

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

STATE OF NEW YORK, STATE OF CALIFORNIA, COMMONWEALTH OF MASSACHUSETTS, STATE OF COLORADO, STATE OF CONNECTICUT, STATE OF DELAWARE, DISTRICT OF COLUMBIA, STATE OF HAWAII, STATE OF ILLINOIS, STATE OF MAINE, STATE OF MARYLAND, STATE OF MICHIGAN, STATE OF MINNESOTA, STATE OF NEVADA, STATE OF NEW JERSEY, STATE OF NEW MEXICO, STATE OF NORTH CAROLINA, STATE OF OREGON, COMMONWEALTH OF PENNSYLVANIA, STATE OF RHODE ISLAND, STATE OF VERMONT, COMMONWEALTH OF VIRGINIA, and STATE OF WISCONSIN,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, ALEX M. AZAR, *in his official capacity as Secretary of Health and Human Services*, and ROGER SEVERINO, *in his official capacity as Director of the Office for Civil Rights at the United States Department of Health and Human Services*,

Defendants.

No. 1:20-cv-5583-AKH

**PLAINTIFFS' LOCAL RULE 56.1
STATEMENT OF UNDISPUTED MATERIAL FACTS**

Pursuant to Local Rule 56.1 of the U.S. District Court for the Southern District of New York, Plaintiffs submit the following statement of undisputed material facts.

I. THE 2020 RULE

1. On June 14, 2019, the Department of Health and Human Services (“HHS” or “the Department”) published in the Federal Register a Notice of Proposed Rulemaking revising the Department’s 2016 Rule implementing Section 1557 of the Affordable Care Act. *Nondiscrimination in Health and Health Education Programs or Activities*, 84 Fed. Reg. 27,846 (June 14, 2019) (the “2019 NPRM”). The 2019 NPRM’s proposals included eliminating from the scope of Section 1557’s protections, the definition of “on the basis of sex,” removing express requirements for covered entities regarding treatment of transgender people, reducing requirements for delivering language assistance to Limited English Proficiency (“LEP”) individuals, and excluding from the Rule’s coverage many private health insurance plans, the Federal Employee Health Benefits program, Medicare Part B plans, and many health programs and activities administered by HHS. *Id.* at 27,850-51, 27,856, 27,860, 27,865, 27,868, 27,869-70, 27,870-71, 27,883-84. The 2019 NPRM also proposed “conforming” amendments to HHS’s Title IX regulations and removing prohibitions against sexual orientation and gender identity discrimination from several unrelated regulations for grant-making programs run by the Center for Medicare and Medicaid Services. *Id.* at 27,869-71.

2. HHS received 198,845 comments in response to the Proposed Rule from individuals, civil rights groups, medical and public health organizations, scholars, members of Congress, health providers, and state and local agencies, including from the Plaintiff States. *See* 2019 NPRM docket, available at <https://www.regulations.gov/docket?D=HHS-OCR-2019-0007>.

3. On June 19, 2020, HHS published in the Federal Register the final rule, *Nondiscrimination in Health and Health Education Programs or Activities*, 85 Fed. Reg. 37,160 (June 19, 2020), with an effective date of August 18, 2020 (the “2020 Rule” or “Final Rule”).

