

No. 23-10078

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**UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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SUSAN NEESE; JAMES HURLY,

*Plaintiffs-Appellees,*

v.

XAVIER BECERRA, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HEALTH AND  
HUMAN SERVICES; UNITED STATES OF AMERICA,

*Defendants-Appellants.*

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Appeal from the United States District Court for the Northern District  
of Texas, No. 2:21-cv-163, Judge Matthew Joseph Kacsmaryk.

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**BRIEF FOR AMICI CURIAE AMERICAN CANCER SOCIETY,  
AMERICAN CANCER SOCIETY CANCER ACTION NETWORK,  
CANCER SUPPORT COMMUNITY, CANCERCARE, CROHN'S &  
COLITIS FOUNDATION, CYSTIC FIBROSIS FOUNDATION, EPILEPSY  
FOUNDATION, HEMOPHILIA FEDERATION OF AMERICA, JUDGE  
DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW,  
NATIONAL LGBT CANCER NETWORK, NATIONAL MULTIPLE  
SCLEROSIS SOCIETY, NATIONAL PATIENT ADVOCATE  
FOUNDATION, NATIONAL ORGANIZATION FOR RARE DISORDERS,  
THE AIDS INSTITUTE, THE LEUKEMIA & LYMPHOMA SOCIETY,  
THE SUSAN G. KOMEN BREAST CANCER FOUNDATION, INC., AND  
WOMENHEART: THE NATIONAL COALITION FOR WOMEN WITH  
HEART DISEASE IN SUPPORT OF DEFENDANTS-APPELLANTS**

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APRIL 3, 2023

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## **CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

### **Plaintiffs-Appellees:**

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### **Defendants-Appellants:**

Defendants-appellants are all governmental parties.

### **Amici Curiae:**

American Cancer Society  
American Cancer Society Cancer Action Network  
Cancer Support Community  
*CancerCare*  
Crohn's & Colitis Foundation  
Cystic Fibrosis Foundation  
Epilepsy Foundation  
Hemophilia Federation of America

Judge David L. Bazelon Center for Mental Health Law  
National LGBT Cancer Network  
National Multiple Sclerosis Society  
National Patient Advocate Foundation  
National Organization for Rare Disorders  
The AIDS Institute  
The Leukemia & Lymphoma Society  
The Susan G. Komen Breast Cancer Foundation, Inc.  
WomenHeart: The National Coalition for Women with Heart Disease

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Dated: April 3, 2023

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## IDENTITY AND INTEREST OF AMICI<sup>1</sup>

The American Cancer Society (ACS), American Cancer Society Cancer Action Network (ACS CAN), Cancer Support Community (CSC), CancerCare, Crohn's & Colitis Foundation, Cystic Fibrosis Foundation (CFF), Epilepsy Foundation, Hemophilia Federation of America (HFA), Judge David L. Bazelon Center for Mental Health Law (Bazelon Center), National LGBT Cancer Network, National Multiple Sclerosis Society (NMSS), National Organization for Rare Disorders (NORD), National Patient Advocate Foundation (NPAF), The AIDS Institute, The Leukemia & Lymphoma Society (LLS), The Susan G. Komen Breast Cancer Foundation, Inc. (Komen), and WomenHeart: The National Coalition for Women with Heart Disease (WomenHeart) (collectively, Amici) represent millions of patients and consumers across the country facing serious, acute, and chronic health conditions and disabilities. Amici have a unique perspective on what individuals and families need to prevent disease, manage health, and cure illness—and a deep understanding of the harm that will result if the district court's decision is allowed to stand.

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<sup>1</sup> This brief is submitted under Federal Rule of Appellate Procedure 29(a) with the consent of all parties. Counsel for amici curiae certify that this brief was not authored in whole or part by counsel for any of the parties; no party or party's counsel contributed money for the brief; and no one other than amici and their counsel have contributed money for this brief.

