

Congress of the United States
Washington, DC 20515

June 18, 2020

Honorable Alex M. Azar II
Secretary of Health and Human Services
200 Independence Ave S.W.
Washington, D.C. 20301-0004

Dear Secretary Azar,

As members of the LGBT Equality Caucus, we write following the Supreme Court's decision of this past Monday in *Bostock v. Clayton County*, which affirmed that the ban on discrimination "because of sex" in Title VII of the Civil Rights Act of 1964 protects LGBTQ employees against workplace discrimination.^[1] Given the Supreme Court's ruling, we call on you to withdraw immediately the final rule titled "Nondiscrimination in Health and Health Education Programs or Activities," which your department released last Friday, June 12, and which imminently will be published in the Federal Register. As you know, this rule implements Section 1557 of the Affordable Care Act (ACA), often known as the Health Care Rights Law, which prohibits discrimination in healthcare on the basis of race, color, national origin, age, disability, and sex. In direct defiance of the law's command, however, your department's rule improperly invites and facilitates healthcare discrimination against lesbian, gay, bisexual and transgender (LGBT) people by withdrawing and criticizing the prior rule's legally sound conclusion that the ACA's prohibition on sex discrimination includes protection against discrimination based on transgender status and gender identity. In light of the Supreme Court's *Bostock v. Clayton County* decision, your department's final rule is indefensible.

Your department's issuance of this rule in its proposed and now its final form has been misguided and shocking for multiple reasons. First, the legal question which the Supreme Court has just answered—that is, whether federal laws against sex discrimination protect LGBT people—was pending before Court when your department first proposed last year to replace the existing rule with a cramped, non-textual interpretation that had been rejected by many lower courts and the EEOC. Second, your department pursued this replacement despite an overwhelming record within your agency showing the widespread and devastating harms of discrimination in healthcare for millions of LGBT Americans, and especially for transgender people, who often face the most aggressively hostile treatment, harassment, denials of care, and other forms of discrimination at grossly disproportionate rates.

Because the Health Care Rights Law exists to improve health by prohibiting discrimination in healthcare, starting in 2013, the Department of Health and Human Services (HHS) sought information about healthcare discrimination problems from the public. HHS then engaged in a rigorous notice and comment process in order to develop a legally and factually sound

^[1] *Bostock v. Clayton Cty., Georgia*, No. 17-1618, 2020 WL 3146686 (U.S. June 15, 2020) (holding that "an employer violates Title VII, which makes it unlawful to discriminate against an individual 'because of' the individual's sex, by firing an individual for being homosexual or being a transgender person").

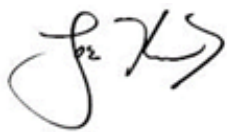
implementation rule. In 2016, HHS issued its final rule, which included explanations of why the sex discrimination law protects LGBT people. By applying proper sex discrimination standards in this context, HHS addressed an area of urgent public health need in a manner consistent with the ACA as a whole and the Health Care Rights Law in particular.

By rejecting the sound legal analysis of the prior rule, your department's final rule deliberately opens the door to widespread discrimination in health services. It does so knowing which communities are at greatest risk of discrimination. And it does so during a particularly perilous moment in world history, in which the United States has already suffered more than 100,000 confirmed deaths due to the COVID-19 pandemic, and with 200,000 projected to die by September. It is well known that these horrifying figures represent to a wildly disproportionate degree the lives of Americans who already suffered from health disparities correlated to invidious discrimination and poverty. LGBT people, people of color, and LGBT people of color make up an outsized share of those we have lost. Your final rule can only worsen the devastating effects of this crisis. Following the Supreme Court's ruling of this past Monday, there is no legal justification whatsoever—let alone a factual justification—for allowing it to take effect.

Again, we call on you to withdraw this rule immediately, and with it your gratuitously issued invitation to discriminate against LGBT people, and especially against transgender people. All people, regardless of their gender identity or sexual orientation, should be treated with dignity and respect, particularly in health care services. This administration has adopted many policies over the past three-and-one-half years that have deliberately increased the likelihood of discrimination against transgender Americans. It is time for this targeting to stop.

We remain committed to achieving a fair and just society for all. This means respecting the rule of law, including those laws which protect both civil rights and public health.

Sincerely,



Joseph P. Kennedy, III
Member of Congress



David N. Cicilline
Member of Congress



Sean Patrick Maloney
Member of Congress



Mark Pocan
Member of Congress



Mark Takano
Member of Congress



Angie Craig
Member of Congress



Sharice L. Davids
Member of Congress



Chris Pappas
Member of Congress