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February 26, 2020

The Honorable Delores G. Kelley
Senate Finance Committee
3 East
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Annapolis, MD 21401

Testimony of FreeState Justice

IN SUPPORT OF

SB738: Health Care Providers and Health Benefit Plans - Discrimination in Provision of Services

To the Honorable Chair Dolores G. Kelley, Vice Chair Brian J. Feldman, and esteemed members of the Finance Committee:

FreeState Justice is Maryland's lesbian, gay, bisexual, transgender, and queer (LGBTQ) civil rights advocacy organization. Each year, we provide free legal services to dozens, if not hundreds, of LGBTQ Marylanders who could not otherwise be able to afford an attorney. Many of our cases involve discrimination in healthcare institutions, and 36.1% of LGBTQ Marylanders identified healthcare as a critical issue in our 2016 Needs Assessment.¹

Unfortunately, Maryland law does not prohibit discrimination against LGBTQ Marylanders on the basis of their sexual orientation or gender identity. Although federal law, notably Section 1557 of the Affordable Care Act² and its implementing

¹ M. Saida Agostini, PUSHING BACK: A BLUE PRINT FOR CHANGE: LESSONS LEARNED FROM THE 2016 NEEDS ASSESSMENT OF LGBTQ MARYLANDERS at 21 (FreeState Justice 2018), available at <https://freestate-justice.org/wp-content/uploads/2019/03/Pushing-Back-A-Blueprint-for-Change.pdf>.

² 42 U.S.C. § 18116 (prohibiting discrimination on the basis of race, color, national origin, sex, age, or disability, by any health program or activity that receives federal funding).

regulations,³ have offered some protections to LGBTQ Marylanders, the Trump Administration's Department of Health and Human Services has proposed new regulations gutting existing protections for sexual orientation and (especially) gender identity.⁴ Meanwhile, pending cases at the Supreme Court of the United States could further undermine the application of all federal nondiscrimination laws to LGBTQ individuals.⁵ Thus without state level protection like that in SB738, LGBTQ Marylanders may soon find themselves without any remedy when discriminated against in access to healthcare.

I. Discrimination Against LGBTQ Marylanders in Access to Healthcare

Discrimination against LGBTQ people can take many forms in a healthcare setting: doctors may refuse to provide care for LGBTQ patients because of their sexual orientation or gender identity, may refuse to recognize the family of LGBTQ couples, and may use harsh or abusive language when treating them.

This discrimination disproportionately affects transgender patients. In fact, a 2017 study by the Center for American Progress demonstrates that 29 % of transgender patients were excluded from healthcare service by a provider because of their actual or perceived gender identity.⁶ A 2015 US Transgender Survey report revealed that one in four transgender people avoided seeking care for fear of discrimination, while one-third who did see a health care provider in the year prior reported having at least one negative experience relating to their transgender status.⁷ Despite Maryland's strong record on LGBTQ rights, the Maryland residents answered largely in line with their peers in other states, with 23% reporting not seeking care

³ 81 Fed. Reg. 31,376 (May 18, 2016), *codified at* 45 C.F.R. Part 92.

⁴ *See* 84 Fed. Reg. 24,846 (June 14, 2019).

⁵ *Altitude Express Inc. v. Zarda*, No. 17-1623; *Bostock v. Clayton County, Ga.*, No. 17-1618; *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Comm'n*, No. 18-107.

⁶ Shabab Ahmed Mirza & Cailin Rooney, *Discrimination Prevents LGBTQ People from Accessing Health Care*, Center for American Progress, Jan. 18, 2018, available at <https://www.americanprogress.org/issues/lgbtq-rights/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/>.

⁷ James, S. E., *et al.*, THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY at 93, 96-99 (Nat'l Ctr. for Transgender Equality 2016), available at <http://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF>.

for fear of being mistreated and 29% reporting having at least one negative interaction with a health care provider in the prior year.⁸

This persistent discrimination causes many LGBTQ Marylanders, especially those outside of the Baltimore and Washington, D.C., metro areas, to drive between 45 to three hours to access inclusive healthcare services.⁹ Even if they are able to find an affirming provider, however, services can still be (and sometimes are) denied by provider or insurance company policies that discriminate against LGBTQ patients.

In one recent case, for instance, a hospital in Baltimore cancelled a transgender man's hysterectomy the night before surgery, despite allowing cisgender patients to receive hysterectomies in the same facilities. It is also all-too-common for insurance companies to deny coverage for transition-related care, in violation of federal law and often their own policies.

