

U.S. House of Representatives
Committee on the Judiciary
Washington, DC 20515–6216
One Hundred Sixteenth Congress

June 15, 2020

The Honorable William P. Barr
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

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

Dear Attorney General Barr and Secretary Azar:

We write to express our grave concern with your efforts to limit the provision of healthcare to vulnerable communities, including LGBTQ people, women, and individuals with limited English proficiency. As our nation faces a pandemic it has not seen in over one hundred years—with over two million Americans infected and over 100,000 dead—access to healthcare is essential now more than ever. Medical providers and healthcare systems are strained to the breaking point and yet, with this sweeping rollback of civil rights protections, this Administration seeks to limit care to some of our most marginalized communities.

On June 12, 2020, the U.S. Department of Health and Human Services (HHS) Office for Civil Rights (OCR) issued its final rule, entitled *Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority*, that would allow healthcare providers to more easily discriminate against patients based on their gender identity or sexual orientation. The final rule removes gender identity from sex discrimination protections in 45 C.F.R. Part 92, explicitly threatening healthcare access for transgender and gender-nonconforming individuals.¹ In drafting the rule, OCR ignored a number of District Court opinions that have concluded that discrimination against transgender individuals is prohibited by Section 1557 of the Affordable Care Act² itself and the multiple circuit courts that have held that discrimination on the basis of

¹ 81 FR 31375 (May 18, 2016) (repealed on Jun. 12, 2020 by, *Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority*).

² Section 1557 of the Affordable Care Act, sometimes referred to as the Health Care Rights Law, prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in covered health programs and activities. Specifically, it prohibits individuals from being “excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal

sex includes discrimination on the basis of gender identity.³ In addition, this rule removes sex stereotyping—a form of discrimination that LGBTQ people often face—from the definition of sex discrimination despite the Supreme Court ruling more than three decades ago that sex stereotyping is an unlawful form of sex discrimination.⁴ This disregard for numerous court opinions, including a Supreme court precedent, is deeply disturbing.

The final rule constitutes one of the largest rollbacks of civil rights for LGBTQ Americans. Under the rule, doctors could refuse to provide LGBTQ patients with anything from routine care, such as a flu shot, to medically necessary care, such as transition-related care or treatment for COVID-19.⁵ LGBTQ individuals, many of whom already face barriers when seeking the most basic services, have historically faced ignorance and discrimination when they seek health care. These disparities have contributed to negative effects on the lives of these individuals and contribute to poorer health in general.⁶ Instead of working to protect these fellow Americans, OCR is attempting to add unnecessary and unlawful hardships for transgender and LGBTQ individuals seeking medical care in the midst of a pandemic.

Moreover, this final rule removes discrimination on the basis of pregnancy, false pregnancy, and termination of pregnancy as forms of sex discrimination. Congress made clear more than four decades ago that discrimination on the basis of pregnancy is a form of sex discrimination and the Supreme Court also ruled more than four decades ago that pregnant individuals have a constitutional right to an abortion. No one should be discriminated against because they are pregnant or because they had a constitutionally protected medical procedure, yet this rule removes any reference to these forms of discrimination being covered as forms of prohibited sex discrimination.

The negative impact of these changes to the regulations implementing Section 1557's sex discrimination prohibition is further exacerbated by the blanket abortion and religious objection exemption the final rule creates. Under this exemption, healthcare providers would be free to engage in sex discrimination to the extent the prohibition on discrimination is inconsistent with the organization's religious tenets or involves providing or paying for an abortion. This blanket exemption will further empower health care providers to discriminate against LGBTQ people, women, and other marginalized communities, and coupled with the creation of the Conscience

financial assistance . . . or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments)" based on the prohibitions in Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, or Section 504 of the Rehabilitation Act of 1973. It also applies the enforcement mechanisms provided for and available under those titles to this subsection.

³ *States Are All Over the Map When It Comes to Transgender Health Care*, WASH. POST (Jul. 22, 2019), https://www.washingtonpost.com/health/states-are-all-over-the-map-when-it-comes-to-transgender-health-care/2019/07/19/68d033a6-a8bd-11e9-9214-246e594de5d5_story.html.

