consistent with findings from other studies. An analysis of BRFSS data collected in 2014 and 2015 found that gay and bisexual men had higher odds of experiencing mental distress than heterosexual men, and lesbian and bisexual women had higher odds of experiencing mental distress and depression than heterosexual women.[93]

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[87] O'NEILL, LGBT ADULTS & COVID-19, *supra* note 77; MEYER & CHOI, OLDER LGBT ADULTS & COVID-19, *supra* note 77. *See also* Thom File & Joey Marshall, *Household Pulse Survey Shows LGBT Adults More Likely to Report Living in Households With Food and Economic Insecurity Than Non-LGBT Respondents*, U.S. CENSUS BUREAU (Aug. 11, 2021), https://www.census.gov/library/stories/2021/08/lgbt-community-harder-hit-by-economic-impact-of-pandemic.html (noting the U.S. Census Bureau's similar findings, based on data collected during the first waves of the Household Pulse Survey that included SOGI measures).

[88] *See, e.g.*, Wendy B. Bostwick et al., *Dimensions of Sexual Orientation and the Prevalence of Mood and Anxiety Disorders in the United States*, 100 AM. J. PUBLIC HEALTH 468 (2010); Michael King et al., *A Systematic Review of Mental Disorder, Suicide, and Deliberate Self Harm in Lesbian, Gay and Bisexual People*, 70 BMC PSYCHIATRY 1 (2008), https://bmcpsychiatry.biomedcentral.com/track/pdf/10.1186/1471-244X-8-70.pdf; Kimberly F. Balsam et al., *Mental Health of Lesbian, Gay, Bisexual, and Heterosexual Siblings*, 114 J. ABNORMAL PSYCH. 471 (2005); Susan D. Cochran & Vickie M. Mays, *Relation between Psychiatric Syndromes and Behaviorally Defined Sexual Orientation in a Sample of the US Population*, 151 J. EPIDEMIOLOGY 516 (2000). For comprehensive reviews of research on LGBT health, *see* INSTITUTE OF MEDICINE, THE HEALTH OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE: BUILDING A FOUNDATION FOR BETTER UNDERSTANDING (2011); THE HEALTH OF SEXUAL MINORITIES: PUBLIC HEALTH PERSPECTIVES ON LESBIAN, GAY, BISEXUAL AND TRANSGENDER POPULATIONS (Ilan H. Meyer & Mary E. Northridge eds., 2007).

[89] MEYER, WILSON & O'NEILL, SELECT FINDINGS, *supra* note 40, at 32.

[90] *Id.*

[91] RACE & WELLBEING SERIES, *supra* note 80.

[92] See, e.g., CHOI, WILSON & MALLORY, *supra* note 80, at 18.

[93] Gonzales & Henning-Smith, *supra* note 82.

Researchers have observed especially high rates of internalized stigma and suicidal ideation among transgender people, even when compared to their cisgender LGB peers.[94] For example, our Generations and TransPop studies found that 42.0% of transgender people had made a suicide attempt compared to 31.6% of LBQ cisgender women and 21.5% of GBQ cisgender men.[95] Among transgender respondents to the USTS, 82% seriously thought about suicide at some point in their lives, with 48% reporting such thoughts in the previous year and 40% reporting actually having attempted suicide at some point in their lives.[96] Among USTS respondents who had attempted suicide, 34% made their first attempt at age 13 or younger; 39% reported a first attempt between ages 14 and 17.[97]

Other studies show that these disparities also exist for LGBT youth. In an analysis of data collected through the Youth Risk Behavior Surveillance survey (YRBS) in 2019, the CDC found that when compared to heterosexual students, LGB students were more likely to report feeling sad or hopeless (66.3% vs. 32.2%); having seriously considered attempting suicide (46.8% vs. 14.5%); and having made a suicide attempt that required medical treatment (6.3% vs. 1.7%) in the past year.[98] The findings are consistent with similar disparities documented in YRBS data from prior years.[99] In a separate analysis of the experiences of transgender youth, the CDC found that 43.9% of transgender students considered attempting suicide, with 16.5% actually attempting suicide, within the past twelve months.[100] Another study found that gender minority youth in California experienced statistically similar rates of lifetime suicidal thoughts compared to their gender-conforming peers, but are much more likely to report suffering severe psychological distress in the past year (17% vs. 7%).[101]

Research has also documented higher rates of substance use among LGBT people. Substance use is often viewed as a stress-coping response and may be related to experiences of stigma and discrimination.[102] A series of reports produced by the Williams Institute have

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[94] *See, e.g.*, Walter O. Bockting et al., *Stigma, Mental Health, and Resilience in an Online Sample of the US Transgender Population*, 103 AM. J. PUBLIC HEALTH 943 (2013); Dejun Su et al., *Mental Health Disparities within the LGBT Population: A Comparison between Transgender and Non-Transgender Individuals*, 1 TRANSGENDER HEALTH 12 (2016); Tyler G. Lefevor et al., *Health Disparities between Genderqueer, Transgender, and Cisgender Individuals: An Extension of Minority Stress Theory*, 66 J. COUNSELING PSYCH. 385 (2019).
[95] MEYER, WILSON & O'NEILL, SELECT FINDINGS, *supra* note 40, at 32.
[96] JAMES ET AL., *supra* note 50, at 112, 114.
[97] *Id.* at 115.
[98] Johns et al., *Sexual Identity*, *supra* note 30, at 23.
[99] *Id.*
[100] Michelle M. Johns et al., Ctrs. for Disease Control & Prevention, *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk, and Sexual Risk Behaviors among High School Students in 19 States and Large Urban School Districts, 2017*, 68 MORBIDITY & MORTALITY WKLY. REP. 67, 69 (2019), https://www.cdc.gov/mmwr/volumes/68/wr/mm6803a3.htm [hereinafter: Johns et al., *Transgender Identity*].
[101] WILSON ET AL., GENDER NONCONFORMING ADOLESCENTS, *supra* note 5, at 2–3.
[102] See, e.g., Richard T. Liu & Lauren B. Alloy, *Stress Generation in Depression: A Systemic Review of the Empirical Literature and Recommendations for Future Study*, 30 CLIN. PSYCH. REV. 582 (2010); Jon. D. Kassel, Laura R. Stroud & Carol A. Paronis, *Smoking, Stress, and Negative Affect: Correlation, Causation, and Context*

examined state-level disparities in substance use between LGBT and non-LGBT people using BRFSS data. Across these reports, focused on states that lack supportive policies for LGBT people, we have found that LGBT people report smoking, binge drinking, and heavy drinking at similar or higher rates than non-LGBT people.[103] Research has documented similar disparities for LGBT youth. For example, one study found that transgender youth were at increased odds of having consumed alcohol, cigarettes, marijuana, or non-marijuana illicit drugs over the past twelve months as compared to cisgender youth.[104]

E. LGBT People Experience Significant Economic Disparities, Which May Impact Health Outcomes

Economic inequalities are correlated with negative health outcomes.[105] Evidence shows significant economic disparities between LGBT people and non-LGBT people. For example, our research has found elevated poverty rates[106] and food insufficiency[107] among LGBT communities. We found in our analyses of Generations and TransPop data that LBQ cisgender women (48.3%) and transgender people (47.7%) were more likely than GBQ cisgender men (31.5%) to be living in a low-income household, with all three groups reporting rates higher than that of the general population (30.4% in 2018).[108] Similarly, we found that LGBTQ people were more likely to report unemployment when compared to the national average (8.1% vs. 4.1%, at

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Across States of Smoking, 129 PSYCHOL. BULLETIN 129 (2003); Kathleen T. Brady & Susan C. Sonne, *The Role of Stress in Alcohol Use, Alcoholism Treatment, and Relapse*, 23 ALCOHOL RESEARCH & HEALTH 263 (1999).

[103] Williams Institute state reports are available at https://williamsinstitute.law.ucla.edu/publications/?issues=discrimination-violence.

[104] Sari L. Reisner et al., *Gender Minority Social Stress in Adolescence: Disparities in Adolescent Bullying and Substance Use by Gender Identity*, 52 J. SEX RES. 243, 249 (2015), https://www.tandfonline.com/doi/full/10.1080/00224499.2014.886321.