Discrimination like this negatively impacts the wellbeing of LGBTQ Marylanders by decreasing their access to healthcare providers and to medical care, especially for those living in rural areas or seeking specialized treatments.

II. Maryland Does Not Have a Comprehensive Healthcare Nondiscrimination Law

Unfortunately, Maryland law is ill-suited to protect LGBTQ Marylanders – or any Marylanders, for that matter – in the face of healthcare discrimination. While Maryland has adopted a suite of laws prohibiting discrimination on the basis of race, sex, age, color, creed, national origin, marital status, sexual orientation, gender identity, or disability: in access to public accommodations;¹⁰ by individuals licensed by the Department of Labor, Licensing, and Regulation;¹¹ in leasing of commercial property;¹² in employment;¹³ or in housing,¹⁴ there is no similarly broad law prohibiting discrimination in the provision of healthcare services or of health

⁸ James S. E., *et al.*, THE 2015 U.S. TRANSGENDER SURVEY, *Maryland State Report* at 3 (Nat'l Ctr. for Transgender Equality 2017) *available at* <https://transequality.org/sites/default/files/USTS%20MD%20State%20Report.pdf>.

⁹ M. Saida Agostini, PUSHING BACK: A BLUE PRINT FOR CHANGE: LESSONS LEARNED FROM THE 2016 NEEDS ASSESSMENT OF LGBTQ MARYLANDERS at 22 (FreeState Justice 2018), *available at* <https://freestate-justice.org/wp-content/uploads/2019/03/Pushing-Back-A-Blueprint-for-Change.pdf>

¹⁰ MD. CODE STATE GOV'T § 20-301 *et seq.*

¹¹ MD. CODE STATE GOV'T § 20-401 *et seq.*

¹² MD. CODE STATE GOV'T § 20-501 *et seq.*

¹³ MD. CODE STATE GOV'T § 20-601 *et seq.*

¹⁴ MD. CODE STATE GOV'T § 20-701 *et seq.*

insurance. Hospitals and doctors' offices are also excluded from the state's list of public accommodations.¹⁵

In place of a comprehensive law prohibiting discrimination in healthcare and health insurance, Maryland has merely the scant protections offered by Health-General § 19-355. Under 19-355, hospitals and "related institutions" (a term defined to mean skilled nursing facilities and similar institutions offering nursing or subsistence care for two or more unrelated individuals)¹⁶ "may not discriminate in providing personal care for an individual because of the race, color, or national origin of the individual."¹⁷ It does not prohibit discrimination by healthcare providers outside of a hospital or nursing facility context, nor by health insurers in any context. Moreover, 19-355 leaves open discrimination on the basis of many classes prohibited by Maryland's other nondiscrimination laws, including sex, age, creed, marital status, disability, sexual orientation, and gender identity.

III. Federal Healthcare Nondiscrimination Protections Are Under Attack

In the absence of a state-level remedy, LGBTQ Marylanders and others have in recent years relied on the expansive protections offered by Section 1557 of the Affordable Care Act and its implementing regulations. Now, however, the continued vitality of those protections are in doubt, as the federal Department of Health and Human Services has proposed rescinding many Obama-era protections, while at the same time the United States Supreme Court is considering whether discrimination "on the basis of sex" includes sexual orientation and gender identity, as many lower courts had previously held.¹⁸

Section 1557 prohibits discrimination by any health program or activity that receives federal funding on the basis of race, color, national origin, sex, age, or disability.¹⁹ Consistent with appellate court decisions from across the country, the Department of Health and Human Services under the Obama administration interpreted "sex" to include sexual orientation and gender identity, and in 2016

¹⁵ MD. CODE STATE GOV'T § 20-301.

¹⁶ MD. CODE HEALTH-GEN. § 19-301.

¹⁷ MD. CODE HEALTH-GEN. § 19-355.

¹⁸ See, e.g., *Whitaker v. Kenosha Unified School District*, 858 F.3d 1034 (7th Cir. 2017); *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017) (en banc); *Dodds v. U.S. Dept. of Education*, 845 F.3d 217 (6th Cir. 2016); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. Feb. 29, 2000). See also *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that sex stereotyping constituted discrimination on the basis of sex).

