

Congress of the United States
Washington, DC 20515

August 12, 2019

The Honorable Alex Azar
Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Re: RIN 0945-AA11

Dear Secretary Azar:

We write to express our strong opposition to the proposed rule (RIN 0945-AA11) to rollback key provisions of the Health Care Rights Law, Section 1557 of the Affordable Care Act (ACA). With the enactment of the Health Care Rights Law, a landmark law that prohibits discrimination against patients on the basis of race, color, national origin, age, disability, and sex (including gender identity), sex stereotyping, pregnancy, and termination of pregnancy in health care, Congress intended to prohibit discrimination in health care, including by health insurance companies. Yet, the proposed rule would dramatically undermine Congressional intent by inviting widespread discrimination, including by allowing insurance companies, hospitals, doctors, nurses, and other healthcare providers and entities to deny patients care because of who they are, what language they speak, their sexual orientation or gender identity, or the color of their skin.

The proposed rule impermissibly seeks to exempt many health insurance plans, as well as any health program or activity the Department of Health and Human Services (HHS) runs and that was not created by Title I of the ACA, from the anti-discrimination provisions. It would also eliminate the fundamental requirement all patients receive notice of their rights, remove protections for patients with Limited English Proficiency (LEP), and allow health care entities that are controlled by a religious organization to be exempt from the Health Care Rights Law's sex discrimination provisions if the entity claims complying with the provision conflicts with its religious beliefs. Furthermore, the proposed rule ignores twenty years of federal court precedent by proposing to eliminate protections against discrimination on the basis of gender identity and completely disregards Supreme Court precedent on discrimination based on sex stereotyping. Although the proposal acknowledges that Title IX prohibits discrimination based on pregnancy, including termination of pregnancy, it attempts to remove any recognition of that protection from the rule, and refuses to state whether the Department would enforce those protections. This is an attack on all of our civil rights and will harm the very people Congress intended the Health Care Rights Law to protect.

The Proposed Rule Will Harm Patients and Increase Health Disparities

The proposed rule would embolden discrimination against lesbian, gay, bisexual, transgender, and queer (LGBTQ) people, including those who are nonbinary and gender nonconforming. LGBTQ patients are disproportionately more likely to be uninsured or underinsured and face discrimination in accessing care,

including discrimination on the basis of sex stereotypes. If this rule were finalized, an estimated two million transgender patients, who already face significant barriers to care, could be unlawfully denied access to the care they need or forego care entirely for fear of discrimination. In attempting to deny protection from discrimination based on gender identity or sex stereotypes, the proposed rule ignores the statutory text of the Health Care Rights Law and makes improper conclusions about Congress' intent. The Supreme Court repeatedly has held that Congress' inaction with respect to amending or clarifying a statute is not a proper basis for interpreting the law. Indeed, Members of Congress over the years have introduced legislation to overturn judicial interpretations that gender identity discrimination is sex-based, as well as legislation aiming to codify that case law.

The proposed rule further would undermine protections for LGBTQ individuals by attempting to remove explicit gender identity and sexual orientation nondiscrimination protections in ten unrelated Centers for Medicare and Medicaid Services (CMS) regulations. These changes have been proposed without any legal, policy, or cost-benefit analyses as well as without knowledge of their potential impacts on various CMS programs and on LGBTQ patients.

In addition, the proposed rule takes aim at access to reproductive health care. It would add a religious exemption which could permit a religiously-affiliated health care entity to refuse to prescribe contraception to patients because they are not married or refuse to provide fertility treatment to a same-sex couple or transgender individual. The proposed rule also seeks to improperly incorporate Title IX's provisions related to abortion, including the Danforth Amendment which requires "neutrality" with respect to abortion. Although discrimination based on sex encompasses discrimination based on pregnancy and related conditions, HHS refuses to state it would enforce those provisions against a clinic that harassed patients because they were seeking abortions or refused to provide the standard of care for someone suffering a miscarriage or ectopic pregnancy. This could open the door to widespread discrimination that will fall heaviest on those least able to seek health care elsewhere, including people living in rural areas and people of color, who already face harassment and discrimination during pregnancy.