II. PLAINTIFF STATES' HEALTH CARE NONDISCRIMINATION PROTECTIONS

4. State laws and regulations provide for more robust anti-discrimination protections in health care for LGBTQ and LEP individuals, as well as for women and other people who can become pregnant. Comeaux Decl. ¶¶ 5, 7-9 (New Mexico) [Ex. 27]; Powell Decl. ¶ 9 (New York) [Ex. 29]; Schell-Guy Decl. ¶ 9 (New York) [Ex. 30]; Wilson Decl. ¶¶ 11-12 (North Carolina) [Ex. 31]; Allen Decl. ¶ 5 (Oregon) [Ex. 33]; Strumolo Decl. ¶ 9 (Vermont) [Ex. 34]; Roem Decl. ¶¶ 11, 13, 16 (Virginia) [Ex. 35]; Kimsey Decl. ¶ 8, 13 (Virginia) [Ex. 36]; Houdek Decl. ¶¶ 4-7 (Wisconsin) [Ex. 38]; Hughes Decl. ¶ 8, 11 (Connecticut) [Ex. 9]; Kofman Decl. ¶ 9 (District of Columbia) [Ex. 12]; Fullman Decl. ¶ 6 (Delaware) [Ex. 11]; Codes-Johnson Decl. ¶¶ 6-7, 10 (Delaware) [Ex. 10]; Planthold Decl. ¶¶ 5-7, 10 (Illinois) [Ex. 13]; Madden Decl. ¶¶ 6-10; 13 (Illinois) [Ex. 14]; Gillard Decl. ¶¶ 4, 6 (Maryland) [Ex. 17]; Eberle Decl. ¶ 6 (Maryland) [Ex. 18]; Sneirson Decl. ¶ 5 (Maine) [Ex. 15]; Amáez Decl. ¶ 7 (Maine) [Ex. 16]; Boyle Decl. ¶ 5, 7 (Massachusetts) [Ex. 19]; Beagan Decl. ¶¶ 7-8, 10 (Massachusetts) [Ex. 20]; Thomas George Decl. ¶¶ 5-8 (Massachusetts) [Ex. 21]; Hailu Decl. ¶¶ 9-10 (Minnesota) [Ex. 22]; Vaynerman Decl. ¶¶ 5, 8 (Minnesota) [Ex. 23]; Medina-Forrester Decl. ¶¶ 11-14 (New Jersey) [Ex. 25]; Schaler-Haynes Decl. ¶¶ 7-10 (New Jersey) [Ex. 26]; Kunkel Decl. ¶ 5 (New Mexico) [Ex. 28]; Maylath Decl. ¶¶ 6, 10 (Nevada) [Ex. 24]; Bimestefer Decl. ¶¶ 8, 11 (Colorado) [Ex. 7]; Conway Decl. ¶¶ 9, 11-15, 21 (Colorado) [Ex. 8]; Kish Decl. ¶ 5 (California) [Ex. 6]; Lara Decl. ¶¶ 6, 12, 15 (California) [Ex. 5]; Novais Decl. ¶ 5 (Rhode Island) [Ex. 32].

III. HARMS TO THE PLAINTIFF STATES

A. The States Have Incurred and Will Continue to Incur Regulatory Burdens and Administrative Costs as a Result of the Final Rule.

5. In response to the Final Rule, the States have incurred and will incur costs issuing guidance and directives confirming that their state agencies will: (1) investigate discrimination in

health care by a broad range of entities, including private insurance companies providing employer-based plans; (2) investigate complaints alleging discrimination on the basis of gender identity, sexual orientation, and pregnancy status; and (3) require language access and interpretive services. Allen Decl. ¶ 5 (Oregon) [Ex. 33], Amáez Decl. ¶¶ 9, 10 (Maine) [Ex. 16]; Black Decl. ¶ 4 (Illinois) [Ex. 37]; Kunkel Decl. ¶ 5 (New Mexico) [Ex. 28]; Houdek Decl. ¶¶ 9-12 (Wisconsin) [Ex. 38]; Madden Decl. ¶¶ 16, 17 (Illinois) [Ex. 14]; Maylath Decl. ¶¶ 9, 13 (Nevada) [Ex. 24]; Planthold Decl. ¶¶ 10, 11 (Illinois) [Ex. 13]; Powell Decl. ¶¶ 12-15 (New York) [Ex. 29]; Kimsey Decl. ¶¶ 10-11 (Virginia) [Ex. 36]; Hailu Decl. ¶ 13 (Minnesota) [Ex. 22]; Novais Decl. ¶ 6 (Rhode Island) [Ex. 32].

6. The California Department of Insurance has incurred costs to issue a notice to all California health insurers clarifying that the 2020 Rule does not preempt state law and that health insurers must continue to comply with California’s anti-discrimination laws. Lara Decl. ¶ 20 [Ex. 5].

7. New York’s Department of Financial Services (“NYS DFS”) expended resources to draft, review, and publish a Circular Letter on June 28, 2020, to remind regulated insurers of New York’s non-discrimination protections based on sexual orientation, gender identity or expression, and transgender status and the requirements pertaining to preventive care and screenings. Drafting and review of the Circular Letter took NYS DFS attorneys a significant amount of time. Powell Decl. ¶ 14 [Ex. 29].