¹⁹ 42 U.S.C. § 18116.

issued regulations expressly prohibiting discrimination on the basis of gender identity and defining the term “sex stereotyping” in a way to cover most if not all discrimination on the basis of sexual orientation.²⁰

The 2016 regulations also included several provisions designed to guarantee that transgender individuals have access to healthcare, including provisions prohibiting covered entities from excluding or limiting coverage for health services relating to gender transition,²¹ denying or limiting claim coverage or health services based on a transgender individual’s sex assigned at birth,²² or otherwise denying or limiting coverage or imposing additional cost sharing or other restrictions on gender transition related services.²³

Since these regulations went into effect in 2016, they have had a dramatic effect in expanding the ability of transgender individuals to access healthcare in Maryland. As a result of the Section 1557 regulations, for instance, both the Maryland Insurance Administration and Department of Health and Mental Hygiene have issued guidance to insurance providers and Medicaid Managed Care Organizations requiring them to include coverage for transition-related care.²⁴ The Section 1557 regulations have also been cited in innumerable private actions, especially appeals of insurance denials.

Unfortunately, on June 14, 2019, the Trump administration Department of Health and Human Services issued new proposed regulations that would gut the protections enshrined in Section 1557.²⁵ These regulations entirely eliminate the general prohibition on discriminating against individuals on the basis of gender identity, as well as the specific protections for transgender individuals; adopt a blanket religious freedom exemption for healthcare providers that would be a license to discriminate; allow insurers to vary benefits to discriminate against

²⁰ 45 C.F.R. § 92.4.

²¹ 45 C.F.R. § 92.207(b)(4).

²² 45 C.F.R. § 92.206, 92.207(b)(3). For example, a health insurance plan cannot deny coverage for a transgender woman’s mammogram on the grounds that she was assigned male at birth, or, alternatively, could not deny coverage for treatment of prostate cancer because her health insurance policy designated her as female.

²³ 45 C.F.R. § 92.207(b)(5).

²⁴ See Maryland Department of Health and Mental Hygiene, Maryland Medical Assistance Program Managed Care Organizations Transmittal No. 10 (March 10, 2016), available at https://mmcp.health.maryland.gov/MCOupdates/Documents/pt_37_16.pdf; Maryland Insurance Administration, Bulletin 15-33 (Dec. 10, 2015), available at https://insurance.maryland.gov/Insurer/Documents/bulletins/15-33_2017-ACA-Rate-Form-Filing-Deadlines-and-Substitution-Rules.pdf.

²⁵ 84 Fed. Reg. 24,846 (June 14, 2019).

individuals with HIV; weaken or eliminate language access requirements for non-English speakers; and limit Section 1557's protections only to the specific programs receiving federal funds, rather than all programs of organizations receiving funds.²⁶

Public comment for HHS's proposed regulations closed on August 13, 2019, and the Department is currently reviewing and preparing responses to the voluminous public comments submitted. The final regulations, which are expected to be substantially similar to those proposed in June, will likely go into effect by the end of 2020.

While individuals will still be able to base claims on Section 1557's statutory provisions prohibiting discrimination, appellate court precedent interpreting "discrimination on the basis of sex" as including sexual orientation and gender identity may soon be reversed or called into question by the United State Supreme Court. On October 8, 2019, the Court heard a trio of cases centered on whether Title VII of the Civil Rights Act prohibits discrimination on the basis of sexual orientation and gender identity.²⁷ If, as is widely expected, the Court rules it does not, appellate courts are highly likely to hold other federal nondiscrimination laws, including Section 1557, do not as well. Decisions in the three cases are expected by the end of June.

LGBTQ Marylanders are thus left in an unenviable position: while we are currently protected by Section 1557 and its regulations, it is uncertain if those rights will still exist at the end of the year.

By creating Maryland's first comprehensive healthcare nondiscrimination law, SB738 would eliminate that uncertainty and make clear to LGBTQ Marylanders that we will still have access to healthcare regardless of what happens in Washington.

For this reason, FreeState Justice urges a favorable report.

²⁶ *Id.* See also MaryBeth Musumeci et al, "HHS's Proposed Changes to Non-Discrimination Regulations Under ACA Section 1557," *Disparities Policy* (July 1, 2019).

²⁷ *Altitude Express Inc. v. Zarda*, No. 17-1623; *Bostock v. Clayton County, Ga.*, No. 17-1618; *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Comm'n*, No. 18-107.