

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

STATE OF TEXAS, *et al.*,

Plaintiffs,

Case No. 6:24-CV-00211
Judge Jeremy D. Kernodle

XAVIER BECERRA, *et al.*,

Defendants.

**BRIEF OF AMICI CURIAE CALIFORNIA AND 19
OTHER STATES IN SUPPORT OF DEFENDANTS'
OPPOSITION TO PLAINTIFFS' MOTION FOR
TEMPORARY RESTRAINING ORDER, PRELIMINARY
INJUNCTION, AND STAY OF AGENCY ACTION**

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INTRODUCTION AND INTERESTS OF AMICI

Amici Curiae States of California, Colorado, Connecticut, Delaware, Hawai‘i, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and the District of Columbia (“Amici States”) submit this brief in support of the federal defendants’ opposition to plaintiffs’ motion for a stay of the effective date, a temporary restraining order, and a preliminary injunction against enforcement of the U.S. Department of Health and Human Services’ (“HHS”) new final rule, Nondiscrimination in Health Programs and Activities, 89 Fed. Reg. 37,522 (May 6, 2024) (to be codified at 42 C.F.R. pts. 438, 440, 457, and 460, and 45 C.F.R. pts. 80, 84, 92, 147, 155, and 156) (“Final Rule”). The Final Rule implements Section 1557 of the Patient Protection and Affordable Care Act (“ACA”). Congress enacted the ACA to expand access to high quality and affordable healthcare, and to address significant barriers to access caused by an inadequate and discriminatory healthcare system. As part of a wide range of reforms, Congress included a landmark civil rights provision that prohibits discrimination in healthcare, known as Section 1557. Section 1557 prohibits health programs and activities receiving federal financial assistance from discriminating against individuals on the basis of their race, color, national origin, sex, age, or disability. Amici States’ experience underscores the importance of comprehensive anti-discrimination protections because discrimination within the healthcare system contributes to poor health outcomes, exacerbates existing health disparities, and leads to ineffective distribution of healthcare resources.

In this action, Texas and Montana challenge one aspect of the Final Rule—the inclusion of gender identity discrimination as an example of discrimination “on the basis of sex.”¹ But the Final Rule’s definition of sex-based discrimination is supported by the statutory text, Congressional

¹ Texas and Montana challenge the Final Rule’s inclusion of both sexual orientation and gender identity, but their arguments focus almost exclusively on gender identity.

intent, Supreme Court precedent, and decisions in numerous federal circuit courts of appeal (including the Fifth Circuit). Prohibiting discrimination based on gender identity is a vital tool for combatting healthcare disparities faced by LGBTQ individuals, and for ensuring that no one is denied access to medically necessary healthcare because of who they are. In particular, discrimination on the basis of gender identity causes economic, physical, and emotional harms to transgender people, including an increased risk of depression, anxiety, substance abuse, and suicide. To prevent these tangible injuries, Amici States have adopted laws and policies that combat sex discrimination against transgender individuals, both in terms of health insurance coverage and access to care.

Amici States submit this brief to present their experience that gender-inclusive policies in healthcare and health insurance have direct and significant benefits to our residents, our communities, and our states and society as a whole, and that the balance of equities and public interest cut against the extraordinary relief that Plaintiffs seek. In light of the many public health benefits conferred by the rule, Amici States encourage the Final Rule's full implementation nationwide. And if the Court issues any preliminary relief (and it should not), such relief should not extend beyond Plaintiffs and the portions of the Final Rule as to which the Court has found that Plaintiffs established irreparable harm and a likelihood of success on the merits.

ARGUMENT

I. AMICI STATES' EXPERIENCE CONFIRMS THAT THE FINAL RULE'S PROHIBITION OF DISCRIMINATION ON THE BASIS OF GENDER IDENTITY WILL BENEFIT AND PROTECT OUR RESIDENTS

The Final Rule's protection of transgender individuals from discrimination on the basis of their gender identity will significantly enhance those individuals' quality of life, and is in line with the Amici States' commitment to protecting access to quality healthcare for all of our residents. Gender dysphoria is the distress and anxiety that can result from incongruence between a person's

gender identity and sex at birth.² While not all transgender individuals suffer from gender dysphoria, those who do experience dysphoria—and who do not receive treatment—undergo significant harms. If unaddressed or untreated, gender dysphoria can affect quality of life and trigger decreased social functioning.³ Among transgender people, suicide attempts are nine times more common than in the overall U.S. population (41% versus 4.6%).⁴ Assuring that transgender individuals who suffer from gender dysphoria are able to access healthcare in accordance with the treatment plans prescribed by their medical teams is critical. Recently, the 2022 U.S. Transgender Survey found that 94% of adult transgender individuals reported being either “a lot more satisfied” (79%) or “a little more satisfied” (15%) after choosing to live at least some of the time as a gender different from the one they were born into.⁵