ACS's mission is to save lives, celebrate lives, and lead the fight for a world without cancer. ACS CAN is the nonpartisan advocacy affiliate of ACS, making cancer a top priority for policymakers, and believing that everyone should have a fair and just opportunity to prevent, detect, treat, and survive cancer.

As the largest professionally led nonprofit network of cancer support worldwide, the CSC is dedicated to ensuring that all people impacted by cancer are empowered by knowledge, strengthened by action, and sustained by community. CSC delivers more than \$50 million in free support and navigation services to cancer patients and their families. We also conduct cutting-edge research on the emotional, psychologic, and financial journey of cancer patients and advocate at all levels of government for policies to help individuals whose lives have been disrupted by cancer.

*CancerCare* is the leading national organization providing free, professional support services and information to help people manage the emotional, practical, and financial challenges of cancer.

Crohn's & Colitis Foundation's mission is to cure Crohn's disease and ulcerative colitis, and to improve the quality of life for children and adults affected by these diseases.

The CFF's mission is to cure cystic fibrosis and to provide all people with CF the opportunity to lead long, fulfilling lives by funding research and drug

development, partnering with the CF community, and advancing high-quality, specialized care. The CFF advocates for policies that promote access to affordable, adequate health care for all people with cystic fibrosis.

Epilepsy Foundation is the leading national, voluntary health organization representing over 3.4 million Americans with epilepsy and seizures. Uncontrolled seizures can lead to disability, injury, and death. Epilepsy medications are the most common, cost-effective treatment for controlling and/or reducing seizures. Timely access to quality, affordable, physician-directed care and effective coverage for epilepsy medications is vital for people with epilepsy.

HFA is a community-based, grassroots advocacy organization that assists, educates, and advocates for people with hemophilia, von Willebrand disease, and other rare bleeding disorders. HFA works for patient access to quality and affordable care and coverage—priorities that reflect the nature of bleeding disorders as serious, life-long, and expensive health conditions.

The Bazelon Center is a national non-profit legal advocacy organization founded in 1972 to advance the rights of individuals with mental disabilities. The Bazelon Center uses litigation, public policy advocacy, education, and training to advocate for laws and policies that ensure equal opportunities for people with mental illness or intellectual disability in all aspects of their lives, including the opportunity to participate fully in their communities.

The mission of the National LGBT Cancer Network is to improve the lives of LGBTQ+ individuals on the cancer journey and those at risk through educational, training, and advocacy initiatives.

NMSS mobilizes people and resources so that the nearly one million people affected by multiple sclerosis (MS) can live their best lives while the Society works to stop MS in its tracks, restore what has been lost and end MS forever.

NORD, a 501(c)(3) organization, is a patient advocacy organization dedicated to individuals with rare diseases and the organizations that serve them. NORD, along with its more than 330 patient organization members, is committed to improving the health and well-being of people with rare diseases by driving advances in care, research, and policy.

NPAF is dedicated to elevating patient and caregiver voices as part of improving equitable access to affordable quality care, particularly for our most underserved populations. NPAF is the advocacy affiliate of Patient Advocate Foundation (PAF), a national organization that provides direct assistance to families coping with complex and chronic health conditions to help meet their most pressing needs for financial and social services advocacy and support.

The AIDS Institute is a nonpartisan, nonprofit organization dedicated to ensuring that all people living with, or at risk of, HIV, viral hepatitis, and other chronic illnesses have access to the care and services they need.

LLS is the world's largest voluntary health agency dedicated to fighting blood cancer and ensuring that the more than 1.3 million blood cancer patients and survivors in the United States have access to the care they need. LLS's mission is to cure leukemia, lymphoma, Hodgkin's disease, and myeloma, and to improve the quality of life of patients and their families. LLS advances that mission by advocating that blood cancer patients have sustainable access to quality, affordable, coordinated healthcare, regardless of the source of their coverage.