8. The Oregon Health Authority (“OHA”) issued a memo to both affected individuals and the regulated community informing them that despite the 2020 Rule, the regulated community must continue to comply with Oregon’s antidiscrimination laws. *Changes to ACA Section 1557 do not affect Oregon Health Plan coverage of gender transition services* (June 25,

2020), Exhibit A, Allen Decl. [Ex. 33]; *see also* Allen Decl. ¶ 5 [Ex. 33]. If the 2020 Rule remains in place, OHA plans to send out further guidance on the changes related to language access necessitated by the 2020 Rule. Allen Decl. ¶ 6 [Ex. 33]. Preparing these guidance documents consumes and will continue to consume significant staff time and resources at OHA, increasing its expenses. *Id.* at ¶¶ 9-10.

9. The Illinois Department of Human Rights, Department of Insurance, and Department of Healthcare and Family Services issued a joint agency communication “to clarify the 2020 Final Rule’s impact on residents of Illinois, to identify the protections from discrimination that exist in State law, and to remind the healthcare community of their ongoing obligations to deliver healthcare services in a non-discriminatory manner,” *Guidance Relating to Nondiscrimination in Healthcare Services in Illinois* (June 26, 2020), <https://www2.illinois.gov/dhr/Documents/Joint%20Nondiscrimination%20Guidance.pdf>, including on bases no longer covered under the Final Rule. Planthold Decl. ¶ 11 [Ex. 13]; Madden Decl. ¶ 16 & Ex. A [Ex. 14].

10. The Wisconsin Office of the Commissioner of Insurance (“WI OCI”) issued a bulletin clarifying legal requirements regarding nondiscrimination in health insurance coverage for individuals who are transgender and/or who have gender dysphoria, which required at least 10 hours of staff time. *Nondiscrimination Regarding Coverage for Insureds Who Are Transgender or Gender Dysphoric*, Wi. Off. of Comm’r of Ins. (June 29, 2020), <https://oci.wi.gov/Pages/Regulation/Bulletin20200629Nondiscrimination.aspx>. Houdek Decl. ¶¶ 9-10 [Ex. 38].

11. In Massachusetts, the state Medicaid and Children’s Health Insurance Program (“MassHealth”) prepared and sent a message to managed care plans and other providers

emphasizing that the changes in the 2020 Rule do not change Massachusetts state law protecting LGBTQ individuals from discrimination and requiring meaningful language access for LEP individuals. Boyle Decl. ¶ 11 [Ex. 19].

12. The New Jersey Department of Health (“NJDOH”) will likely need to update guidance to explain the inconsistencies between the 2020 Rule and state-level non-discrimination protections, which will require staffing, funding, and other resources across NJDOH offices. Medina-Forrester Decl. ¶ 16 [Ex. 25].

13. Rhode Island Department of Health plans to issue guidance to health care professionals and health care facilities to highlight the important differences between what the 2020 Rule requires and what Rhode Island state law requires. This will require at least 315 hours of staff time in the first year following promulgation of the 2020 Rule. Novais Decl. ¶ 6 [Ex. 32].

14. The 2020 Rule engenders substantial confusion and fear of discrimination among health care consumers. Many individuals previously covered by the 2016 Rule’s protections are already confused and distressed by the 2020 Rule, as they do not know if they will be able to rely on state-level protections instead and/or are unaware of state law protections. Hughto Decl. ¶¶ 40-42 [Ex. 41]; *see also* Vera Decl. ¶¶ 5-7 (Trans Lifeline) [Ex. 42]; Conway Decl. ¶ 24 (Colorado) [Ex. 8]; Powell Decl. ¶ 10 (New York) [Ex. 29]; Allen Decl. ¶ 11 (Oregon) [Ex. 33]; Lewis Decl. ¶ 12 (Side by Side) [Ex. 44]; Jones Decl. ¶ 9 (Wisconsin) [Ex. 45]; Davis Decl. ¶¶ 11-12 (Trevor Project) [Ex. 43].

15. Increased discrimination likely to result from the Rule and confusion about transgender-related legal protections will increase stress and internalized stigma among transgender people, and lead to the avoidance of needed care with significant health and financial costs to transgender individuals. Hughto Decl. ¶¶ 49-51, 65 [Ex. 41]. For this reason, the States

have been forced to issue these notices in an effort to combat the harm that will result from the Rule. *See* Lara Decl. ¶¶ 6, 10-12 (discussing California’s efforts to combat discrimination against transgender Californians to avoid confusion which results in patients forgoing or delaying access to medical care, and other public health harms) [Ex. 5].

