PETITION FOR RULEMAKING TO PROMULGATE REGULATIONS GOVERNING DISCRIMINATION UNDER SECTION 1557 OF THE PATIENT PROTECTION AND AFFORDABLE CARE ACT

SUBMITTED TO
THE UNITED STATES DEPARTMENT OF VETERANS AFFAIRS

JULY 20, 2023

Minority Veterans of America
Black Veterans Project
Connecticut Veterans Legal Center
Iran and Afghanistan Veterans of America
Modern Military Association of America
National Center for Transgender Equality
National Veterans Council for Legal Redress
National Veterans Legal Services Program
Protect Our Defenders
Service Women's Action Network
Swords to Plowshares
Transgender American Veterans Association
Veterans Advocacy Project
Vietnam Veterans of America

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INTRODUCTION

Minority Veterans of America ("MVA") petitions the United States Department of Veterans Affairs ("VA") to initiate a rulemaking proceeding under the Administrative Procedure Act[1] to promulgate regulations under Section 1557 of the Patient Protection and Affordable Care Act ("ACA"),[2] to prohibit discrimination in all its federally funded health care activities, in line with the standards proposed by the Department of Health and Human Services ("HHS") in its 2022 Notice of Proposed Rulemaking ("HHS NPRM"). While this petition focuses on the need for rules and standards addressing sex discrimination—including discrimination based on sexual orientation, gender identity, and sex characteristics ("SOGISC")—in VA health care programs and activities, MVA requests that VA's final rule include antidiscrimination provisions for every protected class enumerated in Section 1557, including those based on race, color, national origin, age, disability, and sex. Veterans marginalized along each of these axes deserve clear antidiscrimination protections in the form of regulations promulgated by VA.

Women and LGBTQI+[3] people face unique challenges both while serving in our nation's Armed Forces and as veterans, and they constitute a significant portion of veterans enrolled in the Veterans Health Administration ("VHA") system. As of October 2020, there were over two million women veterans living in the United States,[4] and in 2015, 35.9% of women veterans were enrolled

[1] 5 U.S.C. § 553 (2018).
[2] Pub. L. 111-148, § 1557, 124 Stat. 119, 260 (2010) (codified at 42 U.S.C. § 18116 (2018)).
[3] Except where quoting or referencing published materials that use a different acronym, this Petition uses the initialism "LGBTQI+" to refer to the community of people who are lesbian, gay, bisexual, transgender, or queer, plus intersex people and people who are gender-diverse or identify as having a non-heterosexual sexual orientation. Cited research may use "LGBQ" or "LGBT" to refer to subsets of this broader community.
[4] *Women Veterans in Focus*, U.S. DEP'T VETERANS AFFS. (Dec. 2022), https://www.womenshealth.va.gov/materials-and-resources/facts-and-statistics.asp.

in the VHA health care system.[5] In 2022, there were over one million gay and lesbian veterans[6] and more than 134,000 transgender veterans.[7] VA provides care to nine million enrolled veterans per year,[8] and those numbers swell when including family members and dependents who are eligible for VA health programs. VA delivers this care with a stated goal of providing veterans the "world-class benefits and services they have earned" by "adhering to the highest standards of compassion, commitment, excellence, professionalism, integrity, accountability, and stewardship."[9] This standard, however, has not been met for the hundreds of thousands of women and LGBTQI+ people who rely on the VHA for necessary health care.

Discrimination based on a veteran's sex, including discrimination based on sexual orientation and gender identity ("SOGI"), is rampant within the VHA system. Women and LGBTQI+ veterans report high rates of harassment, disrespect, and inadequate care at VHA facilities. This widespread discrimination causes many women and LGBTQI+ veterans to seek health care outside of the VA system or to avoid seeking care entirely.[10] Care avoidance and inadequate care can have devastating effects on women and LGBTQI+ veterans, who comprise uniquely vulnerable subsets of the veteran population. LGBTQI+ veterans, for example, are less

