Congress of the United States

Washington, DC 20515

October 3, 2022

The Honorable Xavier Becerra
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

The Honorable Chiquita Brooks-LaSure
Administrator
Centers for Medicare and Medicaid Services
200 Independence Avenue, SW
Washington, DC 20201

Dear Secretary Becerra and Administrator Brooks-LaSure,

We write in support of HHS' proposed rule, Nondiscrimination in Health Programs and Activities (Docket HHS-OS-2022-0012), and to urge HHS to explicitly clarify nondiscrimination protections for LGBTQI+ individuals seeking assisted reproduction (AR) services. When Congress passed the Affordable Care Act (ACA) in 2010, it included strong antidiscrimination protections in Section 1557, including a prohibition on discrimination on the basis of sex. Discrimination on the basis of sex includes discrimination on the basis of sexual orientation, gender identity, and sex characteristics, as well as sex stereotypes and pregnancy or related conditions. By explicitly clarifying that prohibited sex discrimination includes these categories, the proposed rule affirms Congress' intent in passing Section 1557 to prohibit all forms of sex discrimination. This is also consistent with case law, including the Supreme Court's 2020 decision in *Bostock v. Clayton County*. While Section 1557 and the proposed rule as it stands would extend to LGBTQI+ individuals and couples who wish to have children, including via AR, we believe that the proposed rule could be further improved by specifying that health programs and activities should not discriminate against LGBTQI+ individuals by placing conditions on coverage that are centered around different-sex couples. Although this letter focuses on the discrimination LGBTQI+ individuals face in particular, the same 1557 protections should apply to other individuals who also face discrimination in accessing AR services.

In 2013, the American Society for Reproductive Medicine defined infertility as "a disease, defined by the failure to achieve a successful pregnancy after 12 months or more of appropriate, timed unprotected intercourse or therapeutic donor insemination." Many health plan policies for AR coverage are based on this definition. Others use a definition of infertility based solely on failure to achieve a pregnancy after a period of unprotected heterosexual intercourse. Both of these definitions, used in this context, place an undue burden on non-heterosexual individuals and couples who wish to reproduce. Health plans using these definitions often impose significant extra costs or complete exclusions of coverage of fertility treatments for LGBTQI+ people. We believe these pervasive policies that focus on cisgender heterosexual couples are inherently discriminatory, and HHS should clarify in the Final Rule that AR coverage, if offered, must be offered without regard to sexual orientation, gender identity, sex characteristics (including intersex traits) or any other factors protected by Section 1557.

AR includes several methods for facilitating reproduction in the case of medical or social infertility. These include intrauterine insemination (IUI), in vitro fertilization (IVF), and surrogacy. Denying such services based on an individual's or couple's inability to have unprotected, procreative sexual intercourse is inherently discriminatory against LGBTQI+ individuals and couples, particularly for the vast majority of same-sex couples for whom sexual intercourse cannot lead to pregnancy. For example, it is discriminatory to deny IUI to a couple

composed of two cisgender women based on their inability to engage in procreative sexual intercourse with each other.

In *Bostock*, the Supreme Court considered whether LGBTQ+ workers who were fired from their jobs for their sexual orientation or gender identity were discriminated against on the basis of sex. The Court held 6-3 that the Civil Rights Act's protection against employment discrimination on the basis of sex applied, and that a plain reading of the protection extends to discrimination based on sexual orientation or gender identity. Consistent with the Supreme Court's decision in *Bostock,* HHS rightly clarifies that nondiscrimination protections on the basis of sex include sexual orientation and gender identity.

One of the primary reasons for HHS' undertaking this rulemaking is to ensure consistency with the *Bostock* decision. We applaud HHS for its efforts, but we believe additional clarity is necessary to ensure covered entities properly comply with the law. We believe that HHS should be more specific about the policies and practices that are mandated or prohibited as a result of Section 1557 and the *Bostock* decision, such as cases of AR coverage where LGBTQI+ Americans have historically met pervasive discrimination. HHS could do so by including a discussion of fertility care at 42 CFR 92.206(b) in the final rule. The ACA's protections as passed by Congress extend to LGBTQI+ individuals and couples who wish to have children, including via AR. LGBTQI+ Americans deserve the same opportunity as heterosexual and cisgender Americans to start a family, and burdensome and unnecessary requirements that do not contemplate fertility as it relates to LGBTQI+ individuals and couples should not stand in their way.

We are united in our commitment to reproductive freedom and to strengthening American families, and we are grateful for your partnership in pursuit of equality. Thank you for your consideration of these comments.

Sincerely,

Chrissy Houlahan
Member of Congress

Mike Quigley
Member of Congress

Dwight Evans
Member of Congress

Donald M. Payne, Jr.
Member of Congress

Jesús G. "Chuy" García
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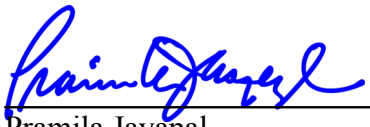

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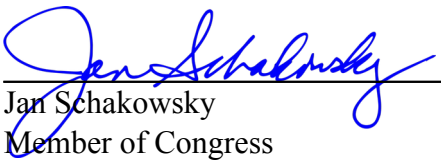

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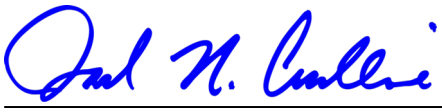

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