Komen is the world's leading nonprofit breast cancer organization representing the millions of people who have been diagnosed and living with breast cancer. Komen advocates on behalf of the estimated 300,590 people in the United States who will be diagnosed with breast cancer and the almost 44,000 who will die from the disease in 2023 alone, many of whom identify as LGBTQ+ individuals.

WomenHeart is the nation's only patient-centered organization focused solely on providing support, education and advocacy to women living with or at risk for heart disease.

Amici are all deeply concerned about the effect the district court's decision will have on the individuals and families they represent. As a direct result of the decision, many individuals will face discrimination or the threat of discrimination, which will delay access to timely treatment, lower the quality of medical care, and

result in poorer health outcomes. Amici submit this brief to assist the Court in understanding the nature and extent of this harm.

## **INTRODUCTION AND SUMMARY OF ARGUMENT**

Discrimination on the basis of sex, gender identity, transgender status, sexual orientation and similar characteristics has no place in our health care system. Such discrimination can be particularly harmful for people suffering from chronic conditions and disabilities, who often must rely on health care providers for access to lifesaving treatments. Indeed, despite progress in treating chronic diseases like cancer or multiple sclerosis, not all groups are benefitting from that progress. Discrimination of all kinds continues to contribute to disparate outcomes from chronic diseases and disabilities. Eliminating discrimination and the resulting barriers to care is critical for achieving better health outcomes for the millions of patients and consumers Amici represent.

Congress agrees. Congress adopted section 1557 to protect individuals from discrimination and to avoid the costs that follow when such discrimination happens. As *Bostock v. Clayton County* makes clear, those protections extend to lesbian, gay, bisexual, transgender, and queer (LGBTQ) people because “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that person based on sex.” 140 S. Ct. 1731, 1741 (2020). The district court’s decision contravenes that precedent and undermines section 1557 by

rolling back protections for LGBTQ people. Amici thus agree with the government that the district court's decision should not stand and that the protections section 1557 guarantees should be restored.

## ARGUMENT

### A. LGBTQ People With Chronic Diseases And Disabilities Face Distinct Challenges Because Of Discrimination

Nearly everyone will require health care at some point in their lives. *See Nat'l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 547 (2012). That fact is apparent from looking at even just a subset of the diseases on which Amici focus:

- Roughly 2 million new cancer cases are expected to be diagnosed in the United States in 2023, while more than 18 million Americans are living with a history of cancer. Am. Cancer Soc'y, *Cancer Facts & Figures 2023*, at 1.<sup>2</sup>
- Roughly four out of ten Americans will develop cancer in their lifetimes. *Id.* at 2.
- An additional 127.9 million American adults are living with cardiovascular diseases. Connie W. Tsao et al., *Heart Disease and Stroke Statistics—2023 Update*, Am. Heart Ass'n, e97 (2023).<sup>3</sup>
- The lifetime risk for developing cardiovascular disease in those free of known disease at age 45 is almost two in three for men and greater than one in two for women. John T. Wilkins et al., *Lifetime Risk and Years*

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<sup>2</sup> <https://www.cancer.org/content/dam/cancer-org/research/cancer-facts-and-statistics/annual-cancer-facts-and-figures/2023/2023-cancer-facts-and-figures.pdf>.

<sup>3</sup> <https://www.ahajournals.org/doi/epdf/10.1161/CIR.0000000000001123>.



*Lived Free of Total Cardiovascular Disease*, 308 J. AM. MED. ASS'N 1795, 1798 (2012).