[5] Off. Data Governance & Analytics, *America's Women Veterans: Military Service History and VA Benefit Utilization Statistics*, U.S. DEP'T VETERANS AFFS. NAT'L CTR. VETERANS ANALYSIS & STAT. 26 (Feb. 2017), https://www.va.gov/vetdata/docs/specialreports/women_veterans_2015_final.pdf.
[6] GJ Gates, *Gay Veterans Top One Million*, URB. INST., www.urban.org/sites/default/files/publication/59711/900642-gay-veterans-top-one-million.pdf. Note that this source does not capture the bisexual and pansexual veteran population, who also comprise an important part of the LGBTQI+ veteran community.
[7] GJ Gates & JL Herman, *Transgender Military Service in the United States*, WILLIAMS INST. www.williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Military-Service-US-May-2014.pdf.
[8] *Veterans Health Administration*, U.S. DEP'T VETERANS AFFS. (2022), https://www.va.gov/health/aboutvha.asp.
[9] *About VA*, U.S. DEP'T VETERANS AFFS. (Sept. 15, 2022), https://www.va.gov/about_va.
[10] Alison B. Hamilton, et al., *Factors Related to Attrition from VA Health Care Use: Findings from the National Survey of Women Veterans*, 28 J. GEN. INTERN. MED. S510, S513 (2013); Serena MacDonald, MD, et al., *Experiences of Perceived Gender-Based Discrimination Among Women Veterans: Data from the ECUUN Study* (published 58 MED. CARE 483 (2020)) (manuscript at 3), available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7607520/pdf/nihms-1641136.pdf; *cf. LGBT Women Veterans Report Missing Needed Health Care Due to Concerns About Interacting with Other Veterans*, U.S. DEP'T VETERANS AFFS. (2018), https://www.hsrd.research.va.gov/research/citations/PubBriefs/articles.cfm?RecordID=917.

likely than other veterans to report that they are in excellent or good health and are more likely than other veterans to have multiple chronic conditions.[11] Veteran women similarly report that they are in worse health than veteran men.[12] Pervasive discrimination within the VHA therefore poses a critical threat to the health and wellbeing of women and LGBTQI+ veterans, and it is incumbent upon VA to take necessary steps to fulfill their promise to provide "world-class benefits and services" to all veterans.[13]

Promulgating regulations under Section 1557 is a necessary first step to remedying this widespread discrimination. Section 1557 prohibits discrimination on the basis of sex by incorporating the protections and enforcement mechanisms of Title IX of the Education Amendments of 1972 ("Title IX").[14] In August 2022, the HHS NPRM was released, containing a new proposed rule under Section 1557.[15] Consistent with the Supreme Court's interpretation of sex discrimination in *Bostock v. Clayton County*,[16] the HHS NPRM explicitly interprets the ban on sex discrimination to also prohibit SOGI discrimination. The HHS NPRM also expressly prohibits covered entities from discriminating on the basis of sex characteristics, categorically excluding gender-affirming care, and denying or limiting health services based on gender identity.[17]

[11] Lauren Korshak et al., *Health Disparities Among LGBT Veterans*, U.S. DEP'T VETERANS AFFS. (2022), https://www.va.gov/HEALTHEQUITY/docs/LGBT_Veterans_Disparities_Fact_Sheet_July2020_Final.pdf.
[12] *Id.*
[13] *About VA*, *supra* note 9.
[14] 20 U.S.C. § 1681 (2018).
[15] 87 Fed. Reg. 47824 (Aug. 4, 2022); *see also* 88 Fed. Reg. 44750 (July 13, 2023) (clarifying and reaffirming the prohibition on SOGI discrimination in federal statutes administered by HHS).
[16] 140 S. Ct. 1731 (2020).
[17] 87 Fed. Reg. at 47867; *id.* at 47918 (proposed § 92.205(b)(4)) ("Proposed paragraph [92.205](b)(4) prohibits a covered entity from denying or limiting health services sought for the purpose of gender-affirming care that the covered entity would provide to a person for other purposes if the denial or limitation is based on a patient's sex assigned at birth, gender identity, or gender otherwise recorded.").