The proposed rule also would pull back dramatically on language access protections. For LEP individuals and those who have LEP family members, the requirements for including taglines on significant documents helps ensure linguistically appropriate access to care. The proposed rule's further elimination of language access plans means covered entities may not identify appropriately the language services they should have in place before an LEP patient arrives for care. Additionally, the elimination of notices to inform patients about their rights and the entity's requirements not to discriminate affects all individuals. Many individuals may not know about their rights, how to request language services, or how to file a complaint if they face discrimination without such notices. While the proposed rule notes the costs of providing notices and taglines and expected preparation of language access plans, the Office of Civil Rights (OCR) failed to balance these costs with the critical need for patients to know they are protected from discrimination. We believe a full analysis would show the proposed elimination of notices, taglines, and language access plans is harmful to patients, and we strongly oppose these revisions.

Further, Section 1557 and its 2016 implementing regulations prohibit health insurance companies from discriminating through marketing practices and benefit design. These protections are especially important for people with disabilities and chronic conditions, including those living with HIV, which disproportionately impacts people of color. The proposed rule seeks to exempt most health insurance

plans from Section 1557's nondiscrimination protections and eliminate the prohibition on discriminatory benefit design and marketing. This could result in health insurers excluding benefits or designing prescription drug formularies to limit access to medically-necessary care for those living with disabilities and other chronic conditions.

The Proposed Rule Signals an Abrogation of HHS's and OCR's Duty to Faithfully Enforce the Health Care Rights Law and Protect Patients from Discrimination

The proposed rule would limit the enforcement mechanisms currently available under Section 1557. Congress intended, as the plain language of Section 1557 shows, for the enforcement mechanisms available under Title VI, Title IX, Section 504, and the Age Discrimination Act to be available for any individual discriminated under the grounds protected by the law. The rule's rollback of this enforcement scheme would impose barriers on those seeking justice, particularly those who have experienced discrimination for intersecting characteristics, such as an African American woman of color who has been discriminated against because of both her race and gender.

The Proposed Rule Must be Withdrawn in its Entirety

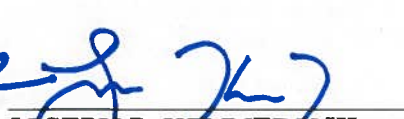
No entity receiving government funding should discriminate against their patients. The proposed rule is yet another attack on LGBTQ individuals, those seeking reproductive health care, immigrants, individuals who are LEP, those living with low incomes, and individuals living at the intersections of these identities. These communities already face too many barriers to accessing quality, affordable health care. This proposed rule will embolden discrimination in our health care system and have devastating impacts on access to health care for millions across this country, exacerbating already troubling health disparities. Not only would this harm the individuals who have historically and currently still face discrimination, but it also would increase public health costs. Yet the Department failed to consider the impact this proposed rule will have on patients and on public health. Instead, it focuses on the cost-savings to insurance companies and hospitals by eliminating important consumer protections and the cost of compliance with civil rights law.

HHS has a duty to enforce faithfully the laws Congress enacted, and OCR has a duty to protect people against discrimination in healthcare. The proposed rule is an abrogation of both of those duties and should be withdrawn in its entirety.