- Another 58.5 million Americans have arthritis; 36.6 million have some form of chronic lung disease; and 24 million suffer from autoimmune diseases, including nearly one million with multiple sclerosis (MS). Ctrs. for Disease Control & Prevention, *Improving the Quality of Life for People With Arthritis*<sup>4</sup>, Ctrs. for Disease Control & Prevention, *2017 National Health Interview Survey* (2018) (analysis by ALA Epidemiology and Statistics Unit using SPPS Software); Nat'l Multiple Sclerosis Soc'y, *MS Prevalence*<sup>5</sup>; Nat'l Inst. of Env't Health Scis., *Autoimmune Diseases*.<sup>6</sup>
- More than one in five adults in the United States lives with a mental illness. Nat'l Inst. of Mental Health, *Statistics*.<sup>7</sup>
- Approximately 1.2 million Americans are living with HIV, a disease that requires lifetime medical care. Ctrs. for Disease Control & Prevention, *HIV Surveillance Supplemental Report 2020 25:1* (2020) (Table 7).<sup>8</sup>
- According to the National Institutes of Health, 1 in 10 people are affected by a rare disease, and half of all people diagnosed with a rare disease are children. Nat'l Insts. of Health, *Delivering Hope for Rare Diseases* (Jan. 2023).<sup>9</sup>

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<sup>4</sup> <https://www.cdc.gov/chronicdisease/resources/publications/factsheets/arthritis.htm>.

<sup>5</sup> <https://www.nationalmssociety.org/About-the-Society/MS-Prevalence>.

<sup>6</sup> <https://www.niehs.nih.gov/health/topics/conditions/autoimmune/index.cfm>.

<sup>7</sup> <https://www.nimh.nih.gov/health/statistics/mental-illness.html>.

<sup>8</sup> <http://www.cdc.gov/hiv/library/reports/hiv-surveillance.html>.

<sup>9</sup> [https://www.ncats.nih.gov/files/NCATS\\_RareDiseasesFactSheet.pdf](https://www.ncats.nih.gov/files/NCATS_RareDiseasesFactSheet.pdf).

The population of people with these chronic diseases and disabilities includes many who identify as LGBTQ. Am. Cancer Soc’y, *Lesbian, Gay, Bisexual, Transgender, Queer (LGBTQ) People with Cancer Fact Sheet* (2022).<sup>10</sup> Indeed, the LGBTQ community has a disproportionate burden of some chronic illnesses, like cancer, HIV, and heart disease. Gwendolyn P. Quinn et al., *Cancer and Lesbian, Gay, Bisexual, Transgender/Transsexual, and Queer/Questioning (LGBTQ) Populations*, 65:5 CA: A CANCER J. FOR CLINICIANS 384, 384-86 (2015); Ctrs. for Disease Control & Prevention, *Diagnoses of HIV Infection in the United States and Dependent Areas, 2018 (Updated)* 14 (2020) (roughly 70% of new HIV diagnoses in 2018 were among gay and bisexual men); Yi Guo et al., *Statin use for Atherosclerotic Cardiovascular Disease Prevention Among Sexual Minority Adults*, J. OF AM. HEART ASSOC. (Dec. 2, 2020) (showing disparity in cardiovascular disease for sexual and gender minority people).<sup>11, 12, 13</sup> LGBTQ individuals are also more

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<sup>10</sup> <https://www.cancer.org/content/dam/cancer-org/cancer-control/en/booklets-flyers/lgbtq-people-with-cancer-fact-sheet.pdf>.

<sup>11</sup> <https://acsjournals.onlinelibrary.wiley.com/doi/pdf/10.3322/caac.21288>.

<sup>12</sup> <https://www.cdc.gov/hiv/pdf/library/reports/surveillance/cdc-hiv-surveillance-report-2018-updated-vol-31.pdf>.