The Final Rule is designed to prohibit covered entities from discriminating against anyone on the basis of a protected characteristic when providing healthcare. Currently, such discrimination is prevalent. The 2022 U.S. Transgender Survey also found that 26% of respondents “had at least one issue with their insurance company in the last 12 months, such as being denied coverage for

² American Psychiatric Association, *Gender Dysphoria*, in Diagnostic and Statistical Manual of Mental Disorders (5th ed. 2022); see also *What is Gender Dysphoria?*, American Psychiatric Association (Aug. 2022), <https://www.psychiatry.org/patients-families/gender-dysphoria/what-is-gender-dysphoria>.

³ See Emily Newfield et al., *Female-to-Male Transgender Quality of Life*, 15(9) *Quality of Life Research* 1447 (2006), <https://www.ncbi.nlm.nih.gov/pubmed/16758113> (observing that transgender men who received transition-related care reported having a higher health-related quality of life than those who had not).

⁴ Ann P. Haas et al., Am. Found. for Suicide Prevention & The Williams Inst., *Suicide Attempts Among Transgender and Gender Non-Conforming Adults: Findings of the National Transgender Discrimination Survey 2* (2014), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-GNC-Suicide-Attempts-Jan-2014.pdf>.

⁵ Sandy E. James et al., Nat’l Ctr. For Transgender Equal., *Early Insights: A Report of the 2022 U.S. Transgender Survey* 17 (Feb. 2024), https://transequality.org/sites/default/files/2024-02/2022%20USTS%20Early%20Insights%20Report_FINAL.pdf. Similarly, 84% of adults receiving hormone treatment reported feeling “a lot more satisfied”, and 88% of adults who had received at least one form of surgery reported the same. Forty-seven percent of respondents “had thought about moving to another state because their state government considered or passed laws that target transgender people for unequal treatment (such as banning access to bathrooms, health care, or sports), and 5% of respondents had actually moved out of state because of such state action.”

hormone therapy, surgery, or another type of health care related to their gender identity/transition; gender-specific health care because they were transgender; *or routine health care because they were transgender.*”⁶ Pervasive discrimination against transgender people within the healthcare system nationwide is well-documented, as are the tangible economic, emotional, and physical consequences suffered by transgender individuals as a result. Many transgender patients “continue to experience discrimination in the health care context.”⁷ This discrimination “create[s] barriers to accessing timely, culturally competent, medically appropriate, and respectful care.”⁸ For example, in a 2015 survey of transgender people, thirteen percent (13%) reported that they were denied coverage for services often considered to be gender-specific, including routine sexual or reproductive health screenings (such as Pap smears, prostate exams, and mammograms) and seven percent (7%) reported that they were denied coverage for other routine health care.⁹ Indeed, the U.S. Department of Health and Human Services has recognized that difficulties in “the process of obtaining health insurance coverage” often lead transgender patients to postpone or avoid obtaining medical care, thus “exacerbat[ing] health disparities experienced by the LGBT

⁶ *Id.* (emphasis added).

⁷ Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,376, 31,444, 31,460–61 (May 18, 2016) (to be codified at 42 C.F.R. pt. 92) (citing studies showing that 26.7% of transgender people reported having been refused needed healthcare and 25% reported having been subject to harassment in medical settings, which can lead those individuals to postpone or avoid needed healthcare); Sandy E. James et al., *Early Insights*, *supra* note 5, at 16-17, 23.

⁸ Daphna Stroumsa, *The State of Transgender Health Care: Policy, Law, and Medical Frameworks*, 104 Am. J. Pub. Health e31 (2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3953767/>; *see also* Nat’l Women’s Law Ctr., *Health Care Refusals Harm Patients: The Threat to LGBT People and Individuals Living with HIV/AIDS* (May 2014), https://nwlc.org/wp-content/uploads/2015/08/lgbt_refusals_factsheet_05-09-14.pdf.