VA should follow HHS's lead. Under the plain text of Section 1557,[18] VA has an obligation to the hundreds of thousands of women and LGBTQI+ veterans suffering from discrimination within VHA health programs and activities. VA should promulgate regulations under Section 1557 in line with the standards and definitions set forth in the HHS NPRM, with important modifications discussed below, to officially prohibit discrimination within the VHA and other any other VA health programs or activities receiving federal financial assistance. While promulgating these regulations is not a cure-all for the challenges facing women and LGBTQI+ veterans, or other minority veterans, VA must take this necessary first step to clarify and provide these veterans with the basic right to antidiscriminatory health care.

I. BACKGROUND

VA provides critical health care for and benefits and services to American veterans through its three administrations: VHA,[19] the Veterans Benefits Administration ("VBA"), [20] and the National Cemetery Administration ("NCA").[21] VHA is the focus of this petition because of its role

[18] 42 U.S.C. § 18116(a) (2018) ("[A]n individual shall not . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency . . . ."). VHA is a "program or activity that is administered by an Executive Agency": namely, VA. 38 U.S.C. § 7301(b) (2018); *see also id.* ("The primary function of the [VHA] is to provide a complete medical and hospital service for the medical care and treatment of veterans . . . ."). HHS has consistently interpreted Section 1557 to apply to federal agencies, including VA. *See* 80 Fed. Reg. 54172, 54173 n.2 (Sept. 8, 2015) ("[O]ther Federal agencies are encouraged to adopt the standards set forth in this proposed rule in their own enforcement of Section 1557."); 85 Fed. Reg. 37169, 37170 (June 19, 2020) ("We encourage other Federal agencies to use this proposed rule as a template for developing their own Section 1557 regulations and policies applicable to their federally assisted health programs or activities."); 87 Fed. Reg. 47824, 47842 (Aug. 4, 2022) ("We encourage other Federal agencies to use this proposed rule as a template for developing their own Section 1557 regulations and policies applicable to their federally assisted health programs or activities.").

[19] *See infra* Section I.A.1.

[20] VBA "provides a variety of benefits and services to service members, Veterans, and their families." *About VBA*, U.S. DEP'T VETERANS AFFS., https://www.benefits.va.gov/BENEFITS/about.asp (referring to life insurance, delivery of disability compensation, wartime veterans supplemental income, benefits for vulnerable veterans with fiduciary services, education and training benefits, mortgage benefits, and employment support).

[21] *About NCA*, U.S. DEP'T VETERANS AFFS., https://www.cem.va.gov/about/index.asp (explaining the provision of burial benefits for veterans and specific family members).

as VA's main health care provider and insurer. Within health care generally, and within VA specifically, women and LGBTQI+ people experience high rates of sex and SOGISC discrimination. Minority veterans, including women and LGBTQI+ veterans, specifically face discrimination that can prevent them from obtaining the health care that they need. Section 1557 provides a means for VA to correct this injustice by following HHS in promulgating rules that clarify prohibited sex and SOGISC discrimination, as well as discrimination based on other protected categories.

A. VHA's Provision of Health Care

The VHA provides health care to meet the unique needs of veterans of the U.S. Armed Forces, as well as their family members and dependents. The VHA is the largest integrated health care delivery system in the United States, providing care at 1,298 health care facilities to nine million enrolled veterans per year.[22] A completely federally funded entity,[23] "[t]he primary function of the [VHA] is to provide a complete medical and hospital service for the medical care and treatment of veterans . . . ."[24]

To provide this high-quality care, the VHA prioritizes equitable access.[25] The VHA strives to ensure "systemwide clinical expertise regarding service-connected conditions and disorders;" a veteran-centric, collaborative approach to primary care; and "a holistic view of the veteran that includes physical, psychosocial, and economic determinants of health, as well as critical support services for family members and caregivers."[26] As a result, VA's mandate is to provide health care that meets the unique needs of veterans.

