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July 21, 2020

By CM/ECF

The Honorable Fredric Block
United States District Judge
United States Courthouse
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: *Tanya Asapansa-Johnson Walker, et al. v. Alex M. Azar II, et al.*, No. 20-2834

Dear Judge Block,

We represent the U.S. House of Representatives, which seeks leave to file a brief *amicus curiae* in support of Plaintiffs in the above-referenced matter.

Background. Section 1557 of the Patient Protection and Affordable Care Act prohibits discrimination in health care on the basis of certain protected characteristics, including an individual's sex. This case concerns a new rule published by the United States Department of Health and Human Services on June 19, 2020, to implement Section 1557. *See Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority*, 85 Fed. Reg. 37,160 (June 19, 2020). The new rule withdraws certain existing protections against discrimination in health care for LGBTQ (lesbian, gay, bisexual, transgender, and queer) individuals.

Plaintiffs have filed this action challenging that rule, and they have filed a motion for a preliminary injunction seeking to enjoin its implementation. *See* Dkt. No. 8 (June 14, 2020). As they argue, the new rule "unlawfully redefines 'on the basis of sex' to specifically exclude a person's transgender status, sexual orientation, or gender identity; removes prior prohibitions against discrimination in health care; and eliminates remedial procedures to address discrimination by health care professionals." *Id.* at 1. This Court ordered that Defendants file and serve any opposition paper to Plaintiffs' motion by Thursday, July 31, 2020. Dkt. No. 9, at 2 (July 16, 2020).

Request to File Brief *Amicus Curiae.* The U.S. House of Representatives respectfully requests this Court's permission to file a motion for leave to file a brief *amicus curiae* in support of Plaintiffs. Plaintiffs and Defendants consent to the filing of this brief. The House filed an identical brief *amicus curiae* in a similar case in the U.S. District Court for the District of Columbia with authorization from that court. *See* Dkt. Nos. 34, 36, *Whitman-Walker Clinic, Inc., et al. v. U.S. Dep't of Health & Human Servs.*, Case No. 20-cv-01630-JEB (July 15, 2020).

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The House has a special interest in the subject matter of this case because it involves the question whether the new rule is consistent with the Affordable Care Act, a law duly enacted by Congress. The House has a strong institutional interest in the effective and nondiscriminatory implementation of the Affordable Care Act and in ensuring that the millions of Americans who have benefited from its reforms and protections continue to do so.

The proposed *amicus* brief would offer the Court the unique perspective of the House regarding the reasons it passed the Affordable Care Act. Specifically, as the proposed *amicus* brief explains, Congress passed the Affordable Care Act after significant study into the problems with then-existing health insurance markets, and the House is thus particularly well suited to explain to the Court why Congress enacted this landmark legislation and how it has helped ensure that all Americans have access to quality, affordable health insurance and care, including through Section 1557's broad prohibition on discrimination in health care.

Moreover, the House's proposed brief will explain that the Supreme Court's decision in *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731 (2020), makes clear that Section 1557's prohibition on health care discrimination on the basis of sex necessarily prohibits discrimination on the basis of sexual orientation and gender identity. As the Court explained, "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Id.* at 1741. The Administration's new rule, which narrowly interprets the prohibition on sex discrimination in the Affordable Care Act, cannot be reconciled with *Bostock*.

Finally, the House's proposed brief will explain that, in addition to violating the text of the Affordable Care Act, the new rule conflicts with Congress's plan in passing that law, which was to *expand* access to quality, affordable health insurance and care and to prevent discrimination against all Americans. Indeed, Section 1557 is part and parcel of Congress's intent to eliminate discrimination, and applying its protections to prevent discrimination against LGBTQ people is necessary to achieving that goal. When Congress passed the Act, LGBTQ individuals often faced insurers and providers who refused to cover or care for them, even though the LGBTQ community generally has significantly greater health care needs than other communities.

In short, the House's brief will explain that the Administration's withdrawal of existing anti-discrimination protections for LGBTQ individuals seriously undermines Congress's intent in passing the Affordable Care Act to prevent discrimination and ensure that all Americans have access to the health care they need. With leave from the Court, the House will file this brief no later than Thursday, July 23, 2020, eight days before Defendants' opposition to Plaintiffs' motion for a preliminary injunction is due. The brief will be approximately 5,200 words in length. Counsel appreciates the Court's attention to this request.

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Respectfully submitted,

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