

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

WHITMAN-WALKER CLINIC, INC., *et al.*,

Plaintiffs,

v.

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

Defendants.

Case No. 1:20-cv-1630

**DECLARATION OF ROY HARKER, EXECUTIVE DIRECTOR,
AGLP: THE ASSOCIATION OF LGBTQ+ PSYCHIATRISTS**

I, Roy Harker, declare as follows:

1. I am the Executive Director of AGLP: The Association of LGBTQ+ Psychiatrists (“AGLP”).

2. I have been the sole staff person for AGLP for over twenty-five years, first as National Office Director for five years, then as Executive Director since 1999. I am an alumnus of Drexel and Temple Universities in Philadelphia, and completed the American Society of Association Executives (“ASAE”) Association Executive Certification in February of 2018, the highest professional credential for those engaged in association management.

3. I am submitting this Declaration in support of Plaintiffs’ motion for a preliminary injunction to prevent the 1557 Revised Rule, published by the Department of Health and Human Services on June 19, 2020 (the “Revised Rule”), from taking effect.

4. AGLP: The Association of LGBTQ+ Psychiatrists is a 501(c)(3) national membership nonprofit organization based in Philadelphia, Pennsylvania, and incorporated in Pennsylvania. AGLP is a community of psychiatrists that educates and advocates on lesbian, gay, bisexual, and transgender mental health issues. AGLP’s goals are to foster a fuller understanding of LGBTQ+

mental health issues; research and advocate for the best mental health care for LGBTQ+ people; develop resources to promote LGBTQ+ mental health; create a welcoming, safe, nurturing, and accepting environment for members; and provide valuable and accessible services to our members. AGLP strives to be a community for the personal and professional growth of all LGBTQ+ psychiatrists, and to be the recognized expert on LGBTQ+ mental health issues.

5. AGLP (formerly known as the Association of Gay and Lesbian Psychiatrists) represents the interests of about 450 LGBTQ+ psychiatrists who are members of the association. AGLP was founded in the 1970s when gay and lesbian members of the American Psychiatric Association (APA) met secretly at the annual meetings. At that time, in most states, homosexuality could be used as cause to rescind someone's license to practice medicine. In 1973, the APA removed homosexuality as a mental disorder from its Diagnostic and Statistical Manual of Mental Disorders (DSM). This allowed a more open association of lesbian and gay psychiatrists, who could be a little less fearful for their jobs if they were found out to be gay. Similarly, in 2012, the APA removed the term "Gender Identity Disorder," which had historically been used by mental health professionals to diagnose transgender individuals, from the DSM and instead added the term "Gender Dysphoria." The reason for the change was to emphasize that a person's identity is not disordered, but rather focus on the clinically significant distress they may suffer as a result of their experiences. The World Health Organization then removed gender dysphoria from psychiatric diagnosis in 2019. Even today, however, the mission of providing support and a safe space for LGBTQ psychiatrists to meet continues to be important to many of AGLP's members. AGLP is the oldest organized association of LGBTQ professionals in the country.

6. AGLP is an independent organization from American Psychiatric Association ("APA"), but works closely with APA through many projects, including but not limited to,

LGBTQ+ representation on the APA Assembly (the Minority Caucus of the APA and AGLP's own representative), APA position statements, LGBTQ+ Committees of the DSM, the creation and staffing of an AIDS Committee, and research and advocacy of particular interest to LGBTQ+ people through their quarterly *Journal of Gay and Lesbian Mental Health*, and seminars and discussion groups that are conducted concurrently with the APA's annual meeting. AGLP works within the APA to influence policies relevant to LGBTQ+ people, including issuing position statements educating about how discrimination and stigmatization of LGBTQ+ people adversely affects their mental health and right to happiness, as well as bringing awareness to and advocating against the misuse of religion to discriminate against LGBTQ+ people.

7. AGLP continues to work with APA and independently to support our members and advocate for LGBTQ+ patients. AGLP also assists medical students and residents in their professional development, encourages and facilitates the presentation of programs and publications relevant to gay and lesbian concerns at professional meetings; and serves as liaison with other minority and advocacy groups within the psychiatric community.

8. The Revised Rule fosters greater discrimination against LGBTQ+ patients, who already experience widespread discrimination in accessing health care. This discrimination increases negative health outcomes and results in health disparities in comparison to the non-LGBTQ+ population. AGLP's members inform us that their LGBTQ patients and patients living with HIV report having experienced frequent discrimination by other health care providers and suffer from more acute medical conditions resulting from such discrimination and fear of seeking medically-necessary health care services. A nationally representative survey from 2017 showed that 68.5% of LGBTQ people who experienced discrimination in the past year said it negatively

affected their psychological well-being, while 43.7% said it negatively affected their physical well-being.¹

9. In addition, a large percentage of AGLP members' experiences are consistent with research findings that transgender patients report having negative experiences related to their gender identity when seeking medical care. A survey of almost 28,000 transgender people conducted in 2015 found that 33% of respondents had experienced a negative interaction with a health care provider because of their gender identity in the year preceding the survey.²

10. In comparison to other populations, LGBTQ patients face significant health disparities. For example, a nationally representative survey to collect data on sexual orientation found LGB people were at heightened risk of psychological distress, drinking, and smoking, and lesbian and bisexual women were at heightened risk of having multiple chronic conditions.³ Data has also shown that transgender people in the United States are more likely to be overweight, be depressed, report cognitive difficulties, and forego treatment for health problems than cisgender people.

