UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BOSTON ALLIANCE OF GAY, LESBIAN, BISEXUAL AND TRANSGENDER YOUTH (BAGLY), *et al.*, Plaintiffs, v. U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*, Defendants.	Civil Action No.: 1:20-cv-11297-PBS

MOTION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF OF SCHOLARS OF THE LGBT POPULATION IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Several scholars who study the lesbian, gay, bisexual, and transgender ("LGBT") population ("Scholars of the LGBT Population" or "*amici*")—M. V. Lee Badgett, Andrew R. Flores, Nanette Gartrell, Christy Mallory, Ilan H. Meyer, Brad Sears, Ari Shaw, and Luis A. Vasquez—respectfully move the Court for leave to file a brief *amici curiae* in this matter, attached hereto as Exhibit 1.

In particular, *amici* seek leave to file a brief in opposition to Defendants' motion to dismiss, filed on October 14, 2020. (ECF No. 21). In this action, Plaintiffs seek declaratory and injunctive relief finding that a regulation pursuant to the Patient Protection and Affordable Care Act adopted by Defendant U.S. Department of Health and Human Services ("HHS"), 85 Fed. Reg. 37,160 (June 19, 2020) ("2020 Rule"), is substantively and procedurally invalid under the Administrative Procedure Act ("APA").

Amici are scholars of public health, medicine, social sciences, public policy, and law who study the health of LGBT people. *Amici* are affiliated with the Williams Institute, a

research center at the UCLA Law School dedicated to the rigorous study of sexual orientation and gender identity. Research conducted by *amici* has been published on numerous occasions in peer-reviewed scientific journals and other publications. Several federal courts have expressly relied on *amici*'s research and other research by the Williams Institute in connection with legal issues affecting the LGBT community. *See, e.g.*, *Baskin v. Bogan*, 766 F.3d 648, 663, 668 (7th Cir. 2014); *Ely v. Saul*, 2020 WL 2744138, at *13 (D. Ariz. May 27, 2020); *G.M.M. ex rel. Hernandez-Adams v. Kimpson*, 116 F. Supp. 3d 126, 141 (E.D.N.Y. 2015); *Campaign for S. Equality v. Bryant*, 64 F. Supp. 3d 906, 943 n.42 (S.D. Miss. 2014); *DeBoer v. Snyder*, 973 F. Supp. 2d 757, 763-64 (E.D. Mich. 2014), *rev'd*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

Amici can inform the Court about the immediate and long-term effects of discrimination on LGBT health. For example, *amici* have explored a phenomenon known as "minority stress," in which stigma and prejudice cause LGBT individuals to endure stress over and above the everyday stress all people endure. This excess stress negatively impacts health outcomes and contributes to the health disparities between LGBT people and non-LGBT people. A*mici* have demonstrated that LGBT-supportive policies and social climates have a positive impact on the health and well-being of LGBT people. As a corollary, the removal of nondiscrimination protections—as well as the perception of their removal—have a direct, negative effect on the lives and health of LGBT Americans.

Amici are intimately familiar with the 2020 Rule; the predecessor rule issued by HHS in 2016 during the Obama Administration ("2016 Rule") which the 2020 Rule purports to repeal; and the administrative record before HHS when it promulgated the 2020 Rule. The Williams Institute submitted a comment letter to HHS that is part of the administrative record,

which *amici* helped prepare. As scholars with extensive expertise in the subject matter area, *amici* believe they can be helpful to the Court in highlighting and explaining the significance of the evidence overlooked or disregarded by HHS in formulating the 2020 Rule.

Accordingly, *amici*'s proposed brief focuses on how the administrative record demonstrated that LGBT people suffer pervasive and widespread discrimination in health coverage and health care, which results in immediate and long-term harms, and contributes to the health disparities between LGBT and non-LGBT Americans.

Dated: New York, New York
November 20, 2020

SCHULTE ROTH & ZABEL LLP

By: /s/ Taleah E. Jennings

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* These counsel are not admitted to practice before the District of Massachusetts.

LOCAL RULE 7.1(B) CERTIFICATION

I hereby certify that counsel for *amici curiae* has conferred with counsel for the parties in a good faith effort to narrow or resolve the issues in this motion. Plaintiffs and Defendants consent to *amici*'s request.