<sup>13</sup> <https://www.ahajournals.org/doi/full/10.1161/JAHA.120.018233?af=R>.

than twice as likely as heterosexual ones to have a mental health disorder in their lifetime. Am. Psychiatric Assoc., *Mental Health Disparities: LGBTQ* (2017).<sup>14</sup>

Despite the universal need for health care and the increased needs of those with chronic diseases and disabilities, LGBTQ people face distinct challenges in obtaining care because of discrimination and the fear of discrimination. Multiple studies have found that lesbian and gay individuals face discrimination from health care providers, including a finding that nearly half (46%) of heterosexual first-year medical students in one report expressed at least some explicit bias against these individuals. Sara E. Burke et al., *Do Contact and Empathy Mitigate Bias Against Gay and Lesbian People Among Heterosexual First-Year Medical Students?*, *Acad Med.* (May 2015).<sup>15</sup> In one survey, 8% of LGBTQ respondents who had visited a health care provider in the past year said that a doctor or health care provider had refused to see them because of their actual or perceived sexual orientation. Shabab A. Mirza & Caitlin Rooney, *Discrimination Prevents LGBTQ People from Accessing Health Care*, *Ctr. for Am. Progress* (Jan. 18, 2018).<sup>16</sup> Nine percent said

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<sup>14</sup> <https://www.psychiatry.org/File%20Library/Psychiatrists/Cultural-Competency/Mental-Health-Disparities/Mental-Health-Facts-for-LGBTQ.pdf>.

<sup>15</sup> <https://pubmed.ncbi.nlm.nih.gov/25674910/>.

<sup>16</sup> <https://www.americanprogress.org/issues/lgbtq-rights/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/>.

that a doctor or health care provider used harsh or abusive language while treating them. *Id.* Other studies report similar results, including that 12% of LGB people report that health care professionals blame them for their health status. Lambda Legal, *When Health Care Isn't Caring: Lambda Legal's Survey of Discrimination Against LGBT People and People Living with HIV* 11 (2010).<sup>17</sup> And the reported discrimination was even higher among transgender people—29% reported that a doctor or health care provider had refused to see them because of their actual or perceived gender identity; 23% had been intentionally misgendered; and 21% said a doctor or provider had used harsh or abusive language. Mirza & Rooney, *supra*.

There is good reason to expect that LGBTQ people with chronic diseases and disabilities are even more likely to experience discrimination than these surveys reported for LGBTQ people generally. Those with a chronic disease or disability often must interact with more health care providers on a more frequent basis. A 2016 study found that 55.5% of all doctor visits in the United States related to one or more chronic conditions. Rui P. Okeyode, Ctrs. for Disease Control & Prevention, *National Ambulatory Medical Care Survey: 2016 National Summary*

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<sup>17</sup> [https://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-report\\_when-health-care-isnt-caring.pdf](https://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-report_when-health-care-isnt-caring.pdf).

*Tables* Table 18 (2016).<sup>18</sup> For example, even long after diagnosis and initial treatment, individuals with a previous cancer diagnosis are more likely to require hospitalizations, ER visits, ambulatory surgeries, and provider visits than those without. They thus spend on average more than twice as long receiving health care in a year compared to individuals without a previous cancer diagnosis. K. Robin Yabroff et al., *Annual Patient Time Costs Associated with Medical Care Among Cancer Survivors in the United States*, 52:7 MED CAR. 594, 597-99 (2014). Similarly, individuals living with HIV must receive lifelong treatment from medical providers to suppress the virus, treatment that helps maintain a healthy immune system and prevent spread. Dep't of Health & Human Servs., *Evidence of HIV treatment and viral suppression in preventing the sexual transmission of HIV* (2022).<sup>19</sup> For an LGBTQ person with one of these chronic conditions, every health care visit comes with a risk of suffering discrimination from doctors or health care providers. Mirza & Rooney, *supra*.

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<sup>18</sup> [https://www.cdc.gov/nchs/data/ahcd/namcs\\_summary/2016\\_namcs\\_web\\_tables.pdf](https://www.cdc.gov/nchs/data/ahcd/namcs_summary/2016_namcs_web_tables.pdf).

<sup>19</sup> <https://www.cdc.gov/hiv/risk/art/evidence-of-hiv-treatment.html>.