[105] *See e.g.* Raj Chetty et al., *The Association Between Income and Life Expectancy in the United States, 2001-2014*, 315 JAMA 16 (2016), https://jamanetwork.com/journals/jama/article-abstract/2513561; E. Richard Brown, *Income Inequalities and Health Disparities*, 172 WEST J. MED. 25 (2000), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1070714/

[106] M.V. LEE BADGETT, SOON KYU CHOI & BIANCA D.M. WILSON, WILLIAMS INST., LGBT POVERTY IN THE UNITED STATES: A STUDY OF DIFFERENCES BETWEEN SEXUAL ORIENTATION AND GENDER IDENTITY GROUPS 14–15 (2019), https://williamsinstitute.law.ucla.edu/wp-content/uploads/National-LGBT-Poverty-Oct-2019.pdf.

[107] *See, e.g.*, KERITH J. CONRON ET AL., WILLIAMS INST., FOOD INSUFFICIENCY AMONG LGBT ADULTS DURING THE COVID-19 PANDEMIC (2022) [hereinafter: CONRON ET AL., LGBT FOOD INSUFFICIENCY], https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Food-Insufficiency-Apr-2022.pdf; KERITH J. CONRON & KATHRYN K. O'NEILL, WILLIAMS INST., FOOD INSUFFICIENCY AMONG TRANSGENDER ADULTS DURING THE COVID-19 PANDEMIC, https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Food-Insufficiency-Update-Apr-2022.pdf; BIANCA D.M. WILSON, M. V. LEE BADGETT & ALEXANDRA-GRISSELL H. GOMEZ, WILLIAMS INST., "WE'RE STILL HUNGRY" LIVED EXPERIENCES WITH FOOD INSECURITY AND FOOD PROGRAMS AMONG LGBTQ PEOPLE (2020), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTQ-Food-Bank-Jun-2020.pdf; TAYLOR N.T. BROWN, ADAM P. ROMERO & GARY J. GATES, WILLIAMS INST., FOOD INSECURITY AND SNAP PARTICIPATION IN THE LGBT COMMUNITY (2016), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Food-Insecurity-SNAP-July-2016.pdf.

[108] MEYER, WILSON & O'NEILL, SELECT FINDINGS, *supra* note 40, at 10–11.

the end of 2017).[109] We also found evidence of housing instability, with 15.2% of all LGBTQ respondents reporting having moved residences three or more times in a two-year period.[110]

Our research suggests that certain economic and other disparities are particularly pronounced for those who are transgender. For example, data collected between 2016 and 2019 showed that 8% of transgender people experienced homelessness within the prior year, compared to 3% of cisgender LGB people and 1% of non-LGBT people.[111] Similarly, a 2019 Williams Institute study found that transgender people, and bisexual cisgender women, had particularly high rates of poverty, with over one-quarter (29.4%) of each group reporting that they lived in poverty.[112] Poverty rates among transgender people were higher than those reported by cisgender heterosexual men in every age group, and were notably higher than those reported by cisgender heterosexual women in some age groups.[113] We also found that transgender people were significantly more likely to report food insecurity than cisgender heterosexual people (19.9% v. 8.3%).[114]

Research also provides evidence that economic disparities are pronounced among LGBT people of color. Across a series of reports using data from the Gallup Survey (2012-2017) and the Generations and TransPop surveys, we found that more LGBT adults of color reported greater economic instability compared to white LGBT adults across many indicators.[115] Our research on experiences during the COVID-19 pandemic also found disparities based on race and SOGI: 29% of LGBT people of color reported having less ability to pay for household goods and 26% percent reported being unable to pay their rent or mortgage compared to 14% and 9% of non-LGBT white respondents, respectively.[116] We have also found that Black LGBT people experience higher rates of housing instability,[117] and that LGBT people of color experience greater rates of food insufficiency compared to cisgender heterosexual people.[118]

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[109] *Id.*
[110] *Id.* at 11.
[111] BIANCA D.M. WILSON ET AL., WILLIAMS INST., HOMELESSNESS AMONG LGBT ADULTS IN THE US 1 (2020), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Homelessness-May-2020.pdf [hereinafter: WILSON, ET AL., LGBT HOMELESSNESS].
[112] BADGETT, CHOI & WILSON, *supra* note 106. While our study found that poverty rates were higher for LGBT people when compared to non-LGBT people across every age group including those over age 65, the observed differences were only statistically significant among people aged 18 to 44 years old.
[113] *Id.*
[114] KERITH J. CONRON & KATHRYN K. O'NEILL, WILLIAMS INST., FOOD INSUFFICIENCY AMONG TRANSGENDER ADULTS DURING THE COVID-19 PANDEMIC 5 (2022), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Food-Insufficiency-Update-Apr-2022.pdf.
[115] Wilson, Bouton & Mallory, Racial Differences, *supra* note 73, at 1.
[116] BRAD SEARS, KERITH J. CONRON & ANDREW R. FLORES, THE IMPACT OF THE FALL 2020 COVID-19 SURGE ON LGBT ADULTS IN THE US 4 (2021), https://williamsinstitute.law.ucla.edu/wp-content/uploads/COVID-LGBT-Fall-Surge-Feb-2021.pdf.
[117] WILSON ET AL., LGBT HOMELESSNESS, *supra* note 111, at 4.
[118] CONRON ET AL, LGBT FOOD INSUFFICIENCY, *supra* note 107, at 7.

F. Evidence Suggests Nondiscrimination Laws May Improve Health Outcomes

In the preamble to the Proposed Rule, HHS requests "comments, data and quantitative elements of health and quality-of-life improvements attributable to nondiscrimination provisions, that could inform a quantitative analysis, should the department finalize this proposed rule…"[119] Nondiscrimination protections may improve outcomes across a variety of vectors.

Studies have used multiple approaches to evaluate the impact of stigma and minority stress on LGBT people, including assessing the relationship between nondiscrimination laws and LGB health. One study found that LGB people who lived in states without laws extending protections to sexual minorities—for example, in employment or hate-crime laws—demonstrated higher levels of mental health problems compared to those living in states with laws that provide such protections.[120] Similarly, studies have found that denying marriage rights to same-sex couples had a negative effect on the mental health of lesbians and gay men, regardless of their relationship status.[121] The converse has also been documented—for example, a study that looked at national variations in marriage laws prior to *Obergefell* showed that a state's permitting same-sex marriage was associated with a seven-percent reduction in the proportion of high school students reporting suicide attempts.[122] Evidence also suggests that anti-bullying laws that enumerate sexual orientation may have a positive impact on mental health of LGBT youth.[123]

Similarly, our research suggests that affirming interventions – including nondiscrimination laws, access to gender-affirming care, and general social support – could lead to better mental health for transgender people.[124] Numerous studies support this hypothesis.[125] For example, a 2020 study found that nondiscrimination policies in health insurance were associated with a decrease in suicidality among gender minority individuals, and the authors suggested that such policies "may offer a mechanism for reducing barriers to care and mitigating

[119] 87 Fed. Reg. 47,905.
[120] Mark L. Hatzenbuehler, Katherine M. Keyes & Deborah S. Hasin, *State-level Policies and Psychiatric Morbidity in Lesbian, Gay, and Bisexual Populations*, 99 AM. J. PUBLIC HEALTH 2275 (2009).
[121] Ellen D. Riggle, Sharon S. Rostosky & Sharon G. Horne, *Psychological Distress, Well-Being, and Legal Recognition in Same-Sex Couple Relationships*, 1 J. FAM. PSYCHOL. 24 (2010); Sharon Scales Rostosky et al., *Marriage Amendments and Psychological Distress in Lesbian, Gay, and Bisexual (LGB) Adults*, 1 J. COUNSELING PSYCHOL. 56 (2009); Mark L. Hatzenbuehler et al., *The Impact of Institutional Discrimination on Psychiatric Disorders in Lesbian, Gay, and Bisexual Populations: A Prospective Study*, 100 AM. J. PUBLIC HEALTH 3 (2010).
[122] Julia Raifman et al., *Difference-in-Differences Analysis of the Association Between State Same-Sex Marriage Policies and Adolescent Suicide Attempts*. 171 JAMA PEDIATR. 4, 350 (2017).
[123] Ilan H. Meyer et al., *Sexual Orientation Enumeration in State Antibullying Statutes in the United States: Associations with Bullying, Suicidal Ideation, and Suicide Attempts Among Youth*, 6 LGBT HEALTH 1 (2019).
[124] JODY L. HERMAN AND KATHERINE K. O'NEILL, WILLIAMS INST., SUICIDE RISK AND PREVENTION FOR TRANSGENDER PEOPLE (2021), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Suicide-Summary-Sep-2021.pdf.
[125] See e.g. Lindsay Mahowald, *LGBTQI+ Nondiscrimination Laws Improve Economic, Physical, and Mental Well-Being*, CTR. FOR AM. PROGRESS (Mar. 24, 2022), https://www.americanprogress.org/article/lgbtqi-nondiscrimination-laws-improve-economic-physical-and-mental-well-being/.

discrimination."[126] Another study found that "transgender-inclusive and protective state-level policies" predicted better health outcomes.[127]

As HHS noted when promulgating the 2016 version of this rule, "because discrimination contributes to health disparities, the prohibition of sex discrimination in health care under Section 1557 can help reduce health disparities" and result in "more people receiving adequate health care, regardless of their sex."[128] In the current Notice of Proposed Rulemaking, HHS further states that "we anticipate that this regulation would reduce the incidence of providers refusing to treat patients based on the patient's gender identity…fewer instances of delayed or denied care, which in turn would lead to reductions in mortality and morbidity risks…"[129] We believe the evidence supports this conclusion.