⁹ Sandy E. James et al., Nat’l Ctr. For Transgender Equal., *The Report of the 2015 U.S. Transgender Survey 95* (2016), <http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf>.

population.”¹⁰ Discrimination, exclusion, and denial of care on the basis of transgender status can lead to increased risk of depression, anxiety, substance abuse, and suicide.¹¹

The Final Rule seeks to prevent gender identity discrimination in the provision of *all* services, including routine ones, as well as in all other administrative aspects of the provision of healthcare. It forbids covered entities from “[a]dopt[ing] or apply[ing] any policy or practice of treating individuals differently or separating them on the basis of sex in a manner that subjects any individual to more than de minimis harm, including by adopting a policy or engaging in a practice that prevents an individual from participating in a health program or activity consistent with the individual’s gender identity.” 89 Fed. Reg. at 37,701. Beyond medical services, the Rule also prohibits discrimination on the basis of a protected characteristic when “providing or administering health insurance coverage” or when providing “health programs and activities through the use of patient care decision support tools.” *Id.*

The Final Rule’s prohibition of discrimination against individuals because of their sexual orientation and gender identity reflects the reality that “LGBTQI+ people face significant health disparities and barriers to health care and insurance coverage . . .” *Id.* at 37,573. The Final Rule describes many examples, including “hospitals where [LGBTQ individuals] have been denied visitation rights and authority to make medical decisions impacting their loved ones’ health conditions,” *id.* at 37,632, and “transgender-specific exclusions to deny coverage for medically necessary treatment.” *Id.* at 37,670. The Final Rule implements important legal protections that

¹⁰ 81 Fed. Reg. 31,375 at 31,460.

¹¹ “People who identify as transgender have higher rates of mental health complications than those in the general population due to stigma and discrimination. In addition to a higher prevalence of mental health issues, transgender people typically experience barriers to healthcare, such as refusal of care, violence, and a lack of provider knowledge. This suggests that these experiences, and not being transgender itself, may predict and contribute towards mental health difficulties.” Louise Morales-Brown, *What to Know About Mental Health Among Transgender Individuals*, Medical News Today (May 20, 2021), <https://www.medicalnewstoday.com/articles/transgender-mental-health>.

will help ensure that no one is denied necessary healthcare (or coverage of such care) because of their gender identity.

The Final Rule also protects the ability of transgender individuals to access the medical care that is deemed best for them by their medical teams following individualized assessments – just as Amici States’ laws do. For example, the District of Columbia has instructed that determinations of “medical necessity” for insurance coverage purposes “must also be guided by providers in communication with individual patients.”¹² Washington forbids insurers from “deny[ing] or limit[ing] coverage for gender affirming treatment” when it is “medically necessary” and “prescribed in accordance with accepted standards of care.”¹³ Oregon has codified its prohibition on insurance plans’ denying benefits on the basis of gender identity.¹⁴ California has also forbidden health insurance companies from discriminating on the basis of gender identity since 2005.¹⁵ The California Department of Insurance has long acknowledged that regulations prohibiting discrimination on the basis of gender identity are “of significant benefit for a very small class of California residents who are directly impacted. . . . [Rules prohibiting such discrimination] should thereby potentially improve their health and welfare since transgender people have been targets of discrimination and violence.”¹⁶

These laws and policies reflect amici States’ core commitment to protecting the equality of all people, regardless of their gender identity, and ensuring that transgender people, including

¹² Chester A. McPherson, D.C. Dep’t of Ins., Bulletin 13-IB-01-30/15, *Prohibition of Discrimination in Health Insurance Based on Gender Identity or Expression* 1, 4 (2014), <https://disb.dc.gov/sites/default/files/dc/sites/disb/publication/attachments/Bulletin-ProhibitionDiscriminationBasedonGenderIdentityorExpressionv022714.pdf>.

¹³ Wash. Rev. Code § 48.43.0128(3)(a) (2019).

¹⁴ Or. Rev. Stat. § 746.021.

¹⁵ See A.B. 1586, 2005-06 Leg., Reg. Sess. (Cal. 2005) (amending Ins. Code § 10140 to define “sex” as incorporating gender identity).