**B. Discrimination In Health Care Harms LGBTQ People In Many Different Ways**

The harms from discrimination go beyond being denied health care. The higher levels of stress related to discrimination and marginalization has led to health behavioral issues and poor health outcomes. Guo, *supra*, at 1-2. Indeed, those higher levels of stress can directly contribute to increased risk of chronic disease like heart disease. *Id.* They also contribute to higher rates of tobacco, alcohol, drug use, and obesity, all of which increase the risks for various chronic conditions. *Id.* And they lead to disparities in mental health, including from an early age—the rate of suicide attempts is *four times* greater for LGB youth than for their heterosexual peers. *Mental Health Disparities*, *supra*.

When LGBTQ people experience bias, humiliation, or harsh treatment at the hands of health care providers, they also can become alienated from the health care system and reluctant to seek care at all. Lambda Legal, *supra*, at 12. In one survey, roughly 29% of LGB respondents and 73% of transgender respondents felt that medical personnel would likely treat them differently because of their sexual orientation or gender identity. *Id.* Because of fears of discrimination from medical personnel, 8% of LGBTQ people in another survey avoided or postponed medical care. Mirza & Rooney, *supra*. That number increased to 14% for those who had experienced discrimination due to their sexual orientation or gender identity in the past year. *Id.* In general, LGBTQ adults are far more likely than others not to seek

healthcare or to lack a regular healthcare provider (30% for LGBTQ adults versus 10% for age-matched heterosexuals). Quinn, *supra*. The delayed or avoided medical care often includes critical preventive services—for LGBTQ people who had experienced discrimination in the past year, 17% reported delaying or avoiding seeking preventive screenings. *Id.*; see Chioun Lee et al., *The Association between Perceived Provider Discrimination, Health Care Utilization, and Health Status in Racial and Ethnic Minorities*, 19 *Ethnicity & Disease* 330 (2009) (reporting that “[p]erceived provider discrimination contributes to health disparities” and “delay” in seeking care for other minority groups).

Timely medical care and preventive screenings are vital for everyone, including LGBTQ people with diagnosed or undiagnosed chronic diseases and disabilities:

- The five-year survival rates for those diagnosed at later stages of cancer are significantly lower than the rates for those diagnosed when their cancer is less advanced. Am. Cancer Soc’y, *Cancer Facts*, *supra*, at 21.<sup>20</sup>
- Early treatment for multiple sclerosis is similarly critical. A growing body of evidence indicates that early and ongoing treatment with an FDA-approved disease-modifying therapy is the best way to manage the MS disease course, prevent accumulation of disability, and protect the brain from damage due to MS. See Daniel M. Hartung et al., *Trends In Coverage for Disease Modifying Therapies in Multiple Sclerosis in*

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<sup>20</sup> <https://www.cancer.org/content/dam/cancer-org/research/cancer-facts-and-statistics/annual-cancer-facts-and-figures/2023/2023-cancer-facts-and-figures.pdf>.

*Medicare Part D*, 38 HEALTH AFFAIRS 303 (2019). MS patients face a reduction in survival of between 8 to 12 years if they do not receive proper treatment. *Id.*

- Timely treatment for epilepsy is also critical to reduce the risk of accident, injury, or sudden unexpected death. C.E Belgley & T.L. Durgin, *The direct costs of epilepsy in the United States: A systemic review of estimates*, 56 EPILEPSIA 1376-87 (2015).
- Early detection and treatment of HIV is not only essential for people living with HIV, but it is also necessary to help stop HIV’s spread—80% of new HIV infections are the result of someone unaware of their status or not receiving treatment. Zihao Li et al., *Vital Signs: HIV Transmission Along the Continuum of Care — United States, 2016*, 68 Morbidity & Mortality Weekly Report 267 (2019).<sup>21</sup>
- Untreated psychosis in individuals with mental illness “increases a person’s risk for suicide, involuntary emergency care, and poor clinical outcomes.” Vikki Wachino et al., *Coverage of Early Intervention Services for First Episode Psychosis*, 2 (Oct. 16, 2015).<sup>22</sup> In contrast, early intervention strategies have changed the trajectory of individuals’ lives, enabling people with serious mental illnesses to live in community settings and participate fully in family and community life. *Id.*