16. States expect to incur additional costs associated with hiring additional staff and/or training to address public confusion and fear of discrimination caused by the 2020 Rule. *See, e.g.*, Lara Decl. ¶ 19 (California) [Ex. 5]; Hughes Decl. ¶ 13 (Connecticut) [Ex. 9]; Codes-Johnson ¶ 11 (Delaware) [Ex. 10]; Madden Decl. ¶ 19 (Illinois) [Ex. 14]; Kofman ¶¶ 10-13 (approximately 75 hours of staff time) (District of Columbia) [Ex. 12]; Eberle Decl. ¶¶ 9-10 (Maryland) [Ex. 18]; Thomas George Decl. ¶ 13 (Massachusetts) [Ex. 21]; Vaynerman ¶ 8 (Minnesota) [Ex. 23]; Maylath Decl. ¶ 14 (Nevada) [Ex. 24]; Medina-Forrester Decl. ¶ 15 (New Jersey) [Ex. 25]; Schaler-Hayes Decl. ¶ 11 (New Jersey) [Ex. 26]; Wilson Decl. ¶ 24 (North Carolina) [Ex. 31]; Altman Decl. ¶ 26 (Pennsylvania) [Ex. 46]; Kimsey Decl. ¶¶ 8-9 (Virginia) [Ex. 36]; Jones Decl. ¶¶ 10-11 (Wisconsin) [Ex. 45]; Novais Decl. ¶ 7-8 (at least 120 hours of staff time) (Rhode Island) [Ex. 32].

17. California Department of Insurance expects that, because confusion triggered by the 2020 Rule will lead to additional calls to the Department, they will hire one or more compliance officers to field those inquiries. Lara Decl. ¶ 19 [Ex. 5]. Two additional Senior Insurance Compliance Officers would cost \$310,000 the first year and \$288,000 each year thereafter. *Id.* Training for those officers regarding the 2020 Rule and relevant state law would involve 10 hours of attorney time to develop and present the training, which would cost \$1,374. *Id.*

18. Because of the 2020 Rule’s removal of notice and tagline requirements and other language assistance requirements, California’s Department of Fair Employment and Housing (“CA DFEH”) plans to take steps to educate LEP Californians about their rights by engaging in a multi-lingual campaign. Kish Decl. ¶ 22 [Ex. 6].

19. New York’s Department of Financial Services has received comments from regulated insurers indicating that they would be implementing the Rule to remove the taglines alerting consumers of the availability of language assistance services from most consumer materials. NYS DFS has needed to analyze the Rule and New York state law to identify what actions must be taken to protect consumers and may need to promulgate a regulation to ensure tagline requirements remain in place. Powell Decl. ¶¶ 15-16 [Ex. 29].

20. States are preparing further guidance on the changes in the 2020 Rule regarding language access, which will consume significant staff time. *See* Allen Decl. ¶¶ 6, 9 (Oregon) [Ex. 33]; Medina-Forrester Decl. ¶ 17 (New Jersey) [Ex. 25]; Kimsey Decl. ¶¶ 8-10 (Virginia) [Ex. 36].

21. The Connecticut Commission on Human Rights and Opportunities (“CHRO”) anticipates that it will expend additional resources and time on training, guidance, and outreach to reduce confusion and clarify the impact of the 2020 Rule on Connecticut residents. CHRO plans to issue a guidance on Connecticut anti-discrimination laws and how they are impacted by the 2020 Rule, as well as holding six trainings for various stakeholders. Connecticut estimates the additional costs of these endeavors to be approximately \$6,000-\$11,000. Hughes Decl. ¶ 13 [Ex. 9].

22. Illinois Department of Human Rights plans, in light of the 2020 Rule, to prepare and conduct training and outreach to address confusion and combat increases in stigma and

discrimination. This outreach will be target both towards the public and to regulated entities. Madden Decl. ¶ 19 [Ex. 14].

23. In the District of Columbia, because the 2020 Rule will create a divergence between federal and District protections, the District of Columbia Health Benefit Exchange (“HBX”) must review and update existing educational materials. HBX also plans to provide additional training to its staff and partners to properly respond to consumer questions about their rights engendered by the confusion caused by the 2020 Rule. HBX estimates the updates and training to require an extra 75 hours of staff and contractor time beyond what was previously planned. Kofman Decl. ¶¶ 10-13[Ex. 12].

24. Minnesota Department of Human Rights expects to conduct outreach and issue publications to ensure that Minnesotans understand that they remain protected by state law and that entities in Minnesota understand their continued obligation not to discriminate on the grounds covered by state law. Vaynerman Decl. ¶ 8 [Ex. 23].

25. NJDOH may need to issue guidance to regulated entities about the necessity of language access and nondiscrimination in the absence of any federal mandate. Medina-Forrester Decl. ¶ 15 [Ex. 25]. NJDOH would also likely issue guidance to consumers to ensure that they are aware of New Jersey’s nondiscrimination protections, notwithstanding the 2020 Rule. Schaler-Hayes Decl. ¶ 11 [Ex. 26].

26. In New York, the Office of Addiction Services and Supports (“OASAS”) is developing training for providers on culturally competent care for LGBTQ individuals and investing resources to address the differences between state and federal protections to ensure that providers are aware of the more stringent state-level protections. Schell-Guy Decl. ¶ 15 [Ex. 30].

27. In response to the 2020 Rule, Virginia issued Executive Directive Five: Access to Affordable, Quality Health Care Coverage, which directed the Secretary of Health and Human Resources to develop a publicly-available Language Access Plan to regularly assess compliance with accessibility and usability of services, regardless of reading level or English proficiency. Kimsey Decl. ¶ 8 [Ex. 36]. Under this Executive Directive, the Department of Medical Assistance Services (“DMAS”) will continue to provide notice of nondiscrimination and language taglines whenever such taglines are necessary to ensure meaningful access to LEP individuals to Medicaid programs and services. *Id.* at ¶ 10.

28. Wisconsin’s Department of Health Services plans to train staff, consumers, and partners to mitigate confusion caused by the 2020 Rule. The development of these guidance documents will draw resources away from other priorities. Jones Decl. ¶¶ 10-11 [Ex. 45].

29. Maryland’s Health Benefit Exchange has already convened a stakeholder workgroup to assess the Rule’s impact, including updated carrier guidance that will need to be issued, regulations that may need to be issued, staff training needs, and consumer outreach and education needs. The development of these plans imposes on MHBE an unnecessary increased burden. Eberle Decl. ¶¶ 9-10 [Ex. 18].

30. Rhode Island Department of Health will need to field complaints and questions from the public regarding the 2020 Rule and revise existing fact sheets and know-your-rights material to reflect the changes in the 2020 Rule. This is expected to require at least 120 hours of staff time in the first year following promulgation of the 2020 Rule. Novais Decl. ¶ 7 [Ex. 32].

B. The Final Rule Inflicts Investigatory and Enforcement Costs, and Related Burdens, on the States.

31. The 2020 Rule will lead some providers to refuse care to transgender individuals and will lead to an increase in denied insurance claims for medically necessary procedures.

Hughto Decl. ¶¶ 35-37 [Ex. 41]. With the removal of explicit gender-identity-based protections under the 2020 Rule, religious providers and healthcare facilities will be able to deny care to transgender individuals if such care is in conflict with their religious beliefs. *Id.* n.36. Given that 1 out of 5 hospital beds reside in a religious hospital and 1 out of the 10 of the largest health systems in the U.S. in 2016 were Catholic, the sanctioned refusal of care to transgender individuals provided by the 2020 Rule could result in a sizable portion of the transgender people being denied care on the basis of religious beliefs with no ability to seek redress from HHS for such discriminatory conduct. *Id.*

32. CA DFEH does not have discretion to decline to process and investigate complaints within its jurisdiction, so any increase in complaints necessarily increases its workload. Kish Decl. ¶ 7 [Ex. 6]. CA DFEH anticipates that processing and resolving complaints that previously could have been filed with OCR could result in at least \$1,346 to \$2,308 of staff time per complaint, and that even a conservative estimate supports an increase of 24 complaints per year being filed by transgender individuals for discrimination in health care and insurance due to the Rule. *Id.* ¶¶ 19-20.

33. Because OCR will not investigate sex discrimination complaints based on sexual orientation or gender identity, the Illinois Department of Insurance expects to receive discrimination complaints that might otherwise have gone to OCR. Illinois estimates that even one additional complaint diverted to state agencies from OCR will cost Illinois about \$4,695. Madden Decl. ¶¶ 20-23 [Ex. 14]; *see also* Planthold Decl. ¶ 14 [Ex. 13].