II. Proposed Changes to Section 1557 Correctly Clarify the Scope of Nondiscrimination Protections

Section 1557 of the Patient Protection and Affordable Care Act ("Section 1557" and "ACA," respectively) prohibits discrimination based on sex, among other personal characteristics, in Federally funded health programs and activities,[130] incorporating by reference Title IX of the Education Amendments of 1972 ("Title IX").[131] The Proposed Rule aims to revise the regulation implementing Section 1557, currently codified at 45 C.F.R. part 92 (2020) (the "2020 Rule"), including the definition of "on the basis of sex."

A. The Proposed Rule Correctly Clarifies that Sexual Orientation and Gender Identity Discrimination are Prohibited by Section 1557

HHS proposes to amend 42 C.F.R. part 92 by adding a section clarifying that:

> Discrimination on the basis of sex includes, but is not limited to, discrimination on the basis of sex stereotypes; sex characteristics, including intersex traits; pregnancy or related conditions; sexual orientation; and gender identity.[132]

[126] Alex McDowell et al., *Association of Nondiscrimination Policies with Mental Health Among Gender Minority Individuals*, 77 JAMA PSYCH. 9, 952-958 (2020).
[127] Steve N. Du Bois et al., *Examining Associations Between State-Level Transgender Policies and Transgender Health*, 26 TRANSGENDER HEALTH. 3, 220-224 (2018).
[128] 81 Fed. Reg. at 31,460-61; 20 U.S.C. § 1681 et seq.
[129] 87 Fed. Reg. at 47,904.
[130] 42 U.S.C. § 18116(a) (2021).
[131] 20 U.S.C. § 1681 *et seq*.
[132] Proposed § 92.101(a)(2).

We agree with HHS that such clarification is in line with the law, and within HHS's authority.[133]

It is now established law that discrimination on the basis of sexual orientation and gender identity are forms of sex discrimination. On June 15, 2020, the Supreme Court held in *Bostock v. Clayton County* that the prohibition on sex discrimination contained within Title VII of the Civil Rights Act of 1964 ("Title VII") encompasses acts of sexual orientation and gender identity discrimination.[134] In January 2021, President Biden issued Executive Order 13988, mandating that the heads of all agencies review applicable sex nondiscrimination statutes to ensure their consistency with *Bostock*.[135] Executive agencies, such as the Equal Employment Opportunity Commission ("EEOC"),[136] the Bureau of Consumer Financial Protection,[137] and the Departments of Labor,[138] Education,[139] Housing and Urban Development,[140] and Agriculture ("USDA"),[141] have taken action to incorporate *Bostock* into their application of sex nondiscrimination

[133] We do not offer comment here on sex characteristics or intersex status. However, we agree that HHS's inclusion of sex stereotypes is consistent with Supreme Court precedent in *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989), as discussed in the preamble to the Proposed Rule at 87 Fed. Reg. 47,858. Our limited research on gender expression suggests that, for example, greater nonconformity with societal gender norms is linked to increased bullying among students. *See* Allegra R. Gordon, Kerith J. Conron & S. Bryn Austin, *Gender Expression, Violence, and Bullying Victimization: Findings from Probability Samples of High School Students in 4 US School Districts,* 88 J. SCH. HEALTH 4, 306-314 (2018), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5836796/. Similarly, we agree that inclusion of discrimination on the basis of sex characteristics or intersex status is consistent with Section 1557's prohibition of sex discrimination, where "intersex" is an umbrella term referring to people born with sex traits that do not conform to binary categories of male and female. A 2021 survey by the Center for American Progress found that intersex people report experiencing discrimination in accessing health care, as well as significant health disparities, such as poor physical and mental health. Caroline Medina & Lindsay Mahowald, KEY ISSUES FACING PEOPLE WITH INTERSEX TRAITS, CTR. FOR AM. PROGRESS (Oct. 26, 2021), https://www.americanprogress.org/article/key-issues-facing-people-intersex-traits/. Additional research is needed to help document experiences of discrimination and disparities experienced by intersex people.

[134] *Bostock v. Clayton County,* 140 S. Ct. 1731, 1737 (2020).

[135] Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, Exec. Order No. 13,988, 86 Fed. Reg. 7023 (Jan. 20, 2021).

[136] *Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity*, EEOC (June 15, 2021), https://www.eeoc.gov/laws/guidance/protections-against-employment-discrimination-based-sexual-orientation-or-gender.

[137] Equal Credit Opportunity (Regulation B): Discrimination on the Bases of Sexual Orientation and Gender Identity, 86 Fed. Reg. 14,363 (Mar. 16, 2021) (to be codified at 12 C.F.R. § 1002).

[138] *See, e.g.*, *DOL Policies on Gender Identity: Rights and Responsibilities*, DEP'T OF LABOR, https://www.dol.gov/agencies/oasam/centers-offices/civil-rights-center/internal/policies/gender-identity.

[139] Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32,637, at 32,639 (June 22, 2021). *See also* Notice of Proposed Rulemaking: Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41,390 (July 12, 2022) (to be codified at 34 C.F.R. § 106).

[140] Making Admission or Placement Determinations Based on Sex in Facilities Under Community Planning and Development Housing Programs; Withdrawal; Regulatory Review, 86 Fed. Reg. 22,125 (Apr. 27, 2021). *See also* Memorandum from Jeanine M. Worden, Acting Assistant Sec'y for Fair Housing & Equal Opportunity, U.S. Dep't of Housing & Urban Development, on Implementation of Executive Order 13988 on the Enforcement of the Fair Housing Act (Feb. 11, 2021), https://www.hud.gov/sites/dfiles/FHEO/documents/WordenMemoEO13988FHActImplementation.pdf.

[141] Supplemental Nutrition Assistance Program: Civil Rights Update to the Federal-State Agreement, 87 Fed. Reg. 35855 (Aug. 15, 2022) (to be codified at 7 C.F.R. § 272). This rule is currently being challenged.

statutes.[142] HHS has issued its own notice of interpretation, prior to issuing this Proposed Rule.[143]

HHS now seeks to strengthen its policy by enacting the Proposed Rule through notice-and-comment. Rules made through the notice-and-comment process have the force of law.[144] It is an established practice for executive agencies to incorporate Supreme Court precedent via notice-and-comment rulemaking.[145] Several rules have been promulgated in this manner to incorporate Supreme Court precedent specifically addressing the scope of nondiscrimination laws,[146] much as HHS proposes to do here regarding *Bostock.* For example, in 2006, the EEOC promulgated and later adopted a rule change to reflect a Supreme Court decision regarding age discrimination.[147] In light of the Supreme Court's holding in *Bostock,* the incorporation of sex nondiscrimination from Title IX under Section 1557 and its interpreting regulations, and both the Department of Education's interpretation of Title IX to prohibit sexual orientation and gender identity discrimination, and the Supreme Court's own history of interpreting Title IX in light of Title VII,[148] HHS has clear support for its proposal to incorporate the holding of *Bostock* into the Proposed Rule through the notice-and-comment process.

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[142] *See also* Eric Bachman, *The Bostock Decision One Year Later: How LGBTQ+ Employment Discrimination Laws Are Evolving*, FORBES (June 10, 2021), https://www.forbes.com/sites/ericbachman/2021/06/10/the-bostock-decision-one-year-later-how-lgbtq-employment-discrimination-laws-are-evolving/?sh=5af40f39293d.