/s/ Taleah E. Jennings

CERTIFICATE OF SERVICE

I hereby certify that on November 20, 2020, I caused the foregoing motion to be electronically filed with the Clerk of the Court using the CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

/s/ Taleah E. Jennings

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

BOSTON ALLIANCE OF GAY, LESBIAN, BISEXUAL AND TRANSGENDER YOUTH (BAGLY), *et al.*,

Plaintiffs,

v.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, *et al.*,

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BRIEF OF *AMICI CURIAE* SCHOLARS OF THE LGBT POPULATION IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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Statement of Interest

Amici curiae ("*amici*") are scholars of public health, medicine, social sciences, public policy, and law who study the health of lesbian, gay, bisexual, and transgender ("LGBT") people.[1] They are affiliated with the Williams Institute, a research center at the UCLA Law School dedicated to the rigorous study of sexual orientation and gender identity. *Amici* have extensively researched LGBT health outcomes, including "minority stress," in which stigma and prejudice impose stress on LGBT individuals on top of the kinds of stress all people experience, resulting in adverse health effects and health disparities between LGBTQ people and the general population. *Amici* are intimately familiar with the administrative record compiled for the 2020 Rule (as defined below) and participated in preparing the comment letter submitted by the Williams Institute and made part of the administrative record. *Amici* believe they are well positioned to inform the Court about the relevant research and what it portends about how the 2020 Rule will impact the lives and health of LGBT Americans.[2]

Summary of Argument

LGBT people suffer discrimination in health care and coverage based on their sexual orientation or gender identity. The U.S. Department of Health and Human Services' ("HHS") regulation *Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority*, 85 Fed. Reg. 37,160 (June 19, 2020) ("2020 Rule"), threatens to impose great harm on LGBT people by perpetuating this discrimination. As the administrative record shows, discrimination directly impairs the health outcomes for LGBT people, and also produces

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[1] *Amici* are identified in the Appendix hereto.

[2] *Amici* certify that no party or its counsel authored any part of this brief, and that no person other than *amici* and their counsel made any monetary contributions intended to fund the preparation or submission of this brief.

other consequences that undermine their health and well-being. Among other things, the discrimination and stigma LGBT people endure causes minority stress, which in turn creates substantial health disparities between LGBT individuals and the general population.

Argument

I. THE ADMINISTRATIVE RECORD DEMONSTRATED THE PREVALENCE AND HARMFUL EFFECTS OF ANTI-LGBT DISCRIMINATION IN HEALTH COVERAGE AND HEALTH CARE.

A. LGBT People Experience Discrimination in Health Care.

The administrative record detailed the significant and pervasive discrimination that LGBT people continue to face in health settings.[3] This discrimination takes many forms, including the outright denial of care and the provision of substandard care. Williams Institute Cmt. ("Comment") at 19-20 & n.27; Institute of Medicine, *The Health of Lesbian, Gay, Bisexual, and Transgender People* (2011) ("IOM") at 62 (cited in Comment at 20).

For example, 56% of lesbian, gay, and bisexual respondents and 70% of transgender respondents in a nationwide survey reported experiencing at least one form of health care discrimination. Lambda Legal, *When Health Care Isn't Caring*, at 5 (2010) (cited in Comment at 20); *see also* Jen Kates et al., *Health and Access to Care and Coverage for Lesbian, Gay, Bisexual, and Transgender Individuals in the U.S.*, at 12-14 (2018) (cited in Comment at 21) (detailing barriers LGBT people face to access care). A separate nationally representative survey found that 8% of lesbian, gay, and bisexual individuals and 29% of transgender

[3] All cited sources are part of the administrative record unless otherwise noted. Each public comment has a unique identifier on the regulations.gov website. The public comments cited herein include, among others, those submitted by The Williams Institute (153416) ("Comment"); the National Center for Transgender Equality (153312) ("NCTE Cmt."); the Trevor Project (128284) ("Trevor Cmt."); the Jim Collins Foundation (155600) ("JCF Cmt."); and the American Psychiatric Association (107673) ("APA Cmt.").

individuals reported being refused care entirely in the preceding twelve months because of their sexual orientation or gender identity. Shabab Ahmed Mirza & Caitlin Rooney, *Discrimination Prevents LGBT People from Accessing Health Care* at 2-3 (2018) ("Mirza") (cited in Comment at 20). Indeed, HHS itself found in 2016 that a quarter of "transgender and gender-nonconforming respondents reported being denied needed treatment, being harassed in health care settings, and postponing medical care because of discrimination by providers," and noted many barriers to transgender coverage and care. *See Nondiscrimination in Health Programs and Activities*, 81 Fed. Reg. 31,376, 31,460 (May 18, 2016) ("2016 Rule").