11. The Revised Rule will result in greater discrimination against LGBTQ+ patients, including those of AGLP's members, and in increased denials of services in violation of medical ethics and standards of care. The Revised Rule presents a direct conflict with nondiscrimination standards adopted by all the major health-professional associations, who have already recognized

¹ Sejal Singh & Laura E. Durso, "Widespread Discrimination Continues to Shape LGBT People's Lives in Both Subtle and Significant Ways," *Center for American Progress*, May 2, 2017, <https://www.americanprogress.org/issues/lgbt/news/2017/05/02/429529/widespread-discrimination-continues-shape-lgbt-peoples-lives-subtle-significant-ways>.

² Sandy James et al., *Executive Summary of the Report of the 2015 U.S. Transgender Survey*, National Center for Transgender Equality (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Executive-Summary-Dec17.pdf>.

³ Human Rights Watch, "You Don't Want Second Best": Anti-LGBT Discrimination in US Health Care (2018), <https://www.hrw.org/report/2018/07/23/you-dont-want-second-best/anti-lgbt-discrimination-us-health-care>.

the need to ensure LGBTQ+ patients are treated with respect and without bias or discrimination in hospitals, clinics, and other health care settings. All of the leading health-professional associations—including the American Medical Association, American Osteopathic Association, American Academy of Physician Assistants, American Nurses Association, American Academy of Nursing, American College of Physicians, American College of Obstetricians and Gynecologists, American Psychiatric Association, American Academy of Pediatricians, American Academy of Family Physicians, American Public Health Association, American Psychological Association, National Association of Social Workers, and many more—have adopted policies articulating that health care providers should not discriminate in providing care for patients and clients because of their sexual orientation or gender identity.

12. There is a consensus amongst scientists that gender identity is part of the natural spectrum of human experience and expression. This includes major medical organizations like the APA. Transgender and gender nonconforming people have been marginalized and continue to fight for basic civil rights. Discrimination and harassment are especially significant sources of stress for transgender youth who are navigating an especially challenging period of their life and are vulnerable to depression and suicide when not supported by family and schools. This is especially true when even their health care providers, the people whom they turn to in their most vulnerable times of need, discriminate against them or deny them care. As an organization of psychiatrists who often serve and care for patients who are LGBTQ+, AGLP knows that discrimination against LGBTQ+ individuals in health care access and coverage remains a pervasive problem. Discrimination by health care providers has been detrimental to the health of LGBTQ patients, and these harms would be exacerbated by the Revised Rule.

13. AGLP has long strongly held and publicly asserted that all people, whether LGBTQ+ or not, deserve equal rights under federal law and the Constitution; that religious liberty justifications for denying health care are thinly disguised efforts to return to marginalization and stigmatization of same-sex and transgender orientations and identities; that virtually every major mental-health organization has concluded that there is no credible scientific evidence that LGBTQ+ citizens are psychologically impaired *per se* or can change who they are; that LGBTQ+ citizens represent no more burden on American society than any other minority group, and, in fact, have made substantive contributions to the arts, sciences, and businesses in America; and that discrimination and stigmatization of LGBTQ+ citizens adversely affects their mental health and right to happiness. Therefore, AGLP steadfastly condemns all legislative and administrative efforts, including the Revised Rule, to deny access to health care to and discriminate against LGBTQ+ citizens.

14. The Revised Rule eliminates the definition of “on the basis of sex” and the specific regulatory prohibition of discrimination on the basis of gender identity, transgender status, and failure to conform to sex stereotypes. The Revised Rule also eliminates specific regulatory provisions related to discrimination against transgender individuals, as well as the provision relating to the discrimination on the basis of association. The elimination of these provisions, in addition to the Revised Rule’s invitation to health care providers to discriminate based on their religious or moral beliefs, will result in direct harms to the LGBTQ+ patients that our members serve and to our members who advocate on behalf of their patients and condemn discrimination resulting from the Revised Rule. Additionally, our members’ workloads will increase as a result of the Revised Rule because more LGBTQ+ patients will seek out their care as a result of discrimination or fear of discrimination from other, non-affirming providers. By inviting

discrimination against patients based on patients' sexual orientation, gender identity, or transgender status, the Revised Rule cannot be reconciled with the ethical standards that health care professionals are charged to uphold.