**C. Preventing Discrimination Is Necessary To Improve Health Outcomes, Provide Better Preventive Care, And Increase Patient Satisfaction With Care**

Discrimination by health care providers also harms LGBTQ people because it pressures them to stay closeted when seeking medical care, leading to worse health

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<sup>21</sup> <http://dx.doi.org/10.15585/mmwr.mm6811e1>.

<sup>22</sup> <https://www.medicaid.gov/federal-policy-guidance/downloads/cib-10-16-2015.pdf>.



outcomes for those with chronic diseases and disabilities. Many studies report that discrimination can deter LGBTQ people from disclosing their sexual orientation or gender identity to health care providers. Institute of Medicine, *The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding* 63 (2011); UC Davis Comprehensive Cancer Center, *LGBT Task Force Finds Disparities in Cancer Screening and Care* (2012)<sup>23</sup>; Liz Hamel et al., *HIV/AIDS In the Lives of Gay and Bisexual Men in the United States*, Kaiser Family Foundation (2014).<sup>24</sup> That lack of disclosure can lead to worse care. Gwendolyn P. Quinn et al., *The Importance of Disclosure: Lesbian, Gay, Bisexual, Transgender/Transsexual, Queer/Questioning, and Intersex Individuals and the Cancer Continuum* 121 *CANCER* 1160, 1161-62 (2015).<sup>25</sup>

LGBTQ individuals also have several risk factors for chronic illness, making preventive care and frequent screenings essential. For example, lesbian women have multiple higher risk factors for breast cancer than heterosexual women, such as higher smoking and obesity rates, greater alcohol use, and never having completed

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<sup>23</sup> <https://health.ucdavis.edu/synthesis/issues/fall2012/lgbt-task-force-tackles-disparities-in-cancer-screening-and-care.html>.

<sup>24</sup> <https://www.kff.org/hiv aids/report/hiv aids-in-the-lives-of-gay-and-bisexual-men-in-the-united-states/>.

<sup>25</sup> <https://acsjournals.onlinelibrary.wiley.com/doi/epdf/10.1002/cncr.29203>.

a pregnancy; compared to straight men, gay men have a higher prevalence of human papillomavirus, which is associated with seven types of cancer; and a transgender person requires screening for different conditions than an individual whose gender identity conforms to the sex they were assigned at birth. *Id.*<sup>26</sup> Frequent HIV screening for gay men or transgender persons similarly helps catch and treat HIV early and helps prevent further spread of the disease. *HIV Surveillance, supra* at 7-8. Yet instead of increased screening by health care providers for these various risks, one survey found that LGBTQ respondents were less likely to receive proper screening—only 32% of female respondents had received recommended mammograms and nearly half of respondents said their providers did not talk to them about their risks of cancer or how to reduce them. UC Davis, *supra*. And more than half of gay and bisexual men reported that a doctor has never recommended they get tested for HIV, even though they account for the overwhelming majority (70%) of new cases. Liz Hamel et al., *supra* at 16;<sup>27</sup> Ctrs. for Disease Control & Prevention, *Diagnoses of HIV Infection, supra*. LGBTQ people also experience higher rates of mental health disorders, rates that are at least partly attributable to the excess stress

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<sup>26</sup> See Cancer.org, HPV and Cancer, <https://www.cancer.org/healthy/cancer-causes/infectious-agents/hpv/hpv-and-cancer-info.html>.