Numerous individual examples in the administrative record illustrate these general patterns. In one documented example, a transgender man could not obtain needed breast cancer treatment from the first two providers he visited; by the time he located a provider willing to treat him, it was too late for chemotherapy. NCTE Cmt. at 20. Another transgender patient was not even informed of his breast cancer diagnosis despite the provider reviewing the test results. *Id.* at 3; *cf.* Human Rights Watch, *You Don't Want Second Best: Anti-LGBT Discrimination in US Health Care*, at 22-23 (2018) ("HRW") (cited in Comment at 20) (detailing refusals of service collected in interviews, including a pediatrician's refusal to evaluate a same-sex couple's six-day-old child). In emergency situations, delay can be deadly. *E.g.*, JCF Cmt. at 11 (recounting an incident where paramedics and emergency room providers delayed treatment after discovering a passenger in a car crash was transgender, leading to her death).

In adopting the 2020 Rule, HHS noted (but then inexplicably disregarded) the numerous accounts in the record "where 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." 85 Fed. Reg. at 37,191-92.

B. Discrimination in Health Care Harms LGBT People.

1. Experiences of Discrimination and Even Fear of Discrimination by Health Care Providers Have Immediate and Direct Effects on the Health and Well-Being of LGBT People.

The immediate effects of discriminatory denials of care and substandard care are serious and evident. Medical conditions can worsen if they are not properly treated, but LGBT people who are subject to discrimination in health settings can often find it difficult to locate substitute providers. Comment at 21 & n.31; Mirza at 4-5 (18% of LGBT people overall and 41% living outside metropolitan areas ranked finding the same type of service at another location "very difficult" or "not possible"). Even in places where medical care is widely available, specialists able to treat conditions beyond the expertise of a general practitioner can be few and far between. Moreover, substandard care is particularly troubling because the patient may not realize at the time that the care they received is not the care they need. *E.g.*, NCTE Cmt. at 6-7.

In addition, discrimination—and even the fear of discrimination—in health care leads LGBT people to avoid or delay needed care. Comment at 21-22 & n.30 (citing HRW at 20; IOM at 62-64, 274; Mirza at 3-4; Lambda at 13). A recent nationally representative survey found that 8% of all LGBT people surveyed avoided or postponed needed medical care because of disrespect or discrimination from health care staff. Mirza at 4. That figure rose to 14% among those who had experienced discrimination on the basis of their sexual orientation or gender identity in the past year. *Id.* LGBT people also avoid preventive care for fear of discrimination, which interferes with early detection and treatment. Office of Disease Prevention

and Health Promotion, *Lesbian, Gay, Bisexual, and Transgender Health*, *in* HEALTHY PEOPLE 2020 ("ODPHP") (quoted in Comment at 24); IOM at 222-25.

Separate surveys of transgender respondents reveal even higher rates of discrimination and avoidance. The 2015 U.S. Transgender Discrimination Survey, the largest survey of transgender people in the U.S. included in the administrative record, found that 23% of transgender individuals did not seek needed care because they feared mistreatment. Nat'l Ctr. for Transgender Equality, REPORT OF THE U.S. TRANSGENDER SURVEY at 98 (2015) ("USTS") (cited in NCTE Cmt. at 4). Another study based on data from a population-based survey of adults in California found that transgender adults were three times more likely to delay or never pick up a prescription. Jody L. Herman, Bianca D.M. Wilson & Tara Becker, *Demographic and Health Characteristics of Transgender Adults in California*, at 7 (2017) (outside the record); *see* NCTE Cmt. at 11-14 (collecting instances of prescription denials); *see* Mirza at 4 (22% of transgender respondents reported avoiding care within the past year because of discrimination) .