Sincerely,



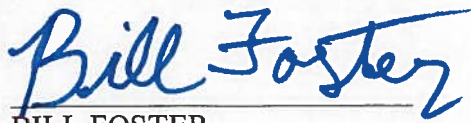
BARBARA LEE
Member of Congress



JOSEPH P. KENNEDY III
Member of Congress



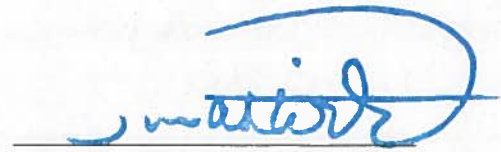
DIANA DeGETTE
Member of Congress



BILL FOSTER
Member of Congress



JACKIE SPEIER
Member of Congress



SUSAN WILD
Member of Congress



LLOYD DOGGETT
Member of Congress



ANN KIRKPATRICK
Member of Congress



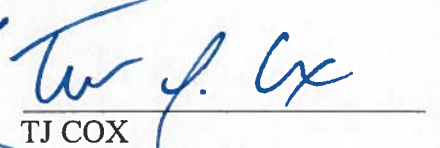
SEAN CASTEN
Member of Congress



AYANNA PRESSLEY
Member of Congress



BOBBY L. RUSH
Member of Congress



TJ COX
Member of Congress



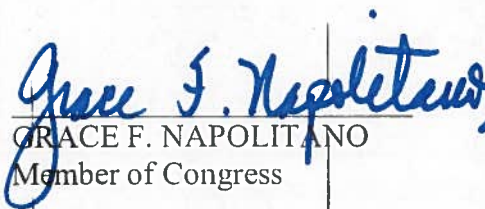
RO KHANNA
Member of Congress



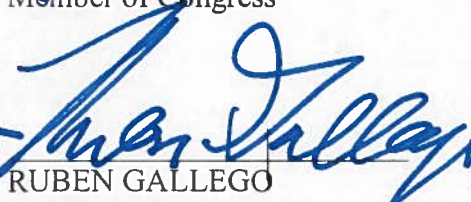
JAN SCHAKOWSKY
Member of Congress



ANDY LEVIN
Member of Congress



GRACE F. NAPOLITANO
Member of Congress



RUBEN GALLEGO
Member of Congress



MARK POCAN
Member of Congress



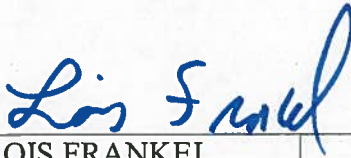
ALAN LOWENTHAL
Member of Congress



SCOTT H. PETERS
Member of Congress



ADRIANO ESPAILLAT
Member of Congress




LOIS FRANKEL
Member of Congress




BONNIE WATSON COLEMAN
Member of Congress



SUSAN A. DAVIS
Member of Congress



EDDIE BERNICE JOHNSON
Member of Congress



DEREK KILMER
Member of Congress

JENNIFER WEXTON
Member of Congress



BRIAN HIGGINS
Member of Congress

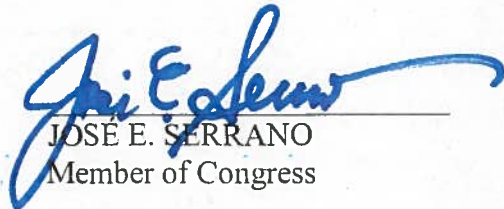
JULIA BROWNLEY
Member of Congress



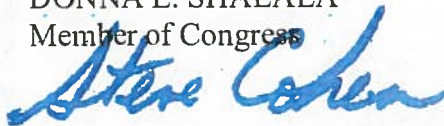
DONNA E. SHALALA
Member of Congress



VERONICA ESCOBAR
Member of Congress



JOSE E. SERRANO
Member of Congress



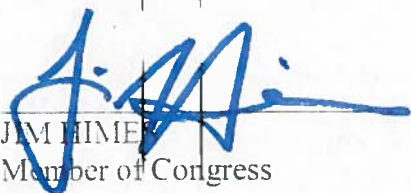
STEVEN COHEN
Member of Congress



ELIOT L. ENGEL
Member of Congress



BETTY MCCOLLUM
Member of Congress



JIM HIMES
Member of Congress



DORIS O. MATSUI
Member of Congress



JUAN VARGAS
Member of Congress



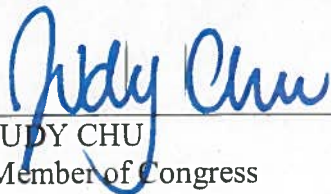
SUZANNE BONAMICI
Member of Congress



ROBIN L. KELLY
Member of Congress



DONALD S. BEYER, JR.
Member of Congress



JUDY CHU
Member of Congress



ANDRÉ CARSON
Member of Congress



TED W. LIEU
Member of Congress

Tony Cardenas Kathy Casto

TONY CÁRDENAS