¹⁶ Ali Zaker-Shahrak et al., Cal. Dep’t of Ins., *Economic Impact Assessment: Gender Nondiscrimination in Health Insurance* 9 (Apr. 13, 2012), <https://www.insurance.ca.gov/01-consumers/110-health/60-resources/upload/Economic-Impact-Assessment-Gender-Nondiscrimination-In-Health-Insurance.pdf>.

those with gender dysphoria, are not denied medically necessary healthcare. The Final Rule achieves these same goals by forbidding discrimination on the basis of sex, including because of sexual orientation, gender identity, and sex stereotypes.

II. THE FINAL RULE’S DEFINITION OF DISCRIMINATION “ON THE BASIS OF SEX” IS CONSISTENT WITH THE STATUTORY TEXT, CONGRESSIONAL INTENT, AND SUPREME COURT PRECEDENT

A. The Final Rule’s Prohibition of Discrimination Based on Sexual Orientation and Gender Identity is Well Supported By Precedent

When Congress enacted the ACA in 2010, it included Section 1557 as a landmark civil rights provision prohibiting discrimination in healthcare. Section 1557 prohibits discrimination in health programs and activities that receive federal financial assistance or are administered by federal agencies. 42 U.S.C. § 18116(a). Section 1557 prohibits discrimination on the basis of any protected classification covered under Title VI of the Civil Rights Act (race, color, and national origin), Section 504 of the Rehabilitation Act of 1973 (disability), Title IX of the Education Amendments (sex), and the Age Discrimination Act of 1975 (age). *Id.* Section 1557 authorizes the Secretary of HHS to “promulgate regulations to implement this section.” *Id.* § 18116(c).

Section 1557, therefore, incorporates Title IX’s prohibition of discrimination “on the basis of sex.” 20 U.S.C. § 1681(a). The Supreme Court has repeatedly affirmed the “broad reach” of Title IX. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175 (2005); *see also id.* at 174 (noting “repeated holdings construing ‘discrimination’ under Title IX broadly”). The Final Rule defines “on the basis of sex” to include discrimination on the basis of: (1) sex characteristics, including intersex traits; (2) pregnancy or related conditions; (3) sexual orientation; (4) gender identity; and (5) sex stereotypes. 89 Fed. Reg. at 37,699. This definition of discrimination “on the basis of sex” is consistent with the plain text of Title IX, Supreme Court precedent, decisions in several circuit courts of appeal, and Congress’s intent that Title IX “be broadly interpreted to provide effective remedies against discrimination.” S. Rep. No. 100-64 (1987).

Texas and Montana argue that the Final Rule’s definition of sex discrimination is contrary to law. Pl. Mem. at 6-14 (June 11, 2024), ECF No. 2 [“Motion”]. They are unlikely to prevail on that claim because the Final Rule faithfully applies the statutory text and follows controlling precedent.

The Supreme Court held that discrimination based on sexual orientation or gender identity are necessarily forms of sex-based discrimination in *Bostock v. Clayton Cnty.*, 590 U.S. 644, 660-62 (2020). In that case, the Court explained that, in the context of a Title VII claim, “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex” because “homosexuality and transgender status are inextricably bound up with sex.” *Bostock*, 590 U.S. at 660-61. To “discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex.” *Id.* at 661. In other words, “if changing the employee’s sex would have yielded a different choice by the employer—a statutory violation has occurred.” *Id.* at 659-60. *Bostock* makes clear that discrimination based on sexual orientation or gender identity is *per se* sex discrimination. *Id.* *Bostock* also affirms the overwhelming weight of prior authority applying another seminal Supreme Court decision, *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), to hold that discrimination against transgender people is a form of prohibited sex stereotyping.

Texas and Montana assert that “*Bostock* does not apply to Section 1557” because it interpreted Title VII’s prohibition of discrimination “because of . . . sex,” and not Title IX’s prohibition of discrimination “on the basis of sex.” *See* Motion at 9. This is a distinction without a difference. Indeed, *Bostock* itself uses Title VII’s phrase “because of sex” and Title IX’s phrase “on the basis of sex” interchangeably.¹⁷ Moreover, the Supreme Court has historically looked to

¹⁷ Compare *Bostock*, 590 U.S. at 650 (“Congress outlawed discrimination in the workplace on the basis of . . . sex . . .”), *id.* at 664 (explaining that the “employer’s ultimate goal might be to