[143] Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972**,** 86 Fed. Reg. 27,984 (May 25, 2021).

[144] *See generally Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 97 (2015) (discussing different types of rulemaking).

[145] *See, e.g.*, Longshore and Harbor Workers' Compensation Act: Maximum and Minimum Compensation Rates, 81 Fed. Reg. 58,878 (Aug. 26, 2016) (Office of Workers' Compensation Programs proposing to amend 20 C.F.R. Part 702 to "codify" the Supreme Court's decision in *Roberts* v. *Sea-Land Services, Inc.*, 566 U.S. 93 (2012)); Flexibility, Efficiency, and Modernization in Child Support Enforcement Programs, 79 Fed. Reg. 68,567 (Nov. 17, 2014) (Centers for Medicare & Medicaid Services proposing changes to 42 C.F.R. § 433 to reflect the Supreme Court's decision in *Turner v. Rogers,* 564 U.S. 431 (2011)).

[146] *See, e.g.*, Revision of the Procedures for the Administration of Section 5 of the Voting Rights Act, 75 Fed. Reg. 33205 (June 11, 2010) (DOJ proposing to amend regulations pertaining to the Voting Rights Act in light of the Supreme Court's decision in *Northwest Austin Mun. Utility Dist. No. One v. Holder,* 557 U.S. 193 (2009)); Nondiscrimination Based on Disability in Federally Assisted Programs and Facilities, 82 Fed. Reg. 6388 (Jan. 19, 2017) (DOJ proposing to amend 28 C.F.R. § 42 to incorporate changes including multiple Supreme Court decisions).

[147] Coverage Under the Age Discrimination in Employment Act, 71 Fed. Reg. 46,177 (2006) (proposing to amend 29 C.F.R. § 1625 to reflect the Supreme Court's decision in *General Dynamics Land Systems v. Cline*, 540 U.S. 581 (2004), regarding types of discrimination prevented).

[148] *See* Memorandum from Pamela S. Karlan, Principal Deputy Assistant Att'y Gen., Civil Rights Div., U.S. Dep't of Justice, to Federal Agency Civil Rights Directors and General Counsels (Mar. 26, 2021), https://www.justice.gov/crt/page/file/1383026/download.

B. The Proposed Rule Correctly Clarifies that Denial of Gender-Affirming Care May Constitute Discrimination on the Basis of Sex

HHS proposes to amend 42 CFR part 92.206 to prohibit a covered entity from denying or limiting "health services sought for the purposes of gender transition that the covered entity would provide to an individual for other purposes, if the denial is based on sex assigned at birth, gender identity, or gender otherwise recorded."[149]

Ensuring that entities do not discriminate in providing treatments for the purposes of gender affirmation is an appropriate step to address the health care needs of transgender people. Such care has been determined to be safe and effective when appropriately prescribed by a treating physician,[150] with longstanding and regularly updated Standards of Care.[151] However, access to gender-affirming care is currently restricted in many U.S. states, with nine states explicitly prohibiting coverage for gender-affirming care under their Medicaid plans (Arkansas, Arizona, Florida, Kentucky, Missouri, Nebraska, Ohio, and Tennessee), and one state explicitly permitting insurers to deny coverage for gender-affirming care (Arkansas).[152] Three states have passed statutory bans on gender-affirming care for youth, and one additional state has enacted policies which limit or prohibit access to gender-affirming care for youth (Texas).[153] We have estimated that a total of 21,850 youth are at risk of losing access to care in those four states alone.[154] Ensuring that states and covered entities provide access to gender-affirming treatments, when such treatments are otherwise available, would guarantee access to treatment for many transgender people and establish a nationwide expectation of care.

Furthermore, Proposed Rule § 92.206 is consistent with applicable law. As HHS notes in the Proposed Rule, "categorical exclusions…facially deny transgender individuals coverage access based on their gender identity and result in more than *de minimis* harm to the individuals;

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[149] Proposed § 92.206(a)(4)

[150] *See What Does the Scholarly Research Say about the Effect of Gender Transition on Transgender Well-Being?*, WHAT WE KNOW PROJECT (2018), https://whatweknow.inequality.cornell.edu/topics/lgbt-equality/what-does-the-scholarly-research-say-about-the-well-being-of-transgender-people/. *See also* Susan D. Boulware et al., *Biased Science: The Texas and Alabama Measures Criminalizing Medical Treatment for Transgender Children and Adolescents Rely on Inaccurate and Misleading Scientific Claims*, YALE L. SCH. PUBLIC L. & LEGAL THEORY (2022), https://medicine.yale.edu/lgbtqi/research/gender-affirming-care/report%20on%20the%20science%20of%20gender-affirming%20care%20final%20april%2028%202022_442952_55174_v1.pdf (forthcoming) (reviewing evidence of safety and effectiveness of gender-affirming treatments for youth).

[151] *See, e.g.*, E. Coleman et al., *World Professional Association for Transgender Health, Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, 23 INT'L J. TRANSGENDER HEALTH S1 (2022), https://www.tandfonline.com/doi/pdf/10.1080/26895269.2022.2100644.

[152] *Healthcare Laws and Policies*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/healthcare_laws_and_policies (last visited Sept. 19, 2022).

[153] *Id.*

[154] KERITH J. CONRON ET AL., WILLIAMS INST., PROHIBITING GENDER-AFFIRMING MEDICAL CARE FOR YOUTH (2022), https://williamsinstitute.law.ucla.edu/publications/bans-trans-youth-health-care/.

therefore they are prohibited discrimination on the basis of sex."[155] This interpretation is consistent with the *Bostock* decision and several district court decisions holding that denials of coverage for gender-affirming care violate Section 1557 of the ACA.[156] Furthermore, HHS correctly notes that "a covered entity's denial of coverage solely on the basis of one's sex assigned at birth—*i.e.,* if the individual was assigned a different sex at birth, such care coverage would not be denied—constitutes disparate treatment and is prohibited under this proposed rule because transgender individuals are the only individuals who seek transition-related care."[157] As discussed in the Proposed Rule, the district court in *Flack v. Wisconsin Department of Health Services* accurately reasoned that where a state Medicaid law "singles out and bars a medically necessary treatment solely for transgender people suffering from gender dysphoria…this is text-book discrimination based on sex."[158]

For the above reasons, we agree with HHS's proposed amendment under Proposed Rule § 92.206(a)(4).

C. The Proposed Rule Correctly Defines Sex Discrimination to Include Marital Status, Parental Status, and Family Status

Under Proposed Rule § 92.208, HHS also clarifies that covered entities would be prohibited from discriminating in their health programs and activities with respect to an individual's marital, parental, or family status.[159] We agree that sex discrimination is correctly defined to include these factors.

Inclusion of marital, parental, and family status is consistent with longstanding interpretations of sex discrimination. For example, regulations pursuant to Title IX have explicitly prohibited discrimination based on a student's parental, family, or marital status since 1975,[160] and HHS's own Title IX regulations continue to prohibit such discrimination.[161] As Section 1557 explicitly incorporates the grounds enumerated in Title IX,[162] it follows that these

[155] 87 Fed. Reg. 47,870-47,872.
[156] *See, e.g.*, *Tovar v. Essentia Health*, 342 F. Supp. 3d 947 (D. Minn. 2018); *Flack v. Wis. Dep't. of Health Servs*., 328 F. Supp. 3d 931 (W.D. Wis. 2018).
[157] 87 Fed. Reg. 47,871.
[158] 87 Fed. Reg. 47,871, fn. 457. *See also Flack,* 328 F. Supp. at 950; *Cruz v. Zucker*, 116 F. Supp. 3d 334. 346 (S.D.N.Y. 2015) (finding a private right to action under title XIX of the Social Security Act where Plaintiffs alleged that denial of gender-affirming care under State Medicaid plan violated the guarantee under 42 U.S.C. § 1396a(a)(1)(B)(i) that medical assistance to categorically needy individuals shall not be less in "amount, duration or scope" than coverage made available to others).
[159] 87 Fed. Reg. 47,828.
[160] 40 Fed. Reg. 24,137 (1975). *See also* 34 C.F.R 106.40(b) (2020).
[161] 45 C.F.R. § 86.40(b) (2005).
[162] 42 U.S.C. § 18116

grounds should be included. Other nondiscrimination provisions – such as the Civil Service Reform Act, which applies to Federal employees – explicitly incorporate marital status.[163]