Member of Congress

KATHY CASTOR
Member of Congress

Deb Haaland

DEB HAALAND
Member of Congress

Bradley S. Schneider

BRADLEY S. SCHNEIDER
Member of Congress

Nydia M. Velázquez

NYDIA M. VELÁZQUEZ
Member of Congress

Peter Welch

PETER WELCH
Member of Congress

Peter A. DeFazio Jimmy Gomez Albio Sires

PETER A. DeFAZIO
Member of Congress

JIMMY GOMEZ
Member of Congress

ALBIO SIRES
Member of Congress

Debbie Wasserman Schultz

DEBBIE WASSERMAN SCHULTZ
Member of Congress

Madeline Dean

MADELEINE DEAN
Member of Congress

Charlie Crist

CHARLIE CRIST
Member of Congress

Jamie Raskin

JAMIE RASKIN
Member of Congress

Jerrold Nadler Jim McGovern

JERROLD NADLER
Member of Congress

JAMES P. MCGOVERN
Member of Congress

Linda T. Sanchez

LINDA T. SANCHEZ
Member of Congress

Theodore E. Deutch

THEODORE E. DEUTCH
Member of Congress

Grace Meng

GRACE MENG
Member of Congress

Chellie Pingree

CHELLIE PINGREE
Member of Congress

Nita M. Lowey

NITA M. LOWEY
Member of Congress

Brad Sherman

BRAD SHERMAN
Member of Congress

Katherine M. Clark

KATHERINE CLARK
Member of Congress

Ann McLane Kuster

ANN McLANE KUSTER
Member of Congress

Susie Lee

SUSIE LEE
Member of Congress

Lizzie Fletcher Norma J Torres Harley Rouda

LIZZIE FLETCHER
Member of Congress

NORMA J TORRES
Member of Congress

HARLEY ROUDA
Member of Congress

David Scott
DAVID SCOTT
Member of Congress

Elijah E. Cummings
ELIJAH E. CUMMINGS
Member of Congress

Rosa L. DeLauro
ROSA L. DeLAURO
Member of Congress

Kurt Schrader
KURT SCHRADER
Member of Congress

Kathleen M. Rice
KATHLEEN M. RICE
Member of Congress

Adam Smith
ADAM SMITH
Member of Congress

Dina Titus
DINA TITUS
Member of Congress

Tim Ryan
TIM RYAN
Member of Congress

Lisa Blunt Rochester
LISA BLUNT ROCHESTER
Member of Congress

Greg Stanton
GREG STANTON
Member of Congress

Dutch Ruppersberger
DUTCH RUPPERSBERGER
Member of Congress

Nanette Diaz Barragan
NANETTE DIAZ BARRAGAN
Member of Congress

Earl Blumenauer
EARL BLUMENAUER
Member of Congress

Raul M. Grijalva
RAUL M. GRIJALVA
Member of Congress

David N. Cicilline