Title VII interpretations of discrimination as instructive when considering Title IX. *See, e.g., Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 616 n.1 (1999) (Thomas, J., dissenting) (“This Court has also looked to its Title VII interpretations of discrimination in illuminating Title IX of the Education Amendments of 1972.”) (internal citations omitted). The Fifth Circuit has likewise emphasized “Title IX’s similarity to Title VII,” explaining that “the prohibitions of discrimination on the basis of sex of Title IX and Title VII *are the same*.” *Lakoski v. James*, 66 F.3d 751, 756-57 (5th Cir. 1995) (emphasis added); *see also Lowrey v. Tex. A&M Univ. Sys.*, 117 F.3d 242, 248 (5th Cir. 1997). *Lakoski* squarely forecloses the argument that Title VII’s prohibition on sex discrimination sweeps more broadly than Title IX’s.

In light of *Bostock*, at least three federal circuit courts of appeal have held that Title IX’s prohibition on sex discrimination must be construed similarly to Title VII’s nearly identically worded prohibition. *See A.C. by M.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 769 (7th Cir. 2023) (“Applying *Bostock*’s reasoning to Title IX, we have no trouble concluding that discrimination against transgender persons is sex discrimination for Title IX purposes, just as it is for Title VII purposes”); *Doe v. Snyder*, 28 F.4th 103, 113-14 (9th Cir. 2022) (discussing *Bostock* and explaining that “[w]e construe Title IX’s protections consistently with those of Title VII”); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 608 (4th Cir. 2020) (Although *Bostock* interprets Title VII of the Civil Rights Act of 1964 . . . it guides our evaluation of claims under Title IX.”); *see also Kadel v. Folwell*, 100 F.4th 122, 164 (4th Cir. 2024) (citing *Bostock* and holding that West Virginia’s categorical exclusion of coverage for gender-affirming care violates Section 1557).

discriminate *on the basis of sexual orientation*) and *id.* at 680 (“[E]mployers are prohibited from firing employees *on the basis of . . . transgender status . . .*”), with *id.* at 661 (“*. . . because of sex.*”) (emphases added).

Even prior to *Bostock*, courts of appeal had held that discrimination based on gender identity violates Title IX. *See, e.g., Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1049 (7th Cir. 2017) (“A policy that requires an individual to use a bathroom that does not conform with his or her gender identity punishes that individual for his or her gender non-conformance, which in turn violates Title IX”), abrogated on other grounds by *Illinois Republican Party v. Pritzker*, 973 F.3d 760 (7th Cir. 2020); *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 533 (3d Cir. 2018) (“barring transgender students from restrooms that align with their gender identity would itself pose a potential Title IX violation”).¹⁸

In short, both pre and post *Bostock* case law strongly support the Final Rule’s inclusion of sexual orientation and gender identity as examples of discrimination “on the basis of sex.” Texas and Montana’s attempt to downplay the reasoning and cabin the applicability of *Bostock* have largely been rejected by federal appellate courts in the four years since *Bostock* was decided.¹⁹

B. Texas and Montana Misstate the Impact of the Final Rule

Texas and Montana claim that the Final Rule attempts to “defund[] States and healthcare providers across the country who refuse to provide or pay for dangerous and experimental ‘gender-transition’ medical activities.” Complaint at 1, ECF No. 1 [“Compl.”]. According to Texas and Montana, the Final Rule “decree[s] gender-transition interventions . . . as the federal standard of care through threats of putting States’ federal funding at risk.” *Id.* at 17. And under the Final Rule, Texas and Montana claim that “a healthcare provider apparently cannot decline to provide a

¹⁸ Other federal circuit courts reached similar conclusions under Title VII prior to *Bostock*. *See, e.g., Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (“discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender”); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) (holding that a transgender firefighter could bring a Title VII claim over allegations that the firefighter was discriminated against for failing “to act and/or identify with his or her gender”).

¹⁹ At least one court of appeal has concluded differently. *See Adams v. Sch. Bd. of St. Johns County*, 57 F.4th 791 (11th Cir. 2022) (en banc).

lactation consultant on the basis that the individual requesting it is a biological male.” *Id.* at 12. These claims are misplaced and overlook key components of the Final Rule.