34. Minnesota expects to expend additional resources to fill the enforcement gap created by the 2020 Rule, as individuals who previously would have sought assistance from OCR will instead be forced to turn to the states for enforcement. Minnesota estimates each

additional complaint will cost the state between \$2,200 and \$3,000. Vaynerman Decl. ¶ 6, 9 [Ex. 23].

35. Connecticut CHRO expects to receive 45-55 new discrimination complaints due to the 2020 Rule, which would cost Connecticut \$52,204 per year, as CHRO would need to hire a new employee to handle the increased number of complaints. Hughes Decl. ¶ 13 [Ex. 9].

36. Delaware Department of Human Rights (“DDHR”) expends, at minimum, 50 to 150 hours to investigate and resolve a complaint. Filling the gap in federal enforcement created by the 2020 Rule will therefore increase staff workload and financial costs for DDHR by diverting complaints to DDHR rather than OCR. Fullman Decl. ¶¶ 20-21 [Ex. 11].

37. Massachusetts Department of Insurance’s Consumer Services Unit spends, on average, between \$100 and \$150 to process a complaint, Beagan Decl. ¶ 13 [Ex. 20], and therefore, additional complaints as a result of the 2020 Rule would increase their costs.

38. Maine Human Rights Commission expects that the number of additional complaints filed with the Commission as a result of the 2020 Rule will be significant. Sneirson Decl. ¶ 11 [Ex. 15]; *see also* Amáez Decl. ¶ 11 [Ex. 16].

39. New Jersey predicts an increase in complaints to its Division of Consumer Affairs and Department of Health. *See* Schaler-Hayes Decl. ¶¶ 12-15 [Ex. 26]; Medina-Forrester Decl. ¶ 20 [Ex. 25]. Each investigation requires staff time and money, which is in limited supply. Medina-Forrester Decl. ¶ 23 [Ex. 25].

40. Nevada’s Division of Public and Behavior Health expects a substantial financial burden due to non-enforcement by OCR as a result of the 2020 Rule. That makes a state agency the only agency available to investigate civil rights discrimination complaints. Maylath Decl. ¶¶ 9, 16 [Ex. 24].

41. In Virginia, complaints of discrimination in healthcare that would have been filed with OCR must now be filed with DMAS. Kimsey Decl. ¶ 11 [Ex. 36]. DMAS employees expect to expend 15-20 hours on uncomplicated discrimination complaints, but complaints that require extensive investigation or other work will require significantly more of DMAS' scarce resources. *Id.* at ¶ 16.

42. In Wisconsin, WI OCI will be the sole outlet for consumer complaints regarding discrimination by health insurers now that OCR will no longer accept discrimination complaints against insurers under the 2020 Rule. Houdek Decl. ¶¶ 11-12 [Ex. 38]. Accordingly, WI OCI anticipates that more time spent on health insurance discrimination complaints will divert time and resources from other complaints received by the agency. *Id.*

43. Pennsylvania Departments of Health and Insurance anticipate an increase in complaints and inquiries as a result of discriminatory denials or barriers to accessing necessary services, as well as an increase in sex discrimination complaints that prior to the enactment of the 2020 Rule would have been reported to OCR. Miller Decl. ¶ 9 [Ex. 47]; Altman Decl. ¶ 27 [Ex. 46].

44. The Rule is also forcing the States to incur costs to issue new regulations or legislation to fill the void left by HHS's decision to abdicate its enforcement obligations in the health care context. *See* Powell Decl. ¶ 9 (New York) [Ex. 29]; Conway Decl. ¶¶ 11-16 (Colorado) [Ex. 8]; Eberle Decl. ¶ 6 (Maryland) [Ex. 18]; Gillard ¶ 4 (Maryland) [Ex. 17]; Roem Decl. ¶ 16-19 (Virginia) [Ex. 35].

45. New York's Department of Financial Services amended New York's insurance law and regulations to prohibit discrimination based on an insured's or prospective insured's actual or perceived sexual orientation, gender identity or expression, or transgender status, and to

prohibit policy exclusions for treatments related to gender transition, gender dysphoria, or gender incongruence. Powell Decl. ¶ 9 [Ex. 29].

46. To ensure LGBTQ New Yorkers remain protected, notwithstanding the 2020 Rule, OASAS initiated a rulemaking to amend regulations governing patient rights in OASAS certified, funded or otherwise authorized programs. Patient Rights, NYS Register Vol. XLII, Issue 28 (proposed July 15, 2020) (to be codified at Part 815 of Title 14 NYCRR). Schell-Guy Decl. ¶ 11 [Ex. 30].

47. In anticipation of the 2020 Rule, the Colorado Department of Insurance promulgated regulation 4-2-62, “Concerning Insurance Unfair Practices Act Prohibitions on Discrimination based upon Sexual Orientation or Gender Identity,” which establishes requirements for insurers to comply with Colorado’s non-discrimination laws in health coverage regarding sexual orientation and transgender status. Conway ¶¶ 11-16 [Ex. 8].

48. Maryland’s General Assembly anticipated the 2020 Rule and enacted legislation to expand Maryland’s antidiscrimination protections to prohibit hospitals, healthcare providers, and other related institutions from refusing or denying medical care to individuals due to their race, color, religion, sex, age, national origin, marital status, sexual orientation, gender identity, or disability. The General Assembly also passed a law preventing insurance carriers from discriminating against consumers due to their race, sex, creed, color, national origin, marital status, sexual orientation, age, gender, gender identity, or disability. Eberle ¶ 6 [Ex. 18]; Gillard ¶ 4 [Ex. 17].

49. Virginia passed House Bill 1429, which ensures that a patient cannot be denied coverage for healthcare services based on their gender identity that a cis-person would be covered for under the same insurance plan. Roem Decl. ¶ 16 [Ex. 35]. The statute only affects

people whose health insurance plans are regulated by the Commonwealth of Virginia, which do not include Medicare, plans purchased under the Affordable Care Act, and self-insured. *Id.* at ¶ 19. Thus, Virginia cannot implement regulations to protect transition-related health care coverage for more than three-fourths of health insurance plans that are supposed to cover the health care needs of the Commonwealth's residents. *Id.* This was the third attempt to pass similar legislation. *Id.* at ¶ 13.

C. The Final Rule Imposes Increased Costs on the Plaintiff States Associated with Uncompensated Health Care Resulting from the Rule.

50. The 2020 Rule will harm the public health by deterring individuals from seeking timely medical treatment, resulting in delayed or denied care and related economic costs. Hughto Decl. ¶¶ 40-42, 49-53, 58-62, 66-67 [Ex. 41].

51. The Rule will cause some LGBT individuals, women or other people who can get pregnant, and LEP individuals to delay or avoid seeking care, which itself causes worse health outcomes. *See* Cooper Decl. ¶¶ 7-10 (California) [Ex. 39]; Starr Decl. ¶¶ 6-15 (California) [Ex. 48]; Codes-Johnson Decl. ¶ 23 (Delaware) [Ex. 10]; Madden ¶ 26 (Illinois) [Ex. 14]; Jegede Decl. ¶ 15 (Michigan) [Ex. 51]; Medina-Forrester Decl. ¶¶ 25-29 (New Jersey) [Ex. 25]; Kunkel Decl. ¶¶ 6-8 (New Mexico) [Ex. 28]; Allen Decl. ¶ 11 (Oregon) [Ex. 33]; Jones Decl. ¶¶ 13-18, 20 (Wisconsin) [Ex. 45]; Lewis Decl. ¶¶ 10-12 (Side by Side) [Ex. 44]; Roem Decl. ¶¶ 8-10 (Virginia) [Ex. 35]; Comeaux ¶ 15 (New Mexico) [Ex. 27]; Levine Decl. ¶ 18 (Pennsylvania) [Ex. 49]; Hughto Decl. ¶¶ 44-46 [Ex. 41].

52. These harms are compounded by the ongoing COVID-19 pandemic. *See* Starr Decl. ¶¶ 7, 10, 15 (California) [Ex. 48]; Madden Decl. ¶ 26 (Illinois) [Ex. 14]; Maylath Decl. ¶¶ 26, 31 (Nevada) [Ex. 24]; Medina-Forrester Decl. ¶¶ 33-34 (New Jersey) [Ex. 25]; Comeaux Decl. ¶ 16 (New Mexico) [Ex. 27]; Kunkel Decl. ¶¶ 9-10 (New Mexico) [Ex. 28]; Allen Decl.

¶ 7 (Oregon) [Ex. 33]; Dolan Decl. ¶¶ 12-13 (Vermont) [Ex. 50]; Jones Decl. ¶ 19 (Wisconsin) [Ex. 45]; Davis Decl. ¶ 11 (Trevor Project) [Ex. 43].

53. California is particularly concerned about the unintended pregnancies that may result from the decreased protection from pregnancy discrimination in the 2020 Rule. Starr Decl. ¶¶ 8-10 [Ex. 48].

54. Pennsylvania anticipates that the explicit exclusion of pregnancy discrimination from the 2020 Rule may result in a greater number of mothers utilizing state-funded assistance programs. Levine Decl. ¶ 16 [Ex. 49].

55. California is specifically worried about the discriminatory effect of the 2020 Rule against LEP individuals, who, as a group, are dying in higher rates from COVID-19. Starr Decl. ¶¶ 6-7 [Ex. 48].

56. New Jersey has particular concern that confusion over the scope of discrimination protections for LGBT individuals will deter them from seeking care and thereby undermine progress in ending the HIV epidemic in New Jersey. Medina-Forrester Decl. ¶ 29 [Ex. 25].

57. New Mexico funds a higher percentage of unplanned births through public funds than the national average, and the state is concerned that number will increase due to delayed care caused by the 2020 Rule. Kunkel Decl. ¶¶ 6-7 [Ex. 28].

58. As individuals delay treatment due to fear of discrimination, health insurance programs funded partially by the States will face increased expenses. Codes-Johnson Decl. ¶ 23 (Delaware) [Ex. 10]; Maylath Decl. ¶ 28 (Nevada) [Ex. 24]; Macomber Decl. ¶ 14 (Michigan) [Ex. 52].

59. The 2020 Rule purports to exclude many insurance plans—including private insurance plans, FEHB plans, and Medicare Part B plans—which, in most cases, are not subject

to state nondiscrimination laws. *See* Planthold Decl. ¶¶ 14, 17, 18 (Illinois) [Ex. 13]; Boyle Decl. ¶ 12 (Massachusetts) [Ex. 19]; Altman Decl. ¶¶ 11, 16-19 (Pennsylvania) [Ex. 46]; Roem Decl. ¶ 19 (Virginia) [Ex. 35].

60. The States' residents enrolled in such plans (e.g., FEHB plans or plans written in other states) will have no recourse with OCR or state enforcement agencies, yet they may still suffer the health and economic consequences of being denied coverage. Hughto Decl. ¶ 53 [Ex. 41].

61. The States administer and oversee multiple federal- and state-funded health care programs, including, for example Medicaid and the Children's Health Insurance Program. *See* Cooper Decl. ¶¶ 1-2 (California) [Ex. 39]; Bimestefer Decl. ¶¶ 14-15 (Colorado) [Ex. 7]; Boyle Decl. ¶¶ 1, 6, 12 (Massachusetts) [Ex. 19]; Codes-Johnson Decl. ¶ 23 (Delaware) [Ex. 10]; Maylath Decl. ¶ 27 (Nevada) [Ex. 24]; Medina-Forrester Decl. ¶ 19 (New Jersey) [Ex. 25]; Kimsey Decl. ¶ 6 (Virginia) [Ex. 36]; Jones Decl. ¶ 1 (Wisconsin) [Ex. 45].

62. California DHCS also administers the Family PACT program, which provides comprehensive family planning services to eligible low-income individuals who do not qualify for full Medicaid coverage. Cooper Decl. ¶ 8 [Ex. 39].

63. In Massachusetts, nearly 146,000 MassHealth members currently have MassHealth as a secondary payer. To the extent that those members are in plans that are not subject to state anti-discrimination law and, those plans do not cover gender affirming services as a result of the 2020 Rule, members will be entitled to receive those services through MassHealth, which will shift extra costs onto that program and the state. Boyle Decl. ¶ 12 [Ex. 19].

64. Pennsylvania expects additional expenses through its Medical Assistance program as a result of some self-funded plans refusing to provide gender transition-related services due to

the 2020 Rule. Miller Decl. ¶ 8 [Ex. 47]. Medical Assistance beneficiaries who would normally receive gender transition services through their primary plan will likely turn to the Medical Assistance program for those services. *Id.*

65. New Jersey operates an Uncompensated Care Fund Program for individuals who are denied health insurance coverage and meet certain income requirements. The program is funded with state dollars and operated through NJDOH. Family planning patients who are denied care under their own insurance and meet specified income requirements may use the safety net services of the New Jersey Family Planning League, whose clinics get support through a state family planning grant funded with state dollars. Medina-Forrester Decl. ¶ 19 [Ex. 25].

Dated: September 10, 2020

Respectfully submitted,

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