⁴ *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

⁵ *The Trump Administration Wants to Let Doctors Discriminate Against Trans Patients*, VOX (May 29, 2019), <https://www.vox.com/identities/2019/5/29/18643022/trans-health-care-rule-discrimination-trump-hhs>.

⁶ *Transgender Noninclusive Healthcare and Delaying Care Because of Fear: Connections to General Health and Mental Health Among Transgender Adults*, *Transgender Health*, NAT'L CTR. FOR BIOTECHNOLOGY INFO., U.S. NAT'L LIB. OF MED. (Feb 1, 2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5436369/>.

and Religious Freedom Division by HHS two years ago, appears to indicate a shift by the agency from focusing on preventing discrimination to encouraging it.

Outside of sex discrimination, this final rule also weakens protections for individuals with limited English proficiency. As the COVID-19 pandemic has illustrated, viruses and diseases do not discriminate based on the language you speak. By changing current regulatory requirements that health care entities provide meaningful access and services to individuals with limited English proficiency, this final rule could encourage language barriers that prevent individuals from accessing medically necessary medical care and could result in discrimination on the basis of national origin, which is prohibited by Section 1557.

In addition, under the regulations adopted after Section 1557 first became law, covered health entities could not deny, cancel, or limit a health insurance policy or claim, impose additional costs, limit coverage, or use discriminatory insurance benefit designs on the basis of race, color, national origin, sex, age, or disability. This new rule, however, eliminates this provision, opening the door for health insurers to vary benefits or their coverage in ways that could discriminate against marginalized communities.

In addition to these rollbacks on nondiscrimination protections for marginalized communities, this final rule also eliminates provisions affirming the rights of individuals to challenge violations of Section 1557 in court. By eliminating the opportunity for judicial review, individuals who experience unlawful discrimination on the basis of race, color, national origin, sex, age, or disability in health programs and activities covered by Section 1557 will be left without the opportunity to vindicate their civil rights in court.

Congress takes its responsibility to safeguard hard-fought civil rights protections very seriously, and we are concerned that HHS may be promoting government-sanctioned discrimination. Americans expect, and deserve, to be treated with dignity and respect no matter their identity and should not fear discrimination when accessing health care.

The House Judiciary Committee has a duty to ensure that the administration of justice within executive branch agencies applies equally to all persons, and that federal law is not twisted into a cudgel to discriminate against vulnerable populations. For these reasons, we request that you produce the following documents and information by June 29, 2020.

1. Documents sufficient to identify all HHS and/or OCR personnel – including but not limited to Secretary Azar and Director Severino – who were involved in the rule making process for the final rule for “Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority.” If no responsive documents exist, please provide a list of all HHS and/or OCR personnel who were involved in the rule making process.
2. All communications dated between January 20, 2017, and the date of this letter, among any personnel from HHS and/or OCR, or between any personnel from HHS and/or OCR and any personnel from the White House and/or OMB, regarding the final rule for Section 1557. If no responsive documents exist, please provide a written summary of all

communications (whether telephonic, in-person, or otherwise) among any HHS and/or OCR personnel, or between any personnel from HHS and/or OCR and any White House and/or OMB personnel regarding the final Section 1557 rule dated between January 20, 2017 and the date of this letter, or state whether there was no such communications.