Even when LGBT people ultimately seek care, the expectation of discrimination can force patients to remain guarded, vigilantly on the lookout for potential threats. Comment at 22; IOM at 20; Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations*, 129:5 PSYCH. BULL. 674, 681 (2003) (cited in APA Cmt. at 3). Patients can be hesitant to share information or to ask relevant questions, thus risking uninformed and lower quality care from the provider. *See* Meyer at 682. As patients access care, they must decide whether to seek the health service, whether to come out to the provider, whether to bring a spouse whose presence may "out" them, and how and from whom they should disguise their identity. *See* IOM at 63-64, 224-25, 269, 274.

2. Prejudice and Stigma Result in Discrimination and Other Minority Stress Processes.

The effects of discrimination are not limited to the direct health impacts of denied, delayed, or substandard care. Societal prejudice and stigma against LGBT people place them at risk of discrimination in health care settings. Discriminatory treatment has cumulative and lasting health consequences that impact not only the individuals who personally face specific instances of discrimination but the LGBT community as a whole. Comment at 21-22.

Stigma and prejudice result in "minority stress," which is the "excess stress to which individuals from stigmatized social [groups] are exposed as a result of their social, often a minority, position." Meyer at 675; IOM at 20-23. Generally, stress is understood as the "physical, mental, or emotional pressure, strain, or tension" that requires engaging "the adaptive machinery of the individual." Meyer at 675. Much like how a bridge one day collapses if subjected to too much weight, our bodies break down due to stress. *E.g.*, *id.* Four decades of research prove that stress damages mental and physical health. Peggy A. Thoits, *Stress and Health: Major Findings and Policy Implications*, 51(S) J. HEALTH & SOC. BEHAV. S41 (2010) (outside the record).

Certain stressors are ubiquitous, like losing a loved one, being fired, or a difficult commute. Meyer at 675. Minority stress is additional "stress related to a variety of stigma-related experiences that stem from" minority status, ranging from "prejudice-related stressful life events such as being attacked or fired" to "expectations of rejection regardless of actual discriminatory circumstances." David M. Frost et al., *Minority stress and physical health in sexual minority individuals*, 38:1 J. BEHAV. MED. at 1 (2015) (cited in cmt. no. 130579); IOM at 20-23. This stress is unique to minorities and increases the risk for diseases stress causes. Meyer at 679; *see also* Pamela J. Sawyer, et al., *Discrimination and the Stress Response:*

Psychological and Physiological Consequences of Anticipating Prejudice in Interethnic Interactions, 102 AM. J. PUB. HEALTH 1020, 1020 (2012) (outside the record).

The stress of a discriminatory event does not stop with that discrete incident. Discriminatory events "have a powerful impact more because of the deep cultural meaning they activate than because of the ramifications of the events themselves." Ilan H. Meyer, *Minority Stress and Mental Health in Gay Men*, 36 J. HEALTH & SOC. BEHAV. 38, 41-42 (1995) (cited in cmt. no. 154588). That is why even "[a] seemingly minor event . . . may evoke deep feelings of rejection . . . disproportionate to the event that precipitated them." *Id.* at 42. As a result, individuals subjected to discrimination alter how they interact with society, increase their vigilance to avoid future discrimination, and face increased stress levels. Meyer at 681-82.

3. Minority Stress Exacerbates LGBT Health Disparities.

Minority stress is linked to several LGBT health disparities, including disproportionate rates of psychological distress, depression, anxiety, substance-use disorders, and suicidal ideation and attempts. Comment at 23, 28; Frank A. Sattler et al., *Effects of Minority Stress, Group-Level Coping, and Social Support on Mental Health of German Gay Men*, 11:3 PLOS ONE (2016) (outside the record); Ilan H. Meyer & Jessica Dietrich, *Lifetime Prevalence of Mental Disorders and Suicide Attempts in Diverse Lesbian, Gay, and Bisexual Populations*, 98:6 AM. J. PUB. HEALTH 1004 (2008) (same); *see* Thoits (same).

In its goal-setting document, "Healthy People 2020," HHS highlighted stark realities that LGBT individuals face compared to other Americans due to anti-LGBT stigma:

- LGBT youth are 2 to 3 times more likely to attempt suicide;
- LGBT youth are more likely to be homeless;
- Lesbians are less likely to get preventive services for cancer;

- Gay men are at higher risk of HIV and other STDs, especially among communities of color;
- Lesbians and bisexual females are more likely to be overweight or obese;
- Transgender individuals have a high prevalence of HIV/STDs, victimization, mental health issues, and suicide and are less likely to have health insurance than [other individuals];
- Elderly LGBT individuals face additional barriers to health because of isolation and a lack of social services and culturally competent providers;
- LGBT populations have the highest rates of tobacco, alcohol, and other drug use.