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[22] *Veterans Health Administration*, *supra* note 8.
[23] *Id.*
[24] 38 U.S.C. § 7301(b) (2018).
[25] *VHA Office of Health Equity*, U.S. DEP'T VETERANS AFFS. (Oct. 11, 2022) https://www.va.gov/healthequity, ("Equitable access to high-quality care for all Veterans is a major tenet of VA health care mission.").
[26] David J. Shulkin, *Why VA Health Care is Different*, 33 FED. PRAC. 9 (2015).

In addition to directly administering the VHA, VA provides federal financial assistance to other health programs or activities through the VHA.[27] Through the Civilian Health and Medical Program of the Department of Veterans Affairs ("CHAMPVA"), the VHA regularly partners with other institutions to provide comprehensive health care to the family members and dependents of some veterans. CHAMPVA is a "comprehensive health care benefits program in which VA shares the cost of covered health care services and supplies with eligible beneficiaries."[28] CHAMPVA provides health insurance to the spouses, widow(er)s, or children of a qualifying veteran sponsor.[29] It covers most "medically necessary" health care services.[30] Medical care covered by CHAMPVA must be received from an authorized provider, which is defined by VA as "any provider performing services within the scope of their license or certification."[31] Similarly, when VA cannot provide necessary care, a veteran can receive health care from non-VHA providers through the Community Care program.[32] Care provided through the Community Care program is paid for by VA.[33]

Minority veterans are especially likely to rely solely on the VHA for health care for myriad reasons. For instance, minority veterans are more likely to experience poverty and institutional

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[27] *See, e.g.*, 38 U.S.C. § 7302(d) (2018):

> The Secretary shall carry out subsection (a) in cooperation with the following institutions and organizations: (1) Schools of medicine, osteopathy, dentistry, nursing, pharmacy, optometry, podiatry, public health, or allied health professions. (2) Other institutions of higher learning. (3) Medical centers. (4) Academic health centers. (5) Hospitals. (6) Such other public or nonprofit agencies, institutions, or organizations as the Secretary considers appropriate.

[28] *CHAMPVA*, U.S. DEP'T VETERANS AFFS., https://www.va.gov/communitycare/programs/dependents/champva.

[29] *CHAMPVA Guide*, U.S. DEP'T VETERANS AFFS 3, https://www.va.gov/COMMUNITYCARE/docs/pubfiles/programguides/champva_guide.pdf.

[30] *See id.* at 13 (including "ambulance service, ambulatory surgery, durable medical equipment (DME), family planning and maternity, hospice, inpatient services, mental health services, outpatient services, pharmacy, skilled nursing care and transplants"). Medically necessary care is defined as: "[s]ervices, drugs, supplies or equipment provided by a hospital or covered provider that we determine: (1) are appropriate to diagnose or treat the patient's condition, illness or injury; (2) are consistent with standards of good medical practice in the U.S.; (3) are not primarily for the personal comfort or convenience of the patient, the family or the provider; (4) are not a part of or associated with the scholastic education or vocational training of the patient and, (5) in the case of inpatient care, cannot be provided safely on an outpatient basis." *Id.* at 83.

[31] *See id.* at 12.

[32] *Community Care*, U.S. DEP'T VETERANS AFFS, https://www.va.gov/COMMUNITYCARE/programs/veterans/index.asp.

[33] *Id.*

racism than non-minority veterans because of identity-based historical marginalization. This, in turn, can result in a high need for health care services. For example, one study found that transgender veterans were more likely to have experienced homelessness, to have reported sexual trauma while on active duty, and to have been incarcerated.[34] LGBTQI+ and gender-minority veterans are more likely to be in fair or poor mental and physical health than the rest of the veteran community.[35] Similarly, veterans of color are 44% more likely to be in fair or poor mental or emotional health, and 51% more likely to be in fair or poor physical health.[36] These disparities can be especially stark for veterans who are members of more than one minority group and therefore are affected by intersectional discrimination. The experiences and realities of all minority veterans leave them particularly vulnerable without affordable and equitable health care services, which they rely on VA to provide.

B. Sex and SOGISC Discrimination Is Rampant in Health Care

Discrimination in health care can contribute to inