IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, *et al.*, Plaintiffs, v. **U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES**, *et al.*, Defendants.	Case No. 1:20-cv-5583 (AKH)

BRIEF OF AMICI CURIAE, THE AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, THE AMERICAN ACADEMY OF NURSING, THE AMERICAN ACADEMY OF PEDIATRICS, THE AMERICAN COLLEGE OF PHYSICIANS, THE AMERICAN MEDICAL ASSOCIATION, THE AMERICAN OSTEOPATHIC ASSOCIATION, THE AMERICAN PSYCHIATRIC ASSOCIATION, THE AMERICAN PUBLIC HEALTH ASSOCIATION, THE NATIONAL ASSOCIATION OF NURSE PRACTITIONERS IN WOMEN'S HEALTH, THE NORTH AMERICAN SOCIETY FOR PEDIATRIC AND ADOLESCENT GYNECOLOGY, THE SOCIETY OF FAMILY PLANNING, THE SOCIETY FOR MATERNAL-FETAL MEDICINE, AND THE SOCIETY OF OB/GYN HOSPITALISTS IN SUPPORT OF PLAINTIFFS

CORPORATE DISCLOSURE STATEMENT

The *amici curiae* hereby certify that each has no parent corporation and no publicly held corporation owns 10% or more of any stock.

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INTEREST OF *AMICI CURIAE*[1]

Amicus Curiae, the American College of Obstetricians and Gynecologists (ACOG) is a national organization of more than 60,000 women's health care physicians and medical professionals. ACOG's membership represents more than 90 percent of all board-certified obstetrician-gynecologists (ob-gyns) in the United States.

As the premiere national medical specialty organization of women's health care physicians, ACOG supports the goals of the Patient Protection and Affordable Care Act (ACA) to expand access to continuous and meaningful health insurance coverage and reject discriminatory practices that jeopardize patient care. ACOG is committed to improving the physical and mental health of all Americans and to informing and educating lawmakers, the judiciary, and the public through science regarding the public health impacts of laws and policies.

Amicus Curiae, the American Academy of Nursing (Academy) serves the public by advancing health policy and practice through the generation, synthesis, and dissemination of nursing knowledge. Academy Fellows are inducted into the organization for their extraordinary contributions to improve health locally and globally. With more than 2,900 Fellows, the Academy represents nursing's most accomplished leaders in policy, research, administration, practice, and academia.

Amicus Curiae, the American Academy of Pediatrics (AAP) is a national, not-for-profit organization representing 67,000 primary care pediatricians, pediatric medical subspecialists, and surgical specialists who are committed to the attainment of optimal physical, mental, and social

[1] *Amici Curiae* hereby certify that no party's counsel authored this brief in whole or in part, no party or party's counsel contributed money intended to fund preparation or submission of this brief, and no person other than *amici curiae* and their counsel contributed money intended to fund preparation or submission of the brief. The parties have consented to the filing of this brief.

health and well-being for all infants, children, adolescents, and young adults. In its dedication to the health of all children, the AAP strives to improve health care access and eliminate disparities for all children, including those who have disabilities, have limited English proficiency, identify as lesbian, gay, bisexual, transgender, or questioning of their sexual or gender identity. Pediatricians know that discrimination in health care settings can impede a child's ability to access the services they need for healthy development, and AAP strongly opposes any attempt to limit access to comprehensive, developmentally appropriate care for our nation's children and adolescents.

Amicus Curiae, the American College of Physicians (ACP) is the largest medical specialty organization in the U.S. and has members in more than 145 countries worldwide. ACP membership includes 163,000 internal medicine physicians, related subspecialists, and medical students. Internal medicine physicians are specialists who apply scientific knowledge and clinical expertise to the diagnosis, treatment, and compassionate care of adults across the spectrum from health to complex illness.

Amicus Curiae, the American Medical Association (AMA) is the largest professional association of physicians, residents, and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all physicians, residents, and medical students in the United States are represented in the AMA's policy-making process. The AMA was founded in 1847 to promote the art and science of medicine and the betterment of public health, and these remain its core purposes. AMA members practice in every medical specialty and in every state, including New York.

Amicus Curiae, the American Osteopathic Association (AOA) represents more than 151,000 osteopathic physicians (DOs) and osteopathic medical students; promotes public health;

encourages scientific research; serves as the primary certifying body for DOs; and is the accrediting agency for osteopathic medical schools. As the primary certifying body for DOs and the accrediting agency for all osteopathic medical schools, the AOA works to accentuate the distinctiveness of osteopathic principles and the diversity of the profession. In addition to promoting public health and encouraging scientific research, the AOA advocates at the state and federal levels on issues that affect DOs, osteopathic medical students and patients.

Amicus Curiae, the American Psychiatric Association (APA) is a nonprofit organization representing over 38,800 physicians who specialize in the practice of psychiatry. APA members engage in research into and education about diagnosis and treatment of mental health and substance use disorders, and are front-line physicians treating patients who experience mental health and/or substance use disorders.

Amicus Curiae, the American Public Health Association (APHA) champions the health of all people and all communities, strengthens the profession of public health, shares the latest research and information, promotes best practices and advocates for evidence-based public health policies. APHA is the only organization that combines a nearly 150-year perspective, a broad-based member community and the ability to influence federal policy to improve the public's health. APHA strongly supports the Patient Protection and Affordable Care Act and opposes efforts to weaken the law's nondiscrimination protections that could lead to reduced access to health care and perpetuate existing health inequities.

Amicus Curiae, the National Association of Nurse Practitioners in Women's Health (NPWH) is a national professional membership organization, NPWH is the nation's leading voice for courageous conversations about women's health. NPWH represents nearly 12,000 certified women's health nurse practitioners in the US. In its clinics and in its culture, women's health

nurse practitioners champion state-of-the-science health care that holistically addresses the unique needs of women across their lifetimes. NPWH elevates the health issues others overlook and compel attention on women's health from providers, policymakers, and researchers.

Other advanced practice registered nurses rely on NPWH for authoritative resources and education that improve women's health and wellness through evidence-based practice. NPWH pioneers policies to address gender disparities and forges strategic partnerships that advance health equity and holistic models of care. NPWH's mission is to ensure the provision of quality primary and specialty health care to women of all ages by women's health and women's health focused nurse practitioners and includes protecting and promoting a woman's right to make her own choices regarding her health within the context of her personal, religious, cultural, and family beliefs.

Since its inception in 1980, NPWH has been a trusted source of information on nurse practitioner education, practice, and women's health issues. NPWH works with a wide range of individuals and groups within nursing, medicine, the health care industry, and the women's health community.

Amicus Curiae, the North American Society for Pediatric and Adolescent Gynecology (NASPAG) is dedicated to providing multidisciplinary leadership in education, research and gynecologic care to improve the reproductive health of youth. Its focus is to serve and be recognized as the lead provider in PAG education, research and clinical care, conduct and encourage multidisciplinary and inter-professional programs of medical education and research in the field of PAG, and advocate for the reproductive well-being of children and adolescents and the provision of unrestricted, unbiased and evidence based practice of PAG. As such, NASPAG supports the goals of the Patient Protection and Affordable Care Act (ACA) to expand access to

continuous and meaningful health insurance coverage and reject discriminatory practices that jeopardize patient care.

Amicus Curiae, the Society of Family Planning (SFP) is the source for science on abortion and contraception. SFP represents approximately 800 scholars and academic clinicians united by a shared interest in advancing the science and clinical care of family planning. The pillars of its strategic plan are: 1) building and supporting a multidisciplinary community of scholars and partners who have a shared focused on the science and clinical care of family planning, 2) supporting the production of research primed for impact, 3) advancing the delivery of clinical care based on the best available evidence, and 4) driving the uptake of family planning evidence into policy and practice.

Amicus Curiae, the Society for Maternal-Fetal Medicine (SMFM) is a non-profit, membership organization based in Washington, DC. With more than 5,000 physicians, scientists, and women's health professionals around the world, the Society supports the clinical practice of maternal-fetal medicine by providing education, promoting research, and engaging in advocacy to optimize the health of high-risk pregnant people and their babies. SMFM supports the Patient Protection and Affordable Care Act (ACA) as a mechanism to expand access to maternity care coverage and reproductive health services, thereby reducing maternal morbidity and mortality.

Amicus Curiae, the Society of OB/GYN Hospitalists (SOGH) is a national organization of more than 1,500 women's health care physicians and medical professionals and is the only national medical sub-specialty organization whose members specialize in inpatient obstetrics and gynecologic care. The SOGH is committed to improving outcomes for hospitalized women and to patient safety and quality care for all women. As frontline, hospital-based providers of women's health care, the SOGH is uniquely positioned to advocate for justice and tolerance through

evidence-based care, research, and policy development. The SOGH supports the goals of the Patient Protection and Affordable Care Act (ACA) to expand access to continuous and meaningful health insurance coverage and reject discriminatory practices that jeopardize patient care.

Amici Curiae submit this brief to inform the Court of the medical consensus regarding what it means to be transgender; provide a brief overview of the treatment protocols used to bring the body into alignment with one's gender identity; and the predictable harms to the health and well-being of transgender individuals that would occur if the Nondiscrimination in Health and Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37,160 (June 19, 2020) (the "Revised Rule") is implemented, such as eliminating prohibitions on discrimination in medical care and health insurance products or otherwise limiting the number of entities and types of insurance products subject to the nondiscrimination requirements of the Revised Rule. Moreover, the Revised Rule harms women, individuals with limited English proficiency, and other marginalized patient populations by rolling back anti-discrimination provisions that protect them when seeking the medical care they need.

SUMMARY OF ARGUMENT

The inability to access timely, science-based, quality health care can be dangerous and even deadly. Barriers to health care include (but are not limited to) lack of coverage and financial constraints, geographic limitations and disparities, and discrimination. The Patient Protection and Affordable Care Act (ACA) sought to enhance the ability of Americans to access health care by, among other things, expanding the availability of insurance coverage, incentivizing the provision of care to marginalized communities, and prohibiting discrimination.

Prior to the passage of the ACA, women and LGBTQ+[2] people faced even greater barriers to health care than they do presently, including higher patient cost-sharing and discriminatory benefit design.[3,4] Section 1557 of the ACA addressed these barriers by providing substantial civil rights protections to patients to whom Amici provide care and prohibiting discrimination in health care on the basis of sex. The implementation of that section in the 2016 Final Rule recognized that Section 1557's broad prohibition of discrimination on the basis of sex includes, but is not limited to, "discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related medical conditions, sex stereotyping, and gender identity."[5] However, the current Administration's Department of Health and Human Services (HHS) seeks to roll back the 2016 Final Rule, limit the protections for LGBTQ people and women, among others, and thereby undermine Section 1557's statutory protections.[6]

ACOG recognizes that ensuring people, including women, LGBTQ+ people and other historically disadvantaged individuals, are able to access health care that is free from discrimination is critical for the health and safety of the patients.[7] Yet, the Revised Rule seeks to weaken critical civil rights protections by adopting an overly restrictive definition of sex discrimination that eviscerates the protections afforded to transgender individuals.

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[2] LGBTQ is an acronym for lesbian, gay, bisexual, transgender and queer or questioning, plus other sexual minorities (e.g. intersex).

[3] Kaiser Family Found., *Women's Health Insurance Coverage* (Jan. 24, 2020), https://www.kff.org/womens-health-policy/fact-sheet/womens-health-insurance-coverage-fact-sheet/.

[4] Lindsey Dawson et al., *The Affordable Care Act and Insurance Coverage Changes by Sexual Orientation*, Kaiser Family Found. (Jan. 18, 2018), https://www.kff.org/disparities-policy/issue-brief/the-affordable-care-act-and-insurance-coverage-changes-by-sexual-orientation/.

[5] 45 C.F.R. § 92.4.

[6] *See* Revised Rule.

[7] *See* Am. Coll. of Obstetricians & Gynecologists Comm., *The Limits of Conscientious Refusal in Reproductive Medicine*, 110 Obstetrics & Gynecology 1203 (2007).).

Further, the discriminatory impact of the Revised Rule is compounded by the fact that it undermines protections for other populations as well, including women and individuals with limited English proficiencies. The Revised Rule also seeks to eliminate prohibitions on discrimination in health insurance products and limit the number of entities and types of insurance products subject to the nondiscrimination requirements. In addition, the Revised Rule undermines non-discrimination provisions by virtually removing an individual's private right of action to sue for discrimination under Section 1557.

Each of these changes will negatively impact access to care for patient populations throughout the United States. Taken together, the changes in the Revised Rule represent a substantial undermining of critical civil rights and access protections for millions of Americans. The harms of the Revised Rule are even more pronounced as the nation faces the Covid-19 pandemic when many face extreme financial hardships, domestic violence, and other challenges that make access to health care both critical and more difficult to obtain.[8] For these reasons, and those explained in detail below, *Amici* respectfully request this Court declare the Revised Rule unlawful and vacate the Revised Rule.

ARGUMENT

The Revised Rule undermines antidiscrimination provisions that are critical to the health and wellbeing of many populations of people in the United States including LGBTQ+ people, women, and people with limited English proficiency (LEP). Like the federal courts that have

[8] https://www.cbsnews.com/news/coronavirus-transgender-lgbtq-health-care-in-covid-19-pandemic/

already enjoined the rule[9], this Court should set the rule aside and preserve the ACA's antidiscrimination protections.

I. THE REVISED RULE ENDANGERS THE HEALTH AND WELL-BEING OF TRANSGENDER PATIENTS

Transgender patients have particular health care needs, in addition to having the health care needs shared by all individuals. Transgender individuals have a "gender identity"—a "deeply felt, inherent sense" of their gender—that is not aligned with the sex assigned to them at birth.[10] Transgender individuals differ from cisgender (*i.e.*, non-transgender) individuals in that their gender identity does not align with the sex assigned at their birth.[11],[12] Recent estimates indicate

[9] *Walker v. Azar*, No. 20-CV-28340FB-SMG, 2020 WL 4749859 (E.D.N.Y. Aug. 17, 2020); *Walker-Whitman Clinic, Inc. v. U.S. Department of Health & Human Services*, No. 20-1630 (JEB)(D.D.C. Sept. 2, 2020).

[10] Am. Psychol. Ass'n, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 70 Am. Psychologist 832, 834 (2015) [hereinafter "Am. Psychol. Ass'n Guidelines"]; *see also* David A. Levine et al., *Office-Based Care for Lesbian, Gay, Bisexual, Transgender, and Questioning Youth*, 132 Pediatrics e297, 298 (2013) [hereinafter "AAP Technical Report"]. "[G]ender identity" refers to a person's internal sense of being male, female, or another gender. Am. Psychoanalytic Ass'n, *Answers to Your Questions About Transgender People, Gender Identity, and Gender Expression* 1 (2014), http://www.apa.org/topics/lgbt/transgender.pdf. Although most people have a gender identity that is male or female, some individuals have a gender identity that is "a blend of male or female[,] or an alternative gender." Am. Psychol. Ass'n Guidelines at 834.

[11] Am. Psychoanalytic Ass'n Guidelines, *supra*, at 861.

[12] The medical profession's understanding of gender has advanced considerably over the past fifty years. Throughout much of the 20th century, individuals who were not gender conforming were often viewed as "perverse or deviant." Am. Psychol. Ass'n, *Report of the APA Task Force on Gender Identity and Gender Variance* 26-27 (2008), https://www.apa.org/pi/lgbt/resources/policy/genderidentity-report.pdf [hereinafter "Am. Psychol. Ass'n Task Force Report"]. Practice during that period tried to "correct" this perceived deviance by attempting to force transgender people to live in accordance with the sex assigned to them at birth. These efforts failed and caused significant harm to the individuals subjected to them. *Id.*; Substance Abuse and Mental Health Servs. Admin., *Ending Conversion Therapy: Supporting and Affirming LGBTQ Youth* 13, 25 (2015), https://store.samhsa.gov/product/Ending-Conversion-Therapy-Supporting-and-Affirming-LGBTQ-Youth/SMA15-4928.

that approximately 1.4 million transgender adults live in the United States, or 0.6 percent of the adult population, although this figure likely understates the population.[13] People of all races and ethnicities identify as transgender.[14] Transgender individuals live in every state, have served in our military, and raise children.[15]

A. Transgender Individuals Have Significant Medical Needs But Face Barriers to Essential Health Care

At some point in their lives, all transgender individuals will require health care such as preventative care, cancer screenings, and care for chronic conditions. Some but not all transgender individuals will also seek care (such as hormone therapy or surgery) to align with a particular gender expression.[16] Yet, despite these medical needs, transgender individuals face substantial barriers to accessing health care, including lack of adequate insurance coverage, discrimination by health care professionals, and health professionals' discomfort or inexperience with the

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[13] Flores, *How* Many *Adults Identify as Transgender in the United States?*, *supra*, 2. It is likely that more transgender individuals live in the United States as "population estimates likely underreport the true number of [transgender] people." Am. Psychol. Ass'n Guidelines, *supra*, at 832.

[14] *See* Halley P. Crissman et al., *Transgender Demographics: A Household Probability Sample of US Adults, 2014*, 107 Am. J. Pub. Health 213, 214-15 (2017); Andrew R. Flores et al., *Race and Ethnicity of Adults Who Identify as Transgender in the United States*, The Williams Inst. 2 (2016), https://williamsinstitute.law.ucla.edu/publications/race-ethnicity-trans-adults-us/.

[15] Gary J. Gates & Jody L. Herman, *Transgender Military Service in the United States*, The Williams Inst. (2014), https://sfcommunityhealth.org/wp-content/uploads/2017/07/Transgender-Military-Service-May-2014.pdf; S.E. James et al., *The Report of the 2015 U.S. Transgender Survey*, Nat'l Ctr. for Transgender Equality 2 (2015), https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF; Rebecca L. Stotzer et al., *Transgender Parenting: A Review of Existing Research*, The Williams Inst. (2014), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Parenting-Review-Oct-2014.pdf.

[16] "[G]ender expression refers to the way a person communicates gender identity to others through behavior, clothing, hairstyles, voice, or body characteristics." Am. Psychol. Ass'n, *Answers to Your Questions About Transgender People, supra,* at 1.

transgender population.[17,18,19,20] According to the 2015 U.S. Transgender Survey Report, nearly 25 percent of transgender individuals did not see a doctor when they needed one in the past year because of fear of being mistreated as a transgender person.[21] Thirty-three percent did not see a doctor due to cost.[22]

Preventative care is critical for all people, including transgender individuals. Due to social marginalization and other factors, transgender individuals may not receive adequate screening and treatment of certain health conditions. For example, transgender people experience greater rates of sexually transmitted infections, such as HIV. The U.S. Centers for Disease Control and Prevention (U.S. CDC) reports estimated 14% of transgender women have HIV and that the percentage of transgender people who received an HIV diagnosis in 2017 was three times the national average.[23] However, discrimination by health care professionals, or lack of awareness of or experience with transgender patient care, can negatively impact health care outcomes for transgender patients. For example, it is imperative that all individuals with a uterus, cervix, breasts,

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[17] Am. Coll. of Obstetricians& Gynecologists Comm., *Health Care for Transgender Individuals*, 118 Obstetrics & Gynecology 1454 (2011).

[18] Kosenko K, RintamakiL, Raney 5, Maness K. Transgender patient perceptions of stigma in health care contexts. *Medical Care* 2013;51(9):819-822.

[19] Poteat T, German D, Kerrigan D. Managing uncertainty: A grounded theory of stigma in transgender health encounters. *Social Science & Medicine* 2013;84(1):22-29.

[20] Lambda Legal. When health care isn't caring: Lambda Legal's survey of discrimination against LGBT people and people with HIV. New York, NY: Lambda Legal. 2010.

[21] James SE, Herman JL, Rankin 5, Keisling M, Mottet L, Anafi M. The report of the 2015 U.S. Transgender Survey. Washington, DC: National Center for Transgender Equality. 2016. Available at: https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf.

[22] *Id*.

[23] Ctr. for Disease Control & Prevention, *HIV - Transgender People* (Nov. 12, 2019), https://www.cdc.gov/hiv/group/gender/transgender/index.html (citing an American Public Health Association study and the CDC's own statistics); Jeffrey S. Becasen et al., *Estimating the Prevalence of HIV and Sexual Behaviors Among the US Transgender Population: A Systematic Review and Meta-Analysis, 2006-2017*, 109 Am. Pub. Health Ass'n e1 (2019).

or a prostate gland be offered regular preventive and diagnostic cancer screenings of those organs.[24] Nonetheless, due to the perception that people who present as a different gender identity or who have had gender affirmation surgery may not require clinical Pap tests, breast exams or prostate cancer screening, transgender individuals may not be offered the opportunity to detect cancers of those organs while the cancers are still treatable.[25]

In addition to care required by the general population, individuals who identify as transgender may also seek care that is specific to their gender identity and/or gender expression, including assessment, counseling, and, as appropriate, puberty-blocking drug treatment, hormone therapy, and surgical interventions to bring the body into alignment with one's gender identity.[26] For some adults and adolescents, hormone treatment to feminize or masculinize the body may be medically necessary.[27] Hormone treatment alters the appearance of the patient's genitals and

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[24] John Hopkins Medicine, Transgender Health: What You Need to Know. 2020. Available at: https://www.hopkinsmedicine.org/health/wellness-and-prevention/transgender-health-what-you-need-to-know.

[25] *Id.*

[26] Am. Psychol. Ass'n Task Force Report, *supra*, at 32-39; Am. Psychol. Ass'n & Nat'l Ass'n of Sch. Psychologists, *Resolution on Gender and Sexual Orientation Diversity in Children and Adolescents in Schools* (2015), http://www.apa.org/about/policy/orientation-diversity.aspx; Am. Psychiatric Ass'n Workgroup on Treatment of Gender Dysphoria, *Assessment and Treatment of Gender Dysphoria and Gender Variant Patients: A Primer for Psychiatrists* 175 Am. J. Psychiatry 1046 (2018); AAP Technical Report, *supra*, at 307-09. Some clinicians still offer versions of "reparative" or "conversion" therapy based on the idea that being transgender is a mental disorder. However, all of the leading medical professional organizations have explicitly rejected such treatments. *See* Am. Med. Ass'n, Policy Number H-160.991, *Health Care Needs of Lesbian, Gay, Bisexual, and Transgender and Queer Populations* (rev. 2018), https://policysearch.ama-assn.org/policyfinder/detail/H-160.991?uri=%2FAMADoc%2FHOD.xml-0-805.xml; Am. Sch. Counselor Ass'n, *The School Counselor and LGBTQ Youth* (2016), https://www.schoolcounselor.org/asca/media/asca/PositionStatements/PS_LGBTQ.pdf; Hilary Daniel et al., *Lesbian, Gay, Bisexual, and Transgender Health Disparities: Executive Summary of a Policy Position Paper from the American College of Physicians*, 163 Annals Internal Med. 135, 136 (2015); AAP Technical Report, *supra*, at 301; Am. Psychoanalytic Ass'n, *Position Statement on Attempts to Change Sexual Orientation, Gender Identity, or Gender Expression*, *supra*.

produces secondary sex characteristics such as increased muscle mass, increased facial hair, and a deepening of the voice in transgender boys and men, and breast growth and decreased muscle mass in transgender girls and women.[28] For children experiencing the onset of puberty, treatment may include medication to prevent further progression of puberty ("puberty blockers"), and to give them additional time to decide whether hormone treatment to feminize or masculinize the body is appropriate.[29] Surgical interventions, such as chest reconstruction surgery for transgender men, breast augmentation (*i.e.* implants) for transgender women, or genital surgery, may also be an appropriate and medically necessary treatment for some patients.[30] However, each patient requires an individualized treatment plan that accounts for the patient's specific needs.[31]

Access to mental health care is a critical component of comprehensive health care for all people and particularly important for transgender individuals. Being transgender "implies no impairment in judgment, stability, reliability, or general social or vocational capabilities."[32] However, due to myriad factors including social exclusion, abuse, and discrimination, LGBTQ individuals are two and a half times more likely to struggle with anxiety, depression, and substance

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[28] *See* Wylie C. Hembree et al., *Endocrine Treatment of Transsexual Persons: An Endocrine Society Clinical Practice Guideline*, 94 J. Clinical Endocrinology & Metabolism 3132, 3140-45 (2009); *see also* Alessandra D. Fisher et al., *Cross-Sex Hormone Treatment and Psychobiological Changes in Transsexual Persons: Two-Year Follow-Up Data*, 101 J. Clinical Endocrinology & Metabolism 4260 (2016).

[29] *Id.* at 3133, 3138, 3140-41; Am. Psychol. Ass'n Guidelines, *supra*, at 842; WPATH Standards of Care, *supra*, at 18-20.

[30] Hembree et al., *Endocrine Treatment of Transsexual Persons*, *supra*, at 3148-49; *see also* WPATH Standards of Care, *supra*, at 57-58.

[31] Am. Psychol. Ass'n Task Force Report, *supra*, at 32.

[32] Am. Psychiatric Ass'n, *Position Statement on Discrimination Against Transgender and Gender Variant Individuals* (2012), https://apsa.org/content/2012-position-statement-attempts-change-sexual-orientation-gender-identity-or-gender.

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abuse, as well as experience higher rates of sexual and physical violence.[33] Out of the 27,715 respondents in the 2015 U.S. Transgender Survey, 47% were sexually assaulted and 40% attempted suicide at some point in their life.[34] In 2014 alone, 9% were physically attacked, 10% were sexually assaulted, and 7% attempted suicide.[35] In addition, some individuals experience debilitating distress and anxiety resulting from the incongruence between an individual's gender identity and birth-assigned sex.[36]

Those medical and mental health needs are not met when financial constraints, the refusal of health insurance to cover such treatment, lack of education, and discrimination present barriers to care.[37] Transgender individuals also are frequently subjected to prejudice and discrimination in multiple areas of their lives —with 30% having experienced homelessness and 16% having lost a job due to their gender identity or expression at some point in their life, and 29% living in poverty in 2014[38]—which exacerbates negative health outcomes and present additional barriers to care.[39]

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[33] Jen Kates et al., *Health and Access to Care and Coverage for Lesbian, Gay, Bisexual, and Transgender Individuals in the U.S.*, Henry J. Kaiser Family Found. (updated May 2018), http://files.kff.org/attachment/Issue-Brief-Health-and-Access-to-Care-and-Coverage-for-LGBT-Individuals-in-the-US.

[34] James et al., *Report of the 2015 U.S.* Transgender *Survey*, Nat'l Ctr. for Transgender Equality, *supra*.

[35] *Id.*

[36] Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* 451-53 (5th ed. 2013) [hereinafter "DSM-5"].

[37] *Committee Opinion Number 512: Health Care for Transgender Individuals, supra*.

[38] *Id.*

[39] Michael L. Hendricks & Rylan J. Testa, *A Conceptual Framework for Clinical Work with Transgender and Gender Nonconforming Clients: An Adaptation of the Minority Stress Model*, 43 Prof'l Psychol.: Research & Practice 460 (2012); Jessica Xavier et al, *The Health, Health-Related Needs, and Lifecourse Experiences of Transgender Virginians* (2007), http://www.vdh.virginia.gov/content/uploads/sites/10/2016/01/THISFINALREPORTVol1.pdf.

B. The Revised Rule Weakens Access to Health Care Protections for Transgender Patients, Exacerbating Existing Barriers to Care.

Section 1557 broadly prohibits discrimination in health care on the basis of sex. *Amici* support existing regulations that correctly recognize that, among other things, discrimination on the basis of sex for the purposes of Section 1557 includes sex stereotyping, discrimination based on gender identity, and discrimination based on pregnancy status, including termination of pregnancy. The Revised Rule adopts an overly restrictive definition of "on the basis of sex," leaving patients —particularly transgender or other gender non-conforming patients— exposed to unnecessary harm without any recourse.

In particular, the Revised Rule seeks to eliminate recognition of gender identity, which includes gender expression and transgender status, as a form of prohibited sex discrimination. *Amici* oppose discrimination on the basis of gender identity and opposes the Revised Rule's failure to recognize discrimination on the basis of gender identity as a form of prohibited sex discrimination under Section 1557.[40,41]

Each of the Revised Rule's changes related to gender identity is antithetical to Congressional intent and does not align with existing case law that recognizes that discrimination

[40] *Committee Opinion Number 512: Health Care for Transgender Individuals, supra*.

[41] Press Release, Am. Coll. of Obstetricians and Gynecologists, *America's Frontline Physicians Urge Trump Administration to Protect Transgender Patients and Women's Reproductive Health* (May 28, 2019), https://www.acog.org/news/news-releases/2019/05/frontline-physicians-urge-trump-administration-to-protect-transgender-patients-and-womens-reproductive-health.

on the basis of sex includes discrimination based on gender identity.[42,43,44,45] Moreover, failing to recognize gender identity and sex stereotyping as prohibited forms of sex discrimination in health care could put millions of people at significant risk of mistreatment.

The Revised Rule improperly permits health care professionals to refuse to address the basic health care needs of transgender individuals, thus increasing their risk of not receiving treatments for cancers and other medical issues while those issues are still treatable. For example, a transgender person could be refused care for a checkup or cancer screening, thus delaying the identification and treatment of breast cancer.[46]

Recognition that gender identity is a prohibited form of sex discrimination under Section 1557 has been a vital tool in overcoming barriers to health care for transgender patients.[47] Since the implementation of Section 1557, 18 states have implemented affirmative coverage protocols in their respective Medicaid programs to ensure coverage of medically necessary transition-related

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[42] *Prescott v. Rady Child.'s Hosp.-San Diego*, 265 F. Supp. 3d 1090 (S.D. Cal. 2017) (holding that discrimination against transgender patients violates the Affordable Care Act)

[43] *Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931, 950 (W.D. Wis. 2018) (holding that a Medicaid program's refusal to cover treatments related to gender transition is "text-book discrimination *based on sex*" in violation of the Affordable Care Act)

[44] *Boyden v. Conlin*, 341 F. Supp. 3d 979 (W.D. Wis. 2018) (holding that a state employee health plan refusal to cover transition-related care constitutes sex discrimination in violation of Title VII, Section 1557 of the ACA, and the Equal Protection Clause)

[45] *Tovar v. Essentia Health*, 342 F. Supp. 3d 947 (D. Minn. 2018) (holding that Section 1557 of the Affordable Care Act prohibits discrimination on the basis of gender identity)

[46] https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2017/09/the-role-of-the-obstetriciangynecologist-in-the-early-detection-of-epithelial-ovarian-cancer-in-women-at-average-risk.

[47] James et al., *Report of the 2015 U.S.* Transgender *Survey*, Nat'l Ctr. for Transgender Equality, *supra*.

care.[48] Additionally, a 2019 Marketplace analysis of 622 silver plan options from 129 issuers in 38 states found that 41 percent of plans surveyed had affirmative coverage policies while only six percent had transgender-specific exclusions.[49] This progress—in both Medicaid and the Marketplace—is in jeopardy with the Revised Rule.

Additionally, as noted in more detail below, the Revised Rule eliminates prohibitions on discrimination on health insurance products, which will have harmful consequences for transgender individuals in particular. For example, under the Revised Rule, insurers could limit access to transition services for transgender individuals. Medical and mental health treatments related to gender transition are beneficial and medically necessary for many transgender patients.[50] As the National Academy of Sciences recognizes, "Laws that guarantee access to health care services, health insurance coverage, and public health programs for all, regardless of sexual orientation, gender identity, and intersex status, are critical to the health and well-being of [sexual and gender diverse] people."[51] ACOG encourages all health plans to cover the various treatments associated with gender identity disorder.[52] This lifesaving care should not be restricted.

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[48] Movement Advancement Project, *Healthcare Laws and Policies: Medicaid Coverage for Transition-Related Care* (Sept. 2, 2020), http://www.lgbtmap.org/img/maps/citations medicaid.pdf..

[49] Out2Enroll, *Summary of Findings: 2019 Marketplace Plan Compliance with Section 1557*, https://out2enroll.org/out2enroll/wp-content/uploads/2018/11/Report-on-Trans-Exclusions-in-2019-Marketplace-Plans.pdf.

[50] *Committee Opinion Number 512: Health Care for Transgender Individuals*, *supra*.

[51] *Understanding the Well-Being of LGBTQI+ Populations, A Consensus Study Report of the National Academies of Sciences, Engineering and Medicine*, National Academies Press (2020), p.7, published at https://www.nationalacademies.org/our-work/understanding-the-status-and-well-being-of-sexual-and-gender-diverse-populations.

[52] *Committee Opinion Number 512: Health Care for Transgender Individuals*, *supra*.

When access to transgender health care is limited or denied, the results can be dire. Lack of access to cancer and HIV screenings, and other forms of preventative care, have broad negative implications. Moreover, denying access to mental health care causes particularly acute issues for transgender individuals. The 2015 U.S. Transgender Survey reported that in 2014, 33% of those surveyed faced mistreatment or discrimination due to being transgender when visiting a health care provider.[53] Experiencing discrimination can have "weathering"[54] physiological effect on the body, such as anxiety or irregular heartbeat, which can result in long-term harm to one's health.[55] This is harmful not only for patients, but for the United States as a whole. The Joint Center for Political and Economic Studies estimates that health inequities and premature deaths cost the United States $309.3 billion a year;[56] which will likely increase under the Revised Rule.

According to a recent study published by the American Academy of Pediatrics (AAP), more than 50 percent of transgender male adolescents have attempted suicide.[57] Similarly, 41.8 percent of adolescents who do not identify as exclusively male or female have attempted suicide,

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[53] James et al., *Report of the 2015 U.S.* Transgender *Survey*, Nat'l Ctr. for Transgender Equality, *supra*.

[54] Arline T. Geronimus et al., *"Weathering" and Age Patterns of Allostatic Load Scores Among Blacks and Whites in the United States*, 96 Am. J. Pub. Health 826 (2006).

[55] *Discrimination*, Off. of Disease Prevention & Health Promotion (2020), https://www.healthypeople.gov/2020/topics-objectives/topic/social-determinants-health/interventions-resources/discrimination (citing Elizabeth A. Pascoe & Laura Smart Richman, *Perceived Discrimination and Health: A Meta-Analytic Review*, 135 Psychol Bull. 531 (2009)).

[56] Thomas A. LaVeist, et al., *The Economic Burden of Health Inequalities in the United States*, Joint Ctr. for Pol. & Econ. Stud. (2009), https://hsrc.himmelfarb.gwu.edu/sphhs_policy_facpubs/225/.

[57] Russell B. Toomey et al., *Transgender Adolescent Suicide Behavior*, 142 Pediatrics 4218 (2018).

followed by nearly 30 percent of transgender female adolescents.[58] Despite the clear need for appropriate and specialized health services, 50% of gender minorities educate their own physicians about necessary care and 20 % report being denied care.[59],[60] The Revised Rule's consequences will exacerbate these negative impacts on transgender individuals.

II. THE REVISED RULE ROLLS BACK PROTECTIONS FOR WOMEN BASED ON PREGNANCY RELATED CARE.

In addition to targeting transgender individuals specifically for withdrawal of health care protections, the Revised Rule also carries broad harmful effects for women. Existing regulations made clear that sex discrimination under Section 1557 includes discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery therefrom, childbirth or related conditions.[61] The Revised Rule seeks to roll back these protections. Although the preamble of the Revised Rule acknowledges that the prohibition against sex discrimination includes discrimination on the basis of termination of pregnancy, it refuses to state whether those protections would be enforced. Moreover, the Revised Rule seeks to eliminate the 2016 regulation's clarification that all pregnancy related care is included in the ban on sex discrimination. While the scope of protection under Section 1557 is clear, ambiguous implementing regulations and enforcement mean discriminatory practices are likely to flourish.

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[58] *Id*.

[59] Jamie M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, Nat'l Ctr. for Transgender Equality and Nat'l Gay & Lesbian Task Force (2011), https://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf.

[60] James et al., *Report of the 2015 U.S.* Transgender *Survey*, Nat'l Ctr. for Transgender Equality, *supra*, at 11, 12, 14.

[61] 45 C.F.R. § 92.4.

In the United States, approximately six million women become pregnant each year. Women in the United States require pregnancy related care including prenatal care, care for pregnancy complications, care for early pregnancy loss or miscarriage (spontaneous abortion), or pregnancy termination (induced abortion).

The Revised Rule establishes blanket religious exemptions to the prohibition on sex discrimination based on termination of pregnancy. Under the Revised Rule, a patient in need of abortion services could be denied or discouraged from seeking necessary health care, placing her health or life at risk. Additionally, women who have experienced a prior termination could be discriminated against if they disclose their prior abortion on a medical history. Safe, legal abortion is a necessary component of women's health care that is essential to women's health and well-being; these exemptions undermine necessary protections.[62],[63]

As maternal mortality rates rise in the United States,[64] enacting regulatory changes that could allow health care professionals and institutions to turn patients away could lead to negative health outcomes for women and higher health costs. This would disproportionately impact certain groups, such as women in rural communities where access to health care is more limited."[65] Section 1557 already contains adequate protections for religious beliefs. The Court should not

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[62] Am. Coll. of Obstetricians and Gynecologists, *Committee Opinion Number 613: Increasing Access to Abortion*, 124 Obstetrics & Gynecology 1060 (2014).

[63] Am. Coll. of Obstetricians & Gynecologists, *Position Statement: Restrictions to Comprehensive Reproductive Health Care* (Apr. 2016), https://www.acog.org/clinical-information/policy-and-position-statements/position-statements/2018/restrictions-to-comprehensive-reproductive-health-care.

[64] Marian F. MacDorman et al., *Is the United States Maternal Mortality Rate Increasing? Disentangling Trends from Measurement Issues*, 128 Obstetrics & Gynecology 447 (2016).

[65] Am. Coll. of Obstetricians and Gynecologists, *Health Disparities in Rural Women*, 123 Obstetrics & Gynecology 384, 385 (2014), https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2014/02/health-disparities-in-rural-women.pdf.

permit the creation of additional exemptions that go beyond recognized law —especially those, as here, that will inhibit patients' ability to access the care they need.

The Revised Rule is also at odds with bedrock principles of medical ethics that require that the "welfare of the patient (beneficence) is central to all considerations in the patient-physician relationship."[66] Both ACOG's Code of Professional Ethics and the American Medical Association's Code of Medical Ethics require medical professionals to act in good faith to protect patient health, even when a patient's health interests conflict with a physician's personal views.[67] *Amici* acknowledge that medical professionals hold a wide variety of personal moral and religious views and respect the right of medical professionals to practice medicine in accordance with their conscience. Yet, while a physician has the right to practice medicine according to one's conscience, refusals of care that conflict with patient well-being should be accommodated only if the primary duty to the patient can be fulfilled. It is not ethical for a physician to refuse to refer for care or leave a patient in a position where he or she cannot obtain care based on personal views.[68] The Revised Rule would permit such unethical behavior and undermine patient access to care.

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[66] American College of Obstetricians and Gynecologists. Code of professional ethics. December 2018. Available at: https://www.acog.org/-/media/Departments/National-Officer-Nominations-Process/ACOGcode.pdf?dmc=l&ts=20190724T1616133833.

[67] American Medical Association. Code of medical ethics: physician exercise of conscience. Available at: https://www.ama-assn.org/delivering-care/ethics/physician-exercise-conscience.

[68] The limits of conscientious refusal in reproductive medicine. ACOG Committee Opinion No. 385. American College of Obstetricians and Gynecologists. *Obstet Gynecol* 2007;110:1203-8.

III. THE REVISED RULE ALSO ROLLS BACK PROTECTIONS FOR PEOPLE WITH LIMITED ENGLISH PROFICIENCY ("LEP") AND OTHER PATIENT POPULATIONS AND HARMS PATIENT CARE.

In addition to provisions that will harm women and LGBTQ+ patients, the Revised Rule undermines protections for individuals with LEP and other vulnerable populations. As of 2015, more than 25.9 million people—approximately 9% of the U.S. population ages five and over—are LEP.[69] This population is consistently among the most vulnerable, showing higher rates of medical errors and worse clinical outcomes than English-proficient patients.[70]

As a result of the Revised Rule, individuals with LEP could face additional challenges in access to culturally and linguistically appropriate care, including information about health insurance and how to access services. The Revised Rule will result in fewer LEP individuals and families being aware of their health benefits and rights. Additionally, by eliminating language access plans and other critical protections for LEP individuals seeking care without articulating other, workable solutions, the Revised Rule discourages health care providers from taking steps to accommodate the needs of people with LEP. Taken together, this change could make health care inaccessible for many marginalized or linguistically isolated communities.

In addition to the changes for individuals with LEP, the Revised Rule seeks to limit an individual's private right of action to sue covered entities for discrimination under Section 1557. Moreover, the Revised Rule seeks to limit an individual's ability to pursue a disparate impact claim. *Amici* support the civil rights protections enshrined in the previous Section 1557 and these critical patient protections should not be scaled back.

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[69] Jeanne Batalova & Jie Zong, *Language Diversity and English Proficiency in the United States*, Migration Information Source (Nov. 11, 2016), https://www.migrationpolicy.org/article/language-diversity-and-english-proficiency-united-states-2015.

[70] A. Green, *Language-Based Inequity in Health Care: Who Is The "Poor Historian"?* 19 AMA J. Ethics 263 (2017).

IV. THE REVISED RULE GRANTS INSURERS CARTE BLANCHE TO DISCRIMINATE AGAINST VULNERABLE PATIENT POPULATIONS.

Section 1557 also includes a ban on discriminatory behavior by health insurance issuers. Under the current regulations, covered entities are prohibited from: denying, canceling, limiting, or refusing to issue or renew a health insurance policy; denying or limiting coverage of a health insurance claim; imposing additional cost-sharing or other limitations or restrictions on coverage; or using discriminatory marketing practices or insurance benefit designs because of race, color, national origin, sex, age, or disability. These important protections would be eliminated under the Revised Rule, opening the door for health insurance issuers to discriminate against certain patient populations and medical conditions.

For example, in addition to the harmful discrimination impacting transgender individuals described above, the Revised Rule would give health insurance issuers the authority to place all medications for certain diseases or infections —such as HIV— into the highest cost-sharing tier, making them cost prohibitive for many patients. Given that the 2015 Transgender Survey found that 30% of transgender people were living in poverty and 15% were unemployed in 2014,[71] the prohibitive cost of HIV and other medications would have a disparate impact on the vulnerable transgender population.

Moreover, the Revised Rule would allow insurance companies to implement prior authorization or step therapy requirements as well as age restrictions for certain medications, even those that have been found to be clinically effective for all ages.

It is foreseeable that some health plans may target contraceptive methods for prior authorization, step therapy requirements, or age restrictions. ACOG has routinely discouraged the

[71] James et al., *Report of the 2015 U.S.* Transgender *Survey*, Nat'l Ctr. for Transgender Equality, *supra*.

Centers for Medicare and Medicaid Services (CMS) from allowing entities to require prior authorization and step therapy for family planning services and supplies and for family planning-related services. ACOG believes that medically-appropriate clinical services must be available to patients without costly delays or the imposition of additional barriers.[72]

This is particularly concerning for adolescent access to long-acting reversible contraception (LARC). Notably, ACOG, AAP, the Centers for Disease Control and Prevention, and the Society of Family Planning support the use of LARC by adolescents as these methods have higher efficacy, higher continuation rates, and higher satisfaction rates compared with shorter-acting contraceptives among adolescents who choose to use them.[73] For example, complications of intrauterine devices (IUDs) and contraceptive implants are rare and differ little between adolescents and adults, which make these methods safe for adolescents.[74] In 2006-2010, 82% of all adolescents at risk of an unintended pregnancy were currently using contraception, but only 59% used a highly effective method, including any hormonal method or IUD.[75] Adolescents are in need of highly-effective forms of contraception, such as LARC, both to prevent unintended pregnancies[76] and to affirm gender identity.[77]

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[72] Am. Coll. of Obstetricians & Gynecologists, *Statement of Policy: Access to Women's Health Care* (July 2019), https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2019/access-to-womens-health-care.

[73] Am. Coll. of Obstetricians & Gynecologists Comm., *Adolescents and Long-Acting Reversible Contraception: Implants and Intrauterine Devices*, 131 Obstetrics & Gynecology 130 (2018).

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5684657/; https://www.jpagonline.org/action/showPdf?pii=S1083-3188%2816%2900122-4; https://transcare.ucsf.edu/guidelines/youth

Granting health plans the power to limit access to these critical medications may create barriers for patients to access the method of their choice, potentially leading to inconsistent use of inferior methods and higher rates of unintended pregnancy. Each of these actions by health plans would constitute sex discrimination under the current Section 1557 regulations, but these practices would be condoned under the Revised Rule. *Amici* oppose these revised provisions.

Lastly, the Revised Rule significantly narrows the population of patients protected by Section 1557's nondiscrimination requirements. First, it carves out all programs and activities that were not expressly created under Title I of the ACA. This includes programs like the National Health Service Corps and the Indian Health Service, neither of which would need to comply with nondiscrimination protections under the Revised Rule. Second, while the regulations still apply to non-health care entities (i.e., health insurance issuers), they only apply to lines of business that receive federal financial support. Under the current regulations, Section 1557 applies to the insurer itself, meaning any product sold by that insurer cannot discriminate based on race, color, national origin, age, disability, or sex. Under the Revised Rule, only the lines of business sold by the insurer that receive federal funding need to comply. This change is harmful to vulnerable populations. Laws and policies that provide affordable, comprehensive health insurance coverage are important to combat health risks, such as poverty and the lack of health insurance, among sexual and gender diverse populations.[78] Third, the Revised Rule expressly exempts short-term, limited-duration insurance (STLDI) products from complying with Section 1557. STLDI plans often exclude

[78] *Understanding the Well-Being of LGBTQI+ Populations, A Consensus Study Report of the National Academies of Sciences, Engineering and Medicine*, National Academies Press (2020), p.7, published at https://www.nationalacademies.org/our-work/understanding-the-status-and-well-being-of-sexual-and-gender-diverse-populations.

coverage for critically important health care services; vary premium rates by gender, health status, and age; and put individuals and families at significant financial risk.

These changes dramatically limit the scope of nondiscrimination protections across federal programs and health insurance products. To protect patients from discrimination across health programs and insurance types, the Revised Rule should be invalidated.

CONCLUSION

For the foregoing reasons, the *Amici Curiae* respectfully urge this Court to grant the Plaintiffs' Motion for Summary Judgment.

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Respectfully submitted,

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