ODPHP; *see also* Jen Kates et al., *Health and Access to Care and Coverage for Lesbian, Gay, Bisexual, and Transgender Individuals in the U.S.*, at 5 (2018) (cited in Comment at 21) (LGBT people often delay preventive care).

Further, LGBT people attempt suicide at rates many times greater than those of the general population. A recent study found that 39% of all LGBT youth surveyed had seriously considered suicide in the previous twelve months, as did more than half of transgender and non-binary youth. Trevor Project, *National Survey on LGBTQ Youth Mental Health 2019*, at 1 (2019) (cited in Trevor Cmt. at 2); ODPHP (LGBT youth are two to three times more likely than their non-LGBT peers to actually attempt suicide); Meyer at 685 (gay or bisexual men are six times more likely than their straight twins to have attempted suicide). Transgender individuals are particularly at risk for both suicidal thoughts and attempts. USTS at 5, 10, 110, 112-15 (finding transgender individuals attempt suicide at rates *nine times* the national average). These risks are heightened when LGBT people experience discrimination and stigma. Mark L. Hatzenbuehler et al., *Stigma as a Fundamental Cause of Population Health Inequalities*, 103 AM. J. PUB. HEALTH 813, 818 (2013) (adolescents living in high-stigma counties were 20% more likely to attempt suicide than their peers in counties with gay-straight alliance student

organizations and anti-bullying policies); IOM at 148-49 (noting relationship between childhood experiences of sexual minority status and later suicide attempts); Jody L. Herman et al, *Suicide Thoughts and Attempts Among Transgender Adults*, at 2 (2019) (outside the record) (USTS data show that 97.7% of transgender adults who experienced four or more discriminatory incidents in the prior year considered suicide, and 51% made an attempt); *see also Prescott v. Rady Children's Hosp.-San Diego*, 265 F. Supp. 3d 1090, 1096-100 (S.D. Cal. 2017) (parents stated Section 1557 claim where misgendering in hospital led to teenage son's suicide).

The Institute of Medicine (now the National Academy of Medicine), which operates under a Congressional charter, recognizes minority stress as one of four perspectives that together provide the best understanding of the causes of health outcomes in LGBT people. IOM at 7, 20-23, 294-95. Indeed, minority stress helps explain why LGBT people face higher levels of poverty, food insecurity, and unemployment than non-LGBT people. Comment at 22 & n.35. And of course these circumstances increase the need for health coverage and care.

HHS, too, has recognized the connection between anti-LGBT discrimination and negative health outcomes. Comment at 23 & nn. 37-41 (citing ODPHP; HHS Centers for Disease Control and Prevention, *Gay and Bisexual Men's Health, Stigma, and Discrimination*; and HHS Office of Women's Health, *Lesbian and Bisexual Health*). For example, in "Healthy People 2020," HHS explained that "LGBT individuals face health disparities linked to social stigma, discrimination, and denial of their civil and human rights" and that the "social determinants affecting the health of LGBT individuals largely relate to oppression and discrimination." ODPHP; Comment at 19-25. Likewise, in previously adopting the 2016 Rule, HHS found that "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." 81 Fed. Reg. at 31,460-61.

C. The 2020 Rule Stands to Increase Discrimination Against LGBT People and Worsen Health and Health Disparities.

The 2020 Rule eliminates protections against discrimination based on sexual orientation and gender identity, and as a consequence, will increase the amount of discrimination that occurs. More discriminatory incidents will increase the immediate health risks of being denied access to care, as well as the cumulative effects of minority stress, and the health disparities for LGBT individuals that will follow. These effects were amply documented in the administrative record. 85 Fed. Reg. 37,225. By indicating that discriminatory conduct is permitted, HHS will encourage discrimination. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 521 (2009) ("To predict that complete immunity . . . will lead to a substantial increase [in violations] . . . seems to us an exercise in logic rather than clairvoyance."). This in turn will negatively impact the health and well-being of LGBT people and exacerbate health disparities.

Conclusion

For the foregoing reasons, *amici* submit this brief in opposition to Defendants' motion to dismiss.

Dated: New York, New York
November 20, 2020

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APPENDIX

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