<sup>27</sup> <https://www.kff.org/hiv/aids/report/hiv-aids-in-the-lives-of-gay-and-bisexual-men-in-the-united-states/>.

they experience because of discrimination. Wendy B. Bostwick et al., *Discrimination and Mental Health Among Lesbian, Gay and Bisexual Adults in the United States*, 84 AM. J. ORTHOPSYCHIATRY 35-45 (2014).<sup>28</sup>

Such discrimination contributes to LGBTQ people's documented lower patient satisfaction. Patient satisfaction is an important metric for health care providers that depends on many factors, including effective and clear communication between health care providers and patients, a safe environment of mutual respect that lets patients disclose information, and support by providers that empowers patients to participate in their own treatment, such as by choosing among different treatment options. Jennifer Jabson & Charlie S. Kamen, *Sexual Minority Cancer Survivors' Satisfaction with Care* 34:1-2 J. PSYCHOSOC. ONCOL. 28, 28-30 (2016). Patient satisfaction positively correlates with better health outcomes—patients who report better satisfaction with their overall experience are more likely to complete prescribed treatment and follow care provider recommendations. *Id.*; Ashish K. Jha et al., *Patients' Perception of Hospital Care in the United States*, 359 NEW ENG. J. MED. 1921, 1925-26 (2008).<sup>29</sup>

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<sup>28</sup> <https://doi.apa.org/doiLanding?doi=10.1037%2Fh0098851>.

<sup>29</sup> <https://www.nejm.org/doi/pdf/10.1056/NEJMsa0804116>.

Unsurprisingly, discrimination against LGBTQ patients lowers their satisfaction level with the care they receive or can access. Jabson, *supra*, at 28-30; Joseph B. Clift & J. Kirby, *Health Care Access and Perceptions of Provider Care Among Individuals in Same-Sex Couples: Findings From the Medical Expenditure Panel Survey (MEPS)*, 59 J. HOMOSEXUALITY 839, 839-40 (2012). For example, one study found that gay and bisexual men were almost twice as likely as heterosexual men (12% versus 7%) to report lower satisfaction with medical care, including reporting that doctors did not show them respect and did not spend enough time with them. Clift & Kirby, *supra*, at 840-42. Another study showed similar results, finding across all measured satisfaction items that LGB cancer survivors reported lower satisfaction with care than heterosexual cancer survivors. Jabson & Kamen *supra*, at 35-38.

Prohibiting medical providers from discriminating on the basis of sexual orientation or gender identity must be part of the solution to these many harms suffered by LGBTQ people with chronic conditions and disabilities. Telling LGBTQ patients to avoid the harm by finding another provider is not an adequate answer. Many chronic conditions and disabilities require specialized care, and in some regions of the country there may be only one or two providers with the necessary expertise. Beth O'Connor et al., *LGBTQIA+ health in rural America*,

*National Rural Health Policy Brief* (Feb. 2022).<sup>30</sup> Thus, one survey found that “18 percent of LGBTQ people said it would be ‘very difficult’ or ‘not possible’ to find the same type of service at a different hospital,” and 17% said the same about finding service at a different community health center or clinic. Mirza & Rooney, *supra*. Even if an alternative provider exists, finding one can delay critical treatment for chronic conditions and disabilities or deter LGBTQ people from receiving or completing the treatment they need. *Supra* at pp. 13-19.

Given the discrimination that many LGBTQ people face in health-care settings, it is critical that the protections Congress adopted in Section 1557 stay in place.

## CONCLUSION

For these reasons, the district court’s judgment should not stand, and the Court should reverse if it reaches the merits.

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<sup>30</sup> [https://www.ruralhealth.us/getattachment/Advocate/Policy-Documents/2022-NRHA-LGBTQ-Policy-Paper-Final-\(1\).pdf.aspx](https://www.ruralhealth.us/getattachment/Advocate/Policy-Documents/2022-NRHA-LGBTQ-Policy-Paper-Final-(1).pdf.aspx).

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Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system on April 3, 2023.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: April 3, 2023

/s/ Joseph R. Palmore  
Joseph R. Palmore

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This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 4,065 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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