First, nothing in the rule would require the provision of care that is not deemed medically appropriate. The Final Rule states that “[n]othing in this section requires the provision of any health service where the covered entity has a legitimate, nondiscriminatory reason for denying or limiting that service.” 89 Fed. Reg. at 37,701. Legitimate reasons include where: (1) “the covered entity typically declines to provide the health service to any individual”; and (2) “the covered entity reasonably determines that such health service is not clinically appropriate for a particular individual.” *Id.* The Final Rule also expressly states that “providers do not have an affirmative obligation to offer any health care, *including gender-affirming care*, that they do not think is clinically appropriate or if religious freedom and conscience protections apply.”²⁰ *Id.* at 37,596 (emphasis added); *see also id.* at 37,597 (“There is no part of section 1557 that compels clinicians to provide a service that they do not believe is medically appropriate for a particular patient . . .”).

In addition, “this final rule does not promote any particular medical treatment, require provision of particular procedures, mandate coverage of any particular care, or *set any standard of care.*” *Id.* at 37,533 (emphasis added). Plainly, anyone without the capacity to lactate is unlikely to have a “clinically appropriate” basis for a lactation consultant. *Id.* at 37,701. Plaintiffs’ other objections fare little better. *Compare* Compl. at 17 (the Final Rule imposes a “federal standard of care”) *with* 89 Fed. Reg. at 37,533 (the Final Rule “does not . . . set any standard of care”). In short, Plaintiffs’ speculation regarding anticipated harms from the Final Rule are unsupported by

²⁰ To support their arguments, Texas and Montana improperly rely (Motion at 5) on a sentence that appeared in an earlier version of the rule but was ultimately omitted from the Final Rule: “a provider’s belief that gender transition or other gender affirming care can never be beneficial for such individuals (or its compliance with a State or local law that reflects a similar judgment) is not a sufficient basis for a judgment that a health service is not clinically appropriate.” 89 Fed. Reg. at 37,597.

evidence and contrary to the text of the Final Rule. They cannot support a claim for irreparable harm necessary to secure a preliminary injunction.

Second, with respect to nondiscrimination in health insurance coverage, “[n]othing in this section requires coverage of any health service where the covered entity has a legitimate, nondiscriminatory reason for denying or limiting coverage of the health service.” 89 Fed. Reg. at 37,701. Nondiscriminatory reasons include “reasonable medical management techniques such as *medical necessity* requirements.” *Id.* (emphasis added). The Final Rule states that “OCR will review a medical necessity determination only to make sure that it is a bona fide medical judgment, not conduct a review of the medical judgment underlying the medical necessity determination, but rather will assess whether the rationale for the denial was based on impermissible discriminatory considerations.” *Id.* at 37,613. And the Final Rule explains that it “does not require coverage of a particular health service; rather, it requires that the coverage being offered must be provided in a neutral and nondiscriminatory manner.” *Id.* at 37,614. The Final Rule neither requires coverage of any particular medical treatment, nor does it seek to overturn good faith coverage determinations of medical necessity. *Id.* All the Final Rule does—with respect to both providers and payers—is prevent a patient from being denied care (or coverage of care) on the basis of the patient’s sexual orientation or gender identity.

III. ANY INJUNCTIVE RELIEF SHOULD BE LIMITED TO THE NAMED PLAINTIFFS AND THE PORTIONS OF THE FINAL RULE THAT THEY CHALLENGE

To the extent that the Court issues any preliminary relief (and it should not), the Court should not extend such relief beyond Plaintiffs and the portions of the Final Rule as to which the Court has found that Plaintiffs established irreparable harm and a likelihood of success. In light of the substantial harms to transgender people that the Final Rule is designed to avoid, and the limited geographic scope of Texas and Montana’s requested relief (applying to their states only), the Court should carefully tailor any relief so that individuals outside of plaintiffs’ States are not imperiled.

First, Texas and Montana’s Proposed Order seeks only an injunction running to the Plaintiffs (and their agencies and political subdivisions);²¹ it does not seek to enjoin the Final Rule’s application to anyone else. Plaintiffs offer no justification for seeking a stay of the effective date of the Final Rule in its entirety. Plaintiffs do not challenge the vast majority of the Final Rule. *See* Motion at 15 (requesting postponement and enjoining Defendants from enforcing and interpreting Section 1557 “as prohibiting discrimination based on sexual orientation or gender identity”). HHS’s inclusion of sexual orientation and gender identity within its definition of sex discrimination in no way affects the validity of the remainder of the regulation, which also contains a severability provision. *See* 45 C.F.R. § 92.2(c). And staying the effective date of the entirety of the Final Rule would prevent any part of the Final Rule from going into effect anywhere in the country, which is not even relief that Plaintiff States seek.