Protections based on marital status are particularly important for LGBT people, who are less likely to be married than non-LGBT people. Evidence shows that many committed same-sex couples are unmarried, in many cases because they were legally prohibited from marrying until recently.[164] A Census Bureau analysis of 2019 American Community Survey data found that 58% of same-sex couples were married compared to 88.3% of different-sex couples.[165] Further, an analysis of the Generations Study described above showed that rates of marriage among LGB individuals in same-sex relationships differ across age cohorts. Only 6% of LGB people aged 18-25 in a same-sex relationship were married, although 47% were in a same-sex relationship. In older cohorts, 37% of those aged 34-41 were married, although 62% were in a same-sex relationships, and 48% of those aged 52-59 were married, despite 87% being in a same-sex relationship.[166]

The Proposed Rule also offers important protections for children of same-sex couples. As noted above, the Census Bureau estimates that 980,000 households are headed by same-sex couples, and that 181,000 same-sex households are raising children under the age of 18.[167] Thus, prohibiting sex discrimination based on marital, parental, and family status will ensure that same-sex couples and families of all kinds will be protected in accordance with longstanding civil rights laws.

D. The Proposed Rule Correctly Limits Exceptions to Section 1557's Applicability

HHS asks for comment on its proposal not to incorporate the exceptions listed under Title IX, and to instead incorporate a more limited framework for religious exceptions pursuant to the Religious Freedom Restoration Act ("RFRA").[168] As HHS notes, Section 1557 explicitly incorporates both the "grounds prohibited under" and "the enforcement mechanisms provided for and available under" Title IX "for purposes of addressing violations of Section 1557."[169] However, it does not explicitly incorporate the "exceptions" listed under Title IX with regard to sex discrimination.[170] Nonetheless, the 2020 Rule incorporated Title IX's exceptions.[171]

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[163] 5 U.S.C. § 2302 (b)(1)(e)
[164] *See, e.g., Obergefell v. Hodges*, 576 U.S. 644 (2015).
[165] Danielle Taylor, *Age, Children and Marital Status Don't Account for Higher Rates of Employment among Same-Sex Couples*, U.S. CENSUS BUREAU (Dec. 29, 2020), https://www.census.gov/library/stories/2020/12/same-sex-couples-more-likely-than-opposite-sex-couples-to-have-both-members-working.html.
[166] ILAN H. MEYER & EVAN A. KRUEGER, WILLIAMS INST., LEGALLY MARRIED LGB PEOPLE IN THE UNITED STATES (2019), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Married-LGB-US-Jun-2019.pdf.
[167] SAME-SEX COUPLE HOUSEHOLDS, *supra* note 10.
[168] 42 U.S. Code § 2000bb–1.
[169] 42 U.S. Code § 18116.
[170] 87 Fed. Reg. 47,840.
[171] 85 Fed. Reg. 37,162; 85 Fed. Reg. 37,207-37,208.

We support the Proposed Rule's proposal not to import any of the Title IX exceptions into the Section 1557 regulation.[172] As the Proposed Rule discusses, the exceptions permitted by Title IX are unique in that they apply to specific educational programs and activities which are inapplicable in the health care context (such as, for example, exempting Boy Scouts and Girl Scouts programs).[173] Additionally, as the Proposed Rule notes,[174] such exceptions could run counter to the Affordable Care Act's guarantees against barriers to care.[175] Furthermore, several federal courts have already enjoined the provision of the 2020 Rule incorporating Title IX's exceptions, finding that part of the rule arbitrary and capricious and contrary to law under the APA.[176]

With regard to religious exceptions in particular, HHS proposes here to rely upon existing expectations as laid out in RFRA.[177] Applying RFRA would continue to ensure that religious beliefs of providers are respected, while also allowing for a "fact-sensitive, case by case analysis" to ensure that the ramifications of providing an exemption to Section 1557 would be fully considered.[178] We agree with this approach. Evidence suggests that denial of various forms of care can have negative consequences, and that denials of care may be motivated, in part, by personal beliefs. For example, anecdotal evidence suggests that providers may invoke personal beliefs to deny access to services and treatments such as birth control, certain fertility treatments, abortion, transition-related care for transgender individuals, and end of life care.[179] It is consistent with the letter and purpose of the ACA[180] to limit such denials of care.

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[172] 87 Fed. Reg. at 47,840.
[173] 87 Fed. Reg. at 47,939-40.
[174] 87 Fed. Reg. at 47,840-47,841
[175] 42 U.S.C. § 18114 ("Notwithstanding any other provision of this Act, the Secretary of Health and Human Services shall not promulgate any regulation that— (1) creates any unreasonable barriers to the ability of individuals to obtain appropriate medical care; (2) impedes timely access to health care services; (3) interferes with communications regarding a full range of treatment options between the patient and the provider; (4) restricts the ability of health care providers to provide full disclosure of all relevant information to patients making health care decisions; (5) violates the principles of informed consent and the ethical standards of health care professionals; or (6) limits the availability of health care treatment for the full duration of a patient's medical needs.").
[176] *See Walker v. Azar*, No. 20-cv-2834 (E.D.N.Y. June 26, 2020); *Whitman-Walker Clinic v. U.S. Dep't of Health & Human Servs.*, No. 1:20-cv-01630 (D.D.C. June 22, 2020); *N.Y. v. U.S. Dep't of Health & Human Servs.*, No. 1:20-cv-05583 (S.D.N.Y. July 20, 2020); *BAGLY v. U.S. Dep't of Health & Human Servs.*, No. 20-cv11297 (D. Mass. July 9, 2021); *Chinatown Serv. Ctr. v. U.S. Dep't of Health & Human Servs.*, No. 1:21-cv-00331 (D.D.C. Oct. 13, 2021).
[177] 87 Fed. Reg. at 47, 841.
[178] *Id.*
[179] *See* NAT'L WOMEN'S L. CTR., *Health Care Refusals Harm Patients: The Threat to LGBT People and Individuals Living with HIV/AIDS* (May 21, 2014), https://nwlc.org/resource/health-care-refusals-harm-patients-threat-lgbt-people-and-individuals-living-hivaids/#; Kim Callinan and Kevin Diaz, *Government, Doctor or Patient – Whose Health Care Preferences Should Be Honored?*, THE HILL (Mar. 20, 2018), https://thehill.com/opinion/healthcare/379374-whose-health-care-preferences-should-be-honored-the-governments-the/.
[180] 42 U.S.C. § 18114.

We therefore agree with HHS that the Proposed Rule should not import the unique exemptions of Title IX, and should instead apply, with regard to religious exemptions, the provisions of RFRA.

III. Further Clarifications Would Strengthen the Proposed Nondiscrimination Provisions

Below we provide comment on areas where we believe additional clarification would aid in enforcement of the Proposed Rule.

A. HHS Should clarify that the Scope of Nondiscrimination Includes Sexual Orientation, Gender Identity, and Other Aspects Consistently Throughout the Rule

In Proposed Rule § 92.101(a), HHS notes forms of discrimination prohibited by Section 1557, including discrimination on the basis of sex stereotypes; sex characteristics, including intersex traits; pregnancy or related conditions; sexual orientation; and gender identity.[181] However, in other sections, HHS does not go into the same level of detail. We recommend that HHS apply this definition consistently wherever possible.