3. All communications dated between January 20, 2017 and the date of this letter between any personnel from HHS and/or OCR and any personnel from the Department of Justice (DOJ), regarding the final rule for Section 1557. If no responsive documents exist, please provide a written summary of all communications (whether telephonic, in-person, or otherwise) between any personnel from HHS and/or OCR and any DOJ personnel regarding the final Section 1557 rule dated between January 20, 2017 and the date of this letter, or state whether there was no such communications.
4. Copies of all analyses, reviews, assessments, reports, memoranda, documents, or opinions that were utilized, consulted, created, or otherwise considered regarding the impact of the final rule for Section 1557 on access to healthcare services, including in underserved communities or communities in a geographic region with only a religious based healthcare provider. If no responsive documents exist, please state as such in your response.
5. Copies of all analyses, reviews, assessments, reports, memoranda, documents, or opinions that were utilized, consulted, created, or otherwise considered regarding the impact of the final rule for “Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority” on access to healthcare services, including for individuals in the LGBTQ community, women, and individuals with limited English proficiency. If no responsive documents exist, please state as such in your response.
6. The number of complaints received by the OCR between FY 2016 to the date of this letter. For the time period requested, please identify the amount of health information privacy complaints, civil rights complaints, and religious/conscience-related complaints received, and for each category of complaint list the number of times OCR took action in the case. For the civil rights complaints, please disaggregate the complaints by protected basis to include gender identity and sexual orientation as separate classes.
7. Any communications dated between January 20, 2017, and the date of this letter, between any personnel from HHS and/or OCR and any outside organizations discussing the increase in, and/or ways to increase, religious/conscience-related complaints or cases. If no responsive documents exist, please provide a written summary of all communications (whether telephonic, in-person, or otherwise) among any HHS and/or OCR personnel and any outside organizations discussing the increase in, and/or ways to increase, religious/conscience-related complaints or cases, or state whether there was no such communications.
8. Documents of any and all changes (or proposed changes) in HHS or OCR policy and/or procedure regarding the evaluation of religious/conscience-related complaints. If no responsive documents exist, please provide a list of any and all changes (or proposed changes) in HHS or OCR policy and/or procedure regarding the evaluation of

religious/conscience-related complaints. If no changes (or proposed changes) exist, please state as such in your response.

9. Documents sufficient to identify all HHS and/or OCR personnel – including but not limited to Secretary Azar and Director Severino – who were involved in the creation of and/or the implementation of the OCR Conscience and Religious Freedom Division (CRFD). If no responsive documents exist, please provide a list of all HHS and/or CMS personnel who were involved in the creation of the CRFD.
10. All communications dated between January 20, 2017, and the date of this complaint, among any personnel from HHS and/or OCR, and between any personnel from HHS and/or OCR and any personnel from the White House and/or any other executive branch agency, regarding both the creation and/or implementation of the CRFD. If no responsive documents exist, please provide a written summary of all communications (whether telephonic, in-person, or otherwise) among any personnel from HHS and/or OCR, and between any HHS and/or OCR personnel and any White House and/or executive branch agency personnel regarding the creation and/or implementation of the CRFD dated between January 20, 2017 and the date of this letter, or state whether there was no such communications.
11. Documents providing the amount of resources assigned to the CRFD, including the number of fulltime employees, investigators, attorneys, and budget size. Please compare these same categories to all the other divisions in the OCR. Please state when, if any, reassignment or reallocation of personnel, resources, or funds has taken place either within HHS, OCR, or the executive branch with the intent or effect of adding additional resources to the CRFD. If such actions occurred, please provide the amount of personnel, resources, or funds reassigned or reallocated to the CRFD. If no such actions took place, please state so in your response.
12. All communications among HHS or OCR personnel, or between any HHS and/or OCR personnel and any personnel from the White House and/or OMB, regarding the OCR Fiscal Years 2020 and 2022 budget request. If no responsive documents exist, please provide a written summary of all communications (whether telephonic, in-person, or otherwise) among any HHS and/or OCR personnel, or between any HHS and/or OCR personnel and any White House or OMB personnel, regarding the OCR FY 2020 budget request, or state whether there was no such communications.

Thank you for your prompt attention to this matter.

Sincerely,



Jerrold Nadler
Chairman



Steve Cohen
Chairman
Subcommittee on the Constitution,
Civil Rights, and Civil Liberties

cc: The Honorable Jim Jordan, Ranking Member, House Committee on the Judiciary
The Honorable Mike Johnson, Ranking Member, Subcommittee on the Constitution,
Civil Rights, and Civil Liberties