15. If not enjoined, the Revised Rule will harm AGLP members, LGBTQ+ patients whose interests AGLP also represents, and the patients who AGLP members treat. The Revised Rule invites health care facilities to discriminate against LGBTQ+ employees and patients without concern about the impact on ensuring the provision of medically necessary care for patients, adherence with medical standards of care, ethical requirements, accreditation requirements, and nondiscrimination requirements in employment and in the provision of patient care. The Revised Rule, therefore, frustrates AGLP's mission of achieving and enforcing safe workspaces for LGBTQ+ psychiatrists and nondiscriminatory health care services to AGLP members' LGBTQ+ patients. The Revised Rule frustrates AGLP's mission of advocating for nondiscrimination standards of care for patients and nondiscriminatory work environments for its members that protect against discrimination on the basis of sexual orientation and gender identity and advocating for cultural competency standards of care for treatment of LGBTQ+ patients.

16. The 2016 Final Rule, promulgated by HHS in 2016 pursuant to Section 1557 of the ACA, prohibits discrimination with regards to certain terms or benefits of employment, including employee health benefit programs. As a result of the Revised Rule, some of AGLP's LGBTQ+ members could lose regulatory protections from discrimination regarding these employment benefits as their employers are covered entities under the Revised Rule but not large enough to be subject to Title VII of the Civil Rights Act.

17. Similarly, some members of AGLP who are employed by religiously-affiliated health care organizations may be subjected to discrimination as a result of the Revised Rule, whose

incorporation of overly broad religious exemptions are inapposite in the health care context and conflict and also conflict with Title VII. AGLP has members who are medical directors and administrators in hospitals and clinics all over the country and, in the course of their employment, these health care providers treat LGBTQ+ patients. The Revised Rule invites religiously-affiliated health care employers to discriminate against employees who are AGLP members for adhering to their medical and ethical obligations to treat all patients in a nondiscriminatory manner, including providing all medically necessary care in the patient's best interest, and for advocating on behalf of patients who are discriminated against by other providers or their employers. The Revised Rule impinges on and conflicts with AGLP members' medical and ethical obligations as health care providers and harms the patients that they serve.

18. AGLP members and their LGBTQ+ patients are stigmatized and demeaned by the message communicated by the Revised Rule that their government privileges beliefs that result in the disapproval and disparagement of LGBTQ+ people in the health care context and refused to protect LGBTQ+ people from discrimination in health care. The Revised Rule invites discrimination against AGLP members as well as their LGBTQ+ patients.

19. Based on their years of working with LGBTQ+ patients who have reported concealing their identities out of fear of discrimination, AGLP members know that the Rule will cause LGBTQ patients to attempt to hide their LGBTQ identities when seeking health care services, especially from religiously-affiliated health care organizations, in order to avoid discrimination. When patients are unwilling to disclose their sexual orientation and/or gender identity to health care providers out of fear of discrimination and being refused treatment, their mental and physical health is critically compromised.

20. AGLP will need to be a resource to its members and their patients, who may be in need of medical services but may no longer know where to go for LGBTQ+-affirming health care as a result of the Revised Rule. The Revised Rule will predictably result in more discrimination and denials of care, and, consequently, more requests for referrals. With an increase in referral requests as a result of the Revised Rule, AGLP will need to allocate additional resources to assisting AGLP members and their patients with health care referrals. AGLP offers an online referral service to patients seeking LGBTQ+-affirming psychotherapy, support, and psychiatric treatment. The Revised Rule adversely impacts AGLP by necessitating the diversion and reallocation of resources in order to provide referrals to increasing numbers of patients. The Revised Rule will make it more difficult and resource-intensive for AGLP to locate and monitor appropriate referrals that will not cause further harm to AGLP patients who have already been discriminated against or who fear discrimination on the basis of objections to the patients' gender identities or sexual orientation. AGLP will have to update its online referral search engine, especially because many health care providers currently listed on the website are affiliated with religious hospitals and organization. As a result of the Revised Rule, AGLP will have to allocate additional staff time to support the increase in referral requests.

21. AGLP will be required to expend its resources to educate and assist its members and the LGBTQ+ patients its members serve to defend against the harms that the Revised Rule causes. AGLP has been working with other medical and health associations, including the APA, to express disapproval of the Revised Rule. Such work has diverted resources away from other proactive projects and outreach efforts that are core to AGLP's mission. AGLP will also spend resources answering AGLP members' inquiries about the Revised Rule given the pervasive and real concern


that the Revised Rule invites behavior that contradicts medical ethical requirements and standards of care.

22. The Revised Rule empowers and invites discrimination against AGLP members and their patients and will create discriminatory work environments for AGLP members. AGLP, in turn, sees and will continue seeing an increase in psychiatrists seeking its assistance with addressing such discrimination. AGLP will need to help its members navigate through these hostile environments and may need to intervene on behalf of its members when necessary. The increased demand for such services will further hamper AGLP's other work because AGLP already has a very limited bandwidth for such services.

[Signature on next page.]

I declare under penalty of perjury under the laws of the United States of America
that the foregoing is true and correct.

Dated this 6th day of July, 2020.


Roy Harker