HHS signals the importance of clear guidance around nondiscrimination requirements in the Proposed Rule. Specifically, HHS notes that "covered entities and protected individuals need additional clarity regarding the specific discriminatory actions prohibited under Section 1557, including clarification regarding whether and how those actions found in the implementing regulations of the statutes referenced in Section 1557 may also apply."[182] Elsewhere in the Proposed Rule, HHS rejects its prior approach of "clarifying" covered entities' obligations under Section 1557 through the use of mere "general statements."[183] We agree with HHS's proposed amendments to existing § 155.120, calling for it to, "in paragraph (c)(1)(ii) . . . remov[e] the term 'sex' and add[] in its place the phrase 'sex (including sexual orientation and gender identity)'."[184] We recommend that HHS implement this change in all areas where sex discrimination is similarly addressed, including in several proposed provisions under "Subpart C - Specific Applications."[185] These include, at a minimum, the Department's proposed regulations on

[181] 87 Fed. Reg. 47,858.
[182] 87 Fed. Reg. at 47,831.
[183] 87 Fed. Reg. at 47,859.
[184] Proposed § 155.120.
[185] 87 Fed. Reg. 47,918-47,919.

prohibited sex discrimination in equal program access;[186] health insurance;[187] association discrimination;[188] the use of clinical algorithms;[189] and telehealth.[190]

Such a modification to the Proposed Rule would be consistent with the activities of other federal agencies enforcing similar non-discrimination protections. For example, the Federal Aviation Administration recently amended its required assurance on civil rights for grantees to expressly list applicable civil rights statutes and their protected bases, including direct reference to SOGI discrimination being encompassed by laws prohibiting sex discrimination consistent with Executive Order 13988.[191] Likewise, the U.S. Department of Agriculture recently issued a final rule requiring that state agencies participating in its Supplemental Nutrition Assistance Program provide an assurance that they will comply with certain civil rights statutes, specifying that this would include a prohibition on discrimination "on the grounds of sex, including gender identity and sexual orientation . . . ."[192]

B. The Proposed Rule Should Address Discrimination Based on Pregnancy-related Conditions and Reproductive Health Services

In the Proposed Rule, HHS "is also considering whether § 92.208 should include a provision to specifically address discrimination on the basis of pregnancy-related conditions."[193] We agree that sex discrimination should be defined to include discrimination based on pregnancy-related grounds, including termination of pregnancy. HHS should consider including explicit provisions under either § 92.101(a)(2), § 92.208, or both.

The 2016 Rule explicitly defined discrimination "on the basis of sex" to include discrimination on the basis of "pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth, or related medical conditions."[194] This language was removed in the 2020 Rule.[195] Restoring the 2016 Rule's inclusion of pregnancy-related conditions, including

[186] Proposed § 92.206 (noting only that "sex" discrimination is prohibited and providing specific examples of what covered entities "must not" do with reference to gender identity, but not sexual orientation).
[187] Proposed § 92.207 (noting only that "sex" discrimination is prohibited and providing specific examples of what covered entities "must not" do without reference to either sexual orientation or gender identity).
[188] Proposed § 92.209 (noting only that "sex" discrimination is prohibited).
[189] Proposed § 92.210 (noting only that "sex" discrimination is prohibited).
[190] Proposed § 92.211 (noting only that "sex" discrimination is prohibited).
[191] Airport Improvement Program (AIP) Grant Assurances, 87 Fed. Reg. 19,571 (Apr. 04, 2022); ASSURANCES: AIRPORT SPONSORS, FAA (2022), https://www.faa.gov/airports/aip/grant_assurances/media/assurances-airport-sponsors-2022-05.pdf.
[192] *See generally* Supplemental Nutrition Assistance Program: Civil Rights Update to the Federal-State Agreement, 87 Fed. Reg. 35,855 (Aug. 15, 2022) (to be codified at 7 C.F.R. § 272). This rule is currently being challenged, see Complaint, Tennessee v. United States Dep't of Agriculture, No. 3:22-cv-00257 (E.D. Tenn. 2022).
[193] 87 Fed. Reg. 47,878.
[194] Former 45 CFR § 92.4 ("Definitions,"); 81 Fed. Reg. 31,467.
[195] 85 Fed. Reg. 37,162, 37,167 ("The Final Rule…eliminates the 2016 Rule's definitions of terms and its list of examples of discriminatory practices").

"termination of pregnancy" would bring Section 1557 back into alignment with longstanding civil rights laws, including Title VII.[196] Thus, HHS should consider adding "pregnancy-related conditions," including "termination of pregnancy" to discrimination prohibited "on the basis of sex" and making these protections explicit in the new rule and through guidance and enforcement.

Pregnancy-related Care

Research and anecdotal evidence demonstrate potential risks associated with denials of or lack of access to pregnancy-related care. For example, denials of pregnancy-related treatment, including treatments for ectopic pregnancy, miscarriage, and pregnancy complications, may result in serious negative health outcomes or even death.[197] As we have noted throughout this comment, disparities are often compounded for people with multiple marginalized identities. For example, research has found that women of color are more likely to be uninsured, receive inadequate prenatal care, and are at risk of poorer outcomes during pregnancy and delivery when compared with white women.[198]

SOGI Discrimination in Reproductive Health Care Access

We additionally recommend that the Proposed Rule specifically clarify that Section 1557's prohibition on sex discrimination prohibits covered entities from denying access to or coverage for reproductive health services due to a person's gender identity or sexual orientation. Evidence shows that LGBT people report discrimination or denials of care when seeking reproductive health care, including fertility treatment, in-vitro fertilization, and preventative care and screenings.[199] Research has also shown disparities in reproductive health outcomes for

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[196] The 2016 Rule sought to conform with "the current state of nondiscrimination law . . .based upon existing regulation and previous Federal agencies' and courts interpretations." 81 Fed. Reg. 31,388. See 45 C.F.R. § 86.40(b) (2005) (HHS Title IX regulation from 2005 explicitly includes discrimination on the basis of pregnancy as a form of discrimination on the basis of sex.); 42 U.S.C. § 2000e(k) (prohibiting discrimination on the basis of pregnancy, childbirth, or related conditions); *Doe v. C.A.R.S. Prot. Plus, Inc*., 527 F.3d 358, 364 (3d Cir.), order clarified, 543 F.3d 178 (3d Cir. 2008) (interpreting Title VII's protections against discrimination on the basis of sex, including "pregnancy . . . or related medical conditions" to include abortion).

[197] *See, e.g.*, Pam Belluck, *They Had Miscarriages, and New Abortion Laws Obstructed Treatment*, N.Y. TIMES (July 17, 2022), https://www.nytimes.com/2022/07/17/health/abortion-miscarriage-treatment.html; Greer Donley & Jill Wieber Lens, *The Devastating Impact of Overturning Roe Will Go Far Beyond Abortion Patients*, TIME (June 24, 2022), https://time.com/6190782/roe-overturned-pregnancy-complications-miscarriage/; Dr. Ghazaleh Moayedi & Whitney Arey, *Abortion Bans Threaten All Pregnancy Care*, REWIRE NEWS GROUP (Sept. 1, 2022), https://rewirenewsgroup.com/2022/09/01/abortion-bans-threaten-all-pregnancy-care/.

[198] Samantha Artiga et al., *Racial Disparities in Maternal and Infant Health: An Overview*, KFF (Nov. 10, 2020), https://www.kff.org/report-section/racial-disparities-in-maternal-and-infant-health-an-overview-issue-brief/.

[199] *See* WILSON ET AL., LBQ WOMEN, *supra* note 12, at 57 (analysis of the National Survey Family Growth showed that 24.9% of cisgender LBQ women have had a doctor ask them if they wanted to get pregnant, compared to 32.8% of cisgender women); Madina Agénor et al., *Mapping the Scientific Literature on Reproductive Health Among Transgender and Gender Diverse People: A Scoping Review*, 29 SEXUAL & REPRODUCTIVE HEALTH MATTERS 8, n.

LGBT people. For example, one study found that unplanned pregnancies are more common among bisexual girls and women than their heterosexual peers, with the odds of pregnancy among sexually active self-identified bisexual girls being 1.72 times greater than their heterosexual high school age peers.[200] Among women ages 15-44, the odds of an unwanted pregnancy are 1.75 times greater for bisexually identified women than their heterosexual peers.[201]

Furthermore, HHS must ensure that reproductive health services are not restricted to people of a specific assigned sex or to people in heterosexual relationships. Applying the reasoning of *Bostock* as described above, it would likely constitute sex discrimination to limit access to and coverage for reproductive health services such as maternity care and contraceptive services only to beneficiaries who identify as women. For example, pregnancies can be experienced by transgender men[202] and other LGBT individuals who do not identify as women. This issue is discussed in the 2019 Proposed Rule; [203] however, the solution proposed there of treating patients on the basis of assigned sex rather than gender identity could constitute discrimination as otherwise prohibited in the current Proposed Rule. Similarly, prohibiting or limiting access to or coverage of infertility treatments for same-sex couples or single people where otherwise provided for different-sex couples or married people could constitute sex discrimination. We therefore recommend that HHS clarify the scope of non-discrimination on the bases of sexual orientation and gender identity in reproductive health services through its new rule, guidance, and enforcement. For example, HHS should consider adding a subsection under new § 92.206 or § 92.208 to specifically discuss the prohibition of discrimination on the basis of sexual orientation and gender identity in reproductive health access.