DAVID N. CICILLINE
Member of Congress

Katie Hill
KATIE HILL
Member of Congress

Adam B. Schiff
ADAM B. SCHIFF
Member of Congress


Paul D. Tonko
PAUL D. TONKO
Member of Congress



JIMMY PANETTA
Member of Congress



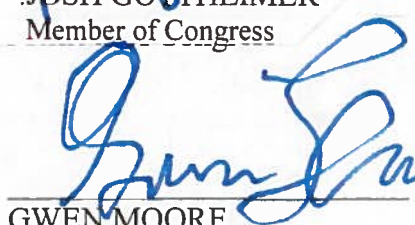
JOSH GOTTHEIMER
Member of Congress



CAROLYN B. MALONEY
Member of Congress



KATIE PORTER
Member of Congress



GWEN MOORE
Member of Congress



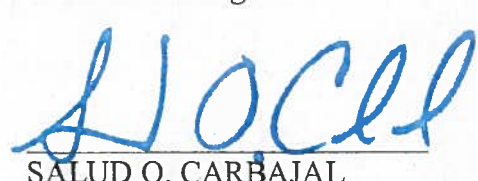
AL GREEN
Member of Congress



JOE COURTNEY
Member of Congress




HENRY C. "HANK" JOHNSON, JR.
Member of Congress



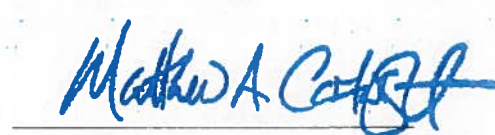
SALUD O. CARBAJAL
Member of Congress



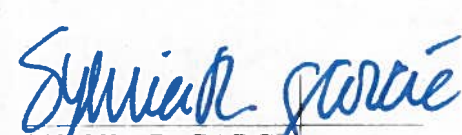
BRENDA L. LAWRENCE
Member of Congress




KAREN BASS
Member of Congress



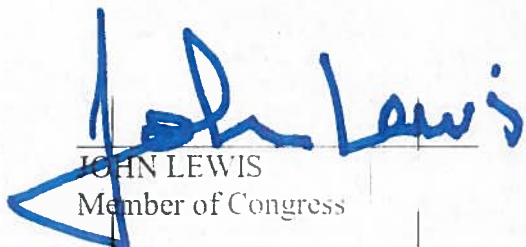
MATT CARTWRIGHT
Member of Congress



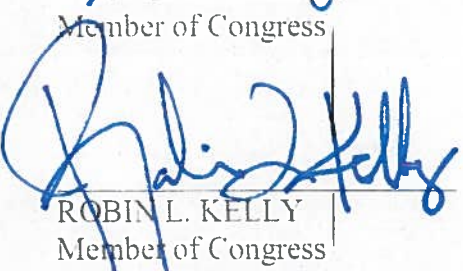
SYLVIA R. GARCIA
Member of Congress



FILEMON VELA
Member of Congress



JOHN LEWIS
Member of Congress




ROBIN L. KELLY
Member of Congress




ROBERT L. HASTINGS
Member of Congress



DANNY K. DAVIS
Member of Congress



DONALD M. PAYNE, JR.
Member of Congress




JOHN B. LARSON
Member of Congress




DARREN SOTO
Member of Congress



SEAN PATRICK MALONEY
Member of Congress





JOHN P. SARBANES
Member of Congress




RASHIDA TLAIB
Member of Congress


ZOE LOFGREN
Member of Congress


EMANUEL CLEAVER, II
Member of Congress

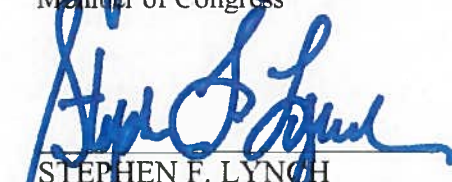

YVETTE D. CLARKE
Member of Congress


JOHN YARMUTH
Member of Congress



JOE NEGUSE
Member of Congress


LUCILLE ROYBAL-ALLARD
Member of Congress



G.K. BUTTERFIELD
Member of Congress

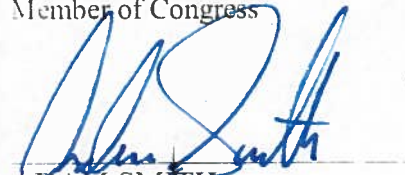

STEPHEN F. LYNCH
Member of Congress

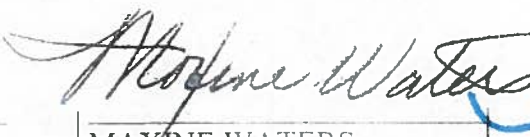

GREGORIO KILILI CAMACHO SABLÁN
Member of Congress

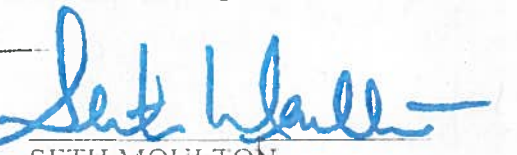

MARK DeSAULNIER
Member of Congress


WILLIAM R. KEATING
Member of Congress


GILBERT R. CISNEROS, JR.
Member of Congress


ADAM SMITH
Member of Congress


MAXINE WATERS
Member of Congress


SETH MOULTON
Member of Congress