Moreover, staying the effective date of the rule in its entirety would substantially undermine the interests of persons not before the court, including, *inter alia*, people with limited English proficiency (§ 92.201), people with disabilities (§§ 92.202, 92.203, 92.204, 92.205), people experiencing race, color, national origin, age, or disability discrimination from health insurance plans (§ 92.207), people experiencing discrimination related to marital, parental, or family status (§ 92.208), people experiencing discrimination on the basis of association (§ 92.209), and people experiencing discrimination from health programs’ use of artificial intelligence, clinical algorithms, predictive analytics, and other patient care decision support tools (§ 92.210)—all of whom stand to benefit from the Final Rule’s guidelines. Accordingly, if the Court determines

²¹ Plaintiffs’ Proposed Order requests a preliminary injunction “against the *Plaintiffs* (including any of their instrumentalities, agencies, and political subdivisions and resident healthcare providers and health insurance issuers) for refusing to comply with the Final Rule.” Proposed Order at 2, ECF No. 2-3 (emphasis added).

that any preliminary relief is warranted (and it should not), the Court should carefully tailor such relief to the parties and claims at issue in this case.

CONCLUSION

The Court should deny Plaintiffs' motion for emergency and preliminary relief.

Dated: June 27, 2024

Respectfully submitted,

ROB BONTA
Attorney General of California
KATHLEEN BOERGERS
Supervising Deputy Attorney General

/s/ Nimrod Pitsker Elias

NIMROD PITSKER ELIAS
(Admitted *pro hac vice*)
STEPHANIE T. YU
SEAN C. MCGUIRE
Deputy Attorneys General
Attorneys for Amicus Curiae State of California

[additional counsel listed on subsequent pages]

ADDITIONAL COUNSEL

PHILIP J. WEISER
Attorney General
State of Colorado
1300 Broadway, 10th Floor
Denver, CO 80203

KATHLEEN JENNINGS
Attorney General
State of Delaware
Delaware Department of Justice
820 N. French Street
Wilmington, DE 19801

ANNE E. LOPEZ
Attorney General
State of Hawai'i
425 Queen Street
Honolulu, Hawai'i, 96813

AARON M. FREY
Attorney General
State of Maine
6 State House Station
Augusta, ME 04333-0006

ANDREA JOY CAMPBELL
Attorney General
Commonwealth of Massachusetts
One Ashburton Place
Boston, MA 02108

KEITH ELLISON
Attorney General
State of Minnesota
102 State Capitol
75 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, MN 55155

MATTHEW J. PLATKIN
Attorney General
State of New Jersey
Richard J. Hughes Justice Complex
25 Market Street
Trenton, NJ 08625

ELLEN F. ROSENBLUM
Attorney General
State of Oregon
1162 Court Street NE
Salem, OR 97301

WILLIAM TONG
Attorney General
State of Connecticut
165 Capitol Avenue
Hartford, CT 06106

BRIAN L. SCHWALB
Attorney General
District of Columbia
400 6th Street N.W.
Washington, DC 20001

KWAME RAOUL
Attorney General
State of Illinois
115 South LaSalle Street
Chicago, IL 60603

ANTHONY G. BROWN
Attorney General
State of Maryland
200 Saint Paul Place
Baltimore, MD 21202

DANA NESSEL
Attorney General
State of Michigan
P.O. Box 30212
Lansing, Michigan 48909

AARON D. FORD
Attorney General
State of Nevada
100 North Carson Street
Carson City, NV 89701

LETITIA JAMES
Attorney General
State of New York
28 Liberty Street
New York, NY 10005

MICHELLE A. HENRY
Attorney General
Commonwealth of Pennsylvania
Strawberry Square, 16th Floor
Harrisburg, PA 17120

PETER F. NERONHA
Attorney General
State of Rhode Island
150 South Main Street
Providence, RI 02903

CHARITY R. CLARK
Attorney General
State of Vermont
109 State Street
Montpelier, Vermont 05609-1001

ROBERT W. FERGUSON
Attorney General
State of Washington
P.O. Box 40100
Olympia, WA 98504

CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2024, this document was filed through the Court's CM/ECF system, which served it upon all counsel of record.

Dated: June 27, 2024

Respectfully submitted,

/s/ Nimrod Pitsker Elias
NIMROD PITSKER ELIAS
(Admitted *pro hac vice*)