Discrimination Related to Termination of Pregnancy

We also recommend that HHS clarify that termination of pregnancy is a covered basis for discrimination under Section 1557. While longstanding federal law prohibits the use of federal funds for abortion and from forcing any person to undergo or aid in abortion services,[204] HHS should nonetheless ensure that Section 1557 sufficiently covers the needs of those who do obtain

18 (2021) (transgender people are less likely to obtain regular Pap tests compared to cisgender women, and the 2015 U.S. Transgender Survey found that 13% of transgender respondents had been denied coverage by a health insurance company for services such as Pap smears and mammograms).

[200] Bethany G. Everett et al., *Sexual Orientation Disparities in Pregnancy Risk Behaviors and Pregnancy Among Sexually Active Teenage Girls: Updates from the Youth Risk Behavior Survey*, 6 LGBT HEALTH 342 (2019). *See also* Lisa L. Lindley & Katrina M. Walsemann, *Sexual Orientation and Risk of Pregnancy Among New York City High-School Students*, 105 AM J, PUB. HEALTH 1379 (2015).

[201] Bethany G. Everett et al., *Sexual Orientation Disparities in Mistimed and Unwanted Pregnancy Among Adult Women*, 49 PERSPECTIVES ON SEX & REPRODUCTIVE HEALTH 157 (2017).

[202] *See, e.g.*, Alexis Light et al., *Family Planning and Contraception Use in Transgender Men*, 98 CONTRACEPTION 266 (2018).

[203] 85 Fed. Reg. 37,189.

[204] 87 Fed. Reg. 47,878-47,879 (Discussing the Weldon, Hyde, Church and Coates-Snow Amendments).

these treatments. Denials of abortion care may cause physical and socioeconomic consequences for patients. A landmark study following participants for 5 years found that women who were denied wanted abortions and gave birth had statistically poorer long-term health outcomes (including serious complications like eclampsia and death) than women who received abortions.[205] The study also found that women denied abortions had other negative outcomes – including being more likely to remain with abusive partners, suffer anxiety and loss of self-esteem, and less likely to have aspiration life plans for the coming year.[206]

The 2020 Rule created confusion about the protections against and remedies for discrimination related to reproductive health care under Section 1557, and termination of pregnancy status in particular.[207] The Supreme Court's recent decision to overturn the right to abortion in *Dobbs vs. Jackson Women's Health*[208] contributes further stigma and confusion to reproductive health access, which is accompanied by increasing State legislation aimed at restricting access to abortion.[209] Anecdotal reports suggest that abortion providers, staff, and patients have experienced increased violence.[210] HHS should therefore ensure that Section 1557's non-discrimination protections provide clear prohibitions on discrimination due to termination of pregnancy wherever applicable.

In sum, we recommend, first, that the prohibition of discrimination on the basis of "pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth, or related medical conditions" be restored to the text of the rule under section § 92.208. Second, that HHS consider whether to include additional language under § 92.101(a)(2) to further clarify that reproductive health services may not be limited or denied based on sexual orientation or

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[205] DIANA GREEN FOSTER, ET AL., ANSIRH, *The Turnaway Study* (2020), https://www.ansirh.org/research/ongoing/turnaway-study.
[206] *Id.*
[207] *See* Ruth Dawson, *Trump Administration's Domestic Gag Rule Has Slashed the Title X Network's Capacity by Half*, GUTTMACHER INST. (Feb. 2020), https://www.guttmacher.org/article/2020/02/trump-administrations-domestic-gag-rule-has-slashed-title-x-networks-capacity-half; Katie Keith, *Religious, Moral Exemptions from Contraceptive Coverage Mandates: Second Verse, Same As The First*, HEALTH AFFAIRS (Nov. 9, 2018), https://www.healthaffairs.org/do/10.1377/forefront.20181109.87594/full/.
[208] *Dobbs v. Jackson Women's Health,* 597 U.S. ___ (2022).
[209] *See After Roe Fell: Abortion Laws by States*, CTR. FOR REPRO. RIGHTS, https://reproductiverights.org/maps/abortion-laws-by-state/ (last visited Sept. 19, 2022); Elizabeth Nash & Lauren Cross, *2021 Is on Track to Become the Most Devastating Antiabortion State Legislative Session in Decades*, GUTTMACHER INST. (June 14, 2021), https://www.guttmacher.org/article/2021/04/2021-track-become-most-devastating-antiabortion-state-legislative-session-decades; Elizabeth Nash & Peter Ephross, *State Policy Trends at Midyear 2022: With Roe About to Be Overturned, Some States Double Down on Abortion Restrictions*, GUTTMACHER INST. (June 22, 2022), https://www.guttmacher.org/article/2022/06/state-policy-trends-midyear-2022-roe-about-be-overturned-some-states-double-down.
[210] NAT'L ABORTION FED., 2021 VIOLENCE AND DISRUPTION STATISTICS 2 (May 19, 2022), https://5aa1b2xfmfh2e2mk03kk8rsx-wpengine.netdna-ssl.com/wp-content/uploads/2021_NAF_VD_Stats_Final.pdf (reporting significant increases in stalking (600%), blockades (450%), hoax devices/suspicious packages (163%), invasions (129%), and assault and battery (128%) targeting abortion providers in 2021).

gender identity. And, third, whether to add language to § 92.206 to further clarify the prohibition on discrimination in reproductive health access on the bases of gender identity.

IV. Proposed Changes to CMS Regulations May Contribute to Better Health Access and Outcomes for LGBT People

OCR and CMS also propose to restore explicit sexual orientation and gender identity protections in the CMS Regulations. Under the current rule, enacted in 2020, such clarifying language was explicitly removed where it had been added in 2016.[211] The Proposed Rule explains that these regulations nonetheless prohibit discrimination on the bases of sexual orientation and gender identity consistent with *Bostock* in a broad range of CMS-regulated areas, including:

> Medicaid, CHIP; PACE; health insurance issuers including issuers providing essential health benefits (EHB) and issuers of qualified health plans (QHPs), and their officials, employees, agents, and representatives; States and the Exchanges carrying out Exchange requirements; and agents, brokers, or web-brokers that assist with or facilitate enrollment of qualified individuals, qualified employers, or qualified employees.[212]

We write in support of the inclusion of sexual orientation and gender identity in all areas where sex discrimination is prohibited, consistent with our comment above regarding § 92.101(a). We offer comment explicitly regarding Medicaid, CHIP and PACE programs, below.

Medicaid and CHIP

Clarifying that sexual orientation and gender identity discrimination is prohibited in Medicaid programs may lead to better health outcomes for LGBT people, and especially transgender people. In 2020, 15.7% of LGBT people, including 10.1% of transgender people, reported Medicaid as their primary source of health insurance in a population-based five-state sample.[213] In California, we found that transgender adults were significantly more likely than cisgender adults to report being covered by Medi-Cal or other public health insurance.[214] Another study found that transgender people are more likely to be uninsured, and less likely to rely on employer-sponsored insurance compared to non-transgender adults – which the authors associate with "lack of federal policies banning health insurance discrimination," among other

[211] 84 Fed. Reg. 27,846 at 27,871; 85 Fed. Reg. 37,219.
[212] 87 Fed. Reg. 47,891.
[213] Williams Inst., unpublished analysis of Behavioral Risk Factor Surveillance Survey data in five states (California, Georgia, Ohio, Texas & Virginia) (on file with authors).
[214] BABEY ET AL., *supra* note 42, at 5. While transgender adults in this study were less likely to report being covered by Medicare specifically, this may be explained at least in part by the transgender population in California skewing younger.

causes.[215] As noted above, evidence suggests that non-discrimination provisions in insurance plans may lead to positive health outcomes for gender minority people.[216]

PACE Program

We also write in support of the proposal to include language addressing nondiscrimination based on sexual orientation and gender identity in the regulations associated with the Program of All-Inclusive care for the Elderly ("PACE") program. The PACE program "provides comprehensive medical and social services to certain frail, elderly people still living in the community."[217] Additionally, "most of the participants who are in PACE are dually eligible for both Medicare and Medicaid."[218] Estimates on the population of LGBT older adults in the U.S. vary, with some researchers estimating that the population of LGBT people over 50 will double to over 5 million adults by 2030.[219] An estimated 7% of LGBT adults in the U.S. are age 65 or older,[220] including approximately 171,700 transgender adults.[221] We have further estimated that 14.8% of LGBT people have Medicare as their primary source of insurance.[222] Although we do not have estimates of the number of LGBT people who are enrolled in the PACE program, these estimates suggest that LGBT people are among the pool of those enrolled in such services.

