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United States Senate

COMMITTEE ON HEALTH, EDUCATION,
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July 7, 2020

The Honorable Alex M. Azar II
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue SW
Washington, DC 20201

Dear Secretary Azar,

We write to urge you to immediately reverse the rule finalized by the Department of Health and Human Services (HHS or the Department) under Section 1557 of the Affordable Care Act (ACA) on June 19, 2020.¹ At the time it was finalized, and as stated in a letter sent to you by many of us who are signed onto this letter, the rule operated under a flawed and discriminatory definition of “sex” that excluded transgender patients from protections under the ACA. Following the U.S. Supreme Court’s June 15 decision in *Bostock v. Clayton County, Georgia*, which held that the definition of sex discrimination in Title VII of the Civil Rights Act includes discrimination based on a person’s sexual orientation or gender identity,² the Department’s rule misstates and mischaracterizes the definition of “sex.” As the Court explained in *Bostock*, because “an employer who fires an individual for being [gay] or transgender fires that person for traits or actions it would not have questioned in members of a different sex . . . [s]ex plays a necessary and undisguisable role in the decision” to fire someone for being gay or transgender.³ The textual analysis that the Supreme Court relied on in concluding that discrimination on the basis of sex includes discrimination motivated by gender identity or sexual orientation applies with equal force to Section 1557. Consequently, the Department’s rule conflicts with statutory text and is inconsistent with Supreme Court precedent because it allows discrimination on the basis of sexual orientation and gender identity. The rule also encourages discrimination by attempting to limit the scope of Section 1557, undermining reproductive rights, and reducing requirements around language access services. We demand you immediately reverse this harmful, unlawful rule.

The protections guaranteed under Section 1557 are critical to preventing discrimination against transgender, gender nonbinary, and gender nonconforming people who face significant barriers to accessing quality, affordable health care. According to the 2015 U.S. Transgender Survey, approximately 25 percent of people surveyed reported problems with insurance coverage as a result of their gender identity.⁴ The survey reported that approximately 27 percent of survey

¹ <https://www.govinfo.gov/content/pkg/FR-2020-06-19/pdf/2020-11758.pdf>

² https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf

³ *Id.*

⁴ <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>

respondents were denied health care due to being transgender.⁵ Around one-third of those who saw a health care provider in 2015 reported having at least one negative experience related to being transgender, such as being refused treatment, verbally harassed, or physically or sexually assaulted, or having to teach the provider how to provide transgender patients with appropriate care.⁶ Twenty-three percent of respondents did not see a doctor when they needed to because of fear of being mistreated as a transgender person.⁷ Transgender people continue to face significant challenges and discrimination on the basis of their gender identity in accessing and receiving health care.

In *Bostock*, the Supreme Court stated unequivocally that discrimination based on sexual orientation or gender identity necessarily entails discrimination based on sex.⁸ The first cannot happen without the second.⁹ The final rule misinterprets the definition of “sex” to use only “explicitly binary terms such as ‘male and female.’”¹⁰ Not only does eliminating health care protections for transgender patients run contrary to the ACA’s broad goal of expanding health care to all people, it also conflicts with Supreme Court precedent. The federal government must follow the letter of the law and the Court’s interpretation of that law. There is no justification for eliminating protections for transgender patients under Section 1557. Given the barriers transgender patients face to accessing high-quality, affordable health care, it is shameful the Department would work to make it even more difficult for transgender patients to get the care they need, particularly during a global pandemic and public health emergency.

We urge you reverse the final Section 1557 rule and instead work to affirmatively protect the rights of all individuals, including LGBTQIA+ people, who seek access to health care.

Sincerely,

/s/ Patty Murray

PATTY MURRAY
Ranking Member
U.S. Senate Committee on Health,
Education, Labor, and Pensions

/s/ Tammy Baldwin

TAMMY BALDWIN
U.S. Senator

/s/ Bernard Sanders

BERNARD SANDERS
U.S. Senator

/s/ Tina Smith

TINA SMITH
U.S. Senator

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf

⁹ *Id.*

¹⁰ <https://www.federalregister.gov/documents/2019/06/14/2019-11512/nondiscrimination-in-health-and-health-education-programs-or-activities>

/s/ Tim Kaine

TIM KAINÉ
U.S. Senator

/s/ Robert P. Casey, Jr.

ROBERT P. CASEY, JR.
U.S. Senator

/s/ Christopher Murphy

CHRISTOPHER MURPHY
U.S. Senator

/s/ Margaret Wood Hassan

MARGARET WOOD HASSAN
U.S. Senator

/s/ Jacky Rosen

JACKY ROSEN
U.S. Senator

/s/ Elizabeth Warren

ELIZABETH WARREN
U.S. Senator