Research suggests that discrimination may impact access to support services and health outcomes for older LGBT adults. Studies have found that LGBT older adults "are 20% less likely than heterosexual peers to access government services such as housing assistance, meal programs, food stamps and senior centers"[223] and "are also more likely to delay seeking health care, partly due to fear of discrimination."[224] Evidence also suggests that transgender older adults experience unique disparities – for example, one qualitative study documented increased fear of mistreatment in elder care, perceived lack of agency, and discrimination in health care.[225]

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[215] Jae Downing, Kendall A. Lawley & Alex McDowell, *Prevalence of Private and Public Health Insurance Among Transgender and Gender Diverse Adults*, 60 MEDICAL CARE 4, 313-314 (2022).
[216] McDowell et al., *supra* note 126.
[217] Program of All Inclusive Care for the Elderly, Ctrs. for Medicaid & Medicare Srvs., https://www.cms.gov/Medicare-Medicaid-Coordination/Medicare-and-Medicaid-Coordination/Medicare-Medicaid-Coordination-Office/PACE/PACE (last visited Sept. 19, 2022).
[218] *Id.*
[219] CHOI & MEYER, *supra* note 42, at 2.
[220] *LGBT Demographic Data Interactive*, *supra* note 6.
[221] ANDREW FLORES ET AL., WILLIAMS INST., HOW MANY ADULTS IDENTIFY AS TRANSGENDER IN THE UNITED STATES? 5 (2016), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Adults-US-Aug-2016.pdf.
[222] Williams Inst., unpublished analysis of Behavioral Risk Factor Surveillance Survey data in five states (California, Georgia, Ohio, Texas & Virginia) (on file with authors).
[223] CHOI & MEYER, *supra* note 42, at 6. *See also* MOVEMENT ADVANCEMENT PROJECT & SERVICES AND ADVOCACY FOR GAY, LESBIAN, BISEXUAL AND TRANSGENDER ELDERS, IMPROVING THE LIVES OF LGBT OLDER ADULTS (2010), http://www.lgbtmap.org/file/improving-the-lives-of-lgbt-older-adults.pdf.
[224] CHOI & MEYER, *supra* note 42. *See* Sara J. Czaja et al., *Concerns About Aging and Caregiving Among Middle-Aged and Older Lesbian and Gay Adults*, 20 AGING & MENTAL HEALTH 1107 (2015).
[225] Matthew Adan et al., *Worry and Wisdom: A Qualitative Study of Transgender Elders' Perspectives on Aging*, 6 TRANSGENDER HEALTH 332 (2021).

Given the high incidence of discrimination in health care as noted above, and the particular vulnerability of those enrolled in PACE, we agree that HHS should explicitly clarify under 42 C.F.R. 460.98(b)(3) that sex discrimination includes discrimination based on sexual orientation and gender identity and under and 42 C.F.R. § 460.112(a) that discrimination based on gender identity is prohibited.

V. The Department Should Mandate Voluntary Data Collection on Sexual Orientation and Gender Identity

Finally, we write to encourage the Department to broaden its data collection requirements by recipients and/or from individuals protected under Section 1557 to ensure quality data on SOGI, provided such data collection does not compromise the privacy or safety of protected individuals. President Biden's June 2022 Executive Order 14075 specifically directs federal agencies to participate in a process to "[strengthen] the Federal Government's collection of SOGI data to advance equity for LGBTQI+ individuals."[226] To further this process, the White House Office of Science and Technology Policy has released a Request for Information from the public to help build the "Federal Evidence Agenda on LGBTQI+ Equity."[227] The RFI asks,

> Where programmatic data is used to enforce civil rights protections, such as in… education settings, what considerations should the [Equitable Data Working Group] Subcommittee on SOGI Data keep in mind when determining promising practices for the collection of this data and restrictions on its use or transfer?[228]

The Department already maintains the authority to require SOGI data collection, and to develop data collection practices to ensure thorough enforcement of Section 1557 and compliance with the Executive Order. Under the Public Health Service Act, as amended by the ACA, the Secretary is empowered to ensure that "any federally conducted or supported health care or public health program, activity or survey" collect and report information on individuals' demographics, specifically their race, ethnicity, sex, primary language, and disability status.[229] Notably, this provision also empowers the Secretary to call for the mandatory collection of "any other demographic data as deemed appropriate by the Secretary regarding health disparities."[230] Relying on this authority, the Department may choose to revise existing or develop new data collection instruments or mechanisms through which to track and measure enforcement of and

[226] Advancing Equality for Lesbian, Gay, Bisexual, Transgender, Queer, and Intersex Individuals, Exec. Order No. 14,075, 87 Fed. Reg. 37,189 (June 15, 2022).
[227] Request for Information; Federal Evidence Agenda on LGBTQI+ Equity, 87 Fed. Reg. 52,083 (Aug. 24, 2022).
[228] 87 Fed. Reg. at 52,084.
[229] 42 U.S.C. § 300kk(a)(1)(A). The Secretary likewise maintains a broad grant of authority to issue regulations "as may be necessary to carry out" the various Medicare insurance programs. 42 U.S.C. § 1395hh(a)(1).
[230] 42 U.S.C. § 300kk(a)(1)(D).

compliance with Section 1557's requirements. Doing so would be consistent with the monitoring activities of other federal agencies charged with enforcing SOGI non-discrimination protections.[231]

We encourage the Department to include measures of SOGI in any surveys it currently administers that collect other demographic information and any future surveys it develops under its authority to enforce Section 1557. There are many existing models that the Department may use as guidance for collecting information on SOGI. For example, an ad hoc panel by the National Academies of Sciences, Engineering, and Medicine focused on SOGI-related methodological issues recently released a consensus study report offering guidance and best practices for collecting data on SOGI, as well as on variations in sex characteristics, in population-based surveys, as well as clinical and administrative settings.[232] We recommend that the Department undertake a review of the available federal SOGI data collection resources and develop improved models to ensure that SOGI data is available to ensure compliance with Section 1557.

In addition, as scholars with experience in measurement development and testing, we would recommend that the Department consider longstanding research on SOGI measurement and assess the performance of any chosen SOGI measures or response options it might consider implementing through this or a future rulemaking. That includes any measures and question designs it may propose related to the assessment of sex characteristics or intersex status. Likewise, we note our concern with potential harm to respondents due to breach of confidentiality related to SOGI information or sex characteristics, and request that the Department take precautions to ensure that all data are collected and reported using appropriate privacy standards.

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[231] *See, e.g.*, State Small Business Credit Initiative; Demographics-Related Reporting Requirements, 87 Fed. Reg. 13,628 at 13,629 (March 10, 2022) (codified at 31 C.F.R. § 35) (Interim Final Rule requiring that creditors under the State Small Business Credit Initiative collect information on applicants' gender identity and sexual orientation; allowing creditors to collect such information related to sex despite a general prohibition on same imposed through the Equal Credit Opportunity Act due to its exception for data collections intended to monitor or enforce compliance with federal law); 29 C.F.R. § 1602.7 et seq. (requiring that employers subject to Title VII file standardized reports with the Equal Employment Opportunity Commission on demographic workforce data, including data by race/ethnicity, sex, and job categories).

[232] MEASURING SEX, GENDER IDENTITY, AND SEXUAL ORIENTATION FOR THE NATIONAL INSTITUTES OF HEALTH, NAT'L ACADEMIES OF SCIENCES, ENGINEERING, & MED. (2022), https://www.nationalacademies.org/our-work/measuring-sex-gender-identity-and-sexual-orientation-for-the-national-institutes-of-health.

VI. Conclusion

HHS proposes to make important changes to the regulations guiding the enforcement of Section 1557 of the Affordable Care Act. As researchers and scholars studying the impact of public policy on anti-LGBT discrimination, we believe the proposed changes as discussed herein will make a positive difference in ensuring access to healthcare for every individual.

Thank you for your consideration of the information and comments provided herein. Please direct any correspondence to redfield@law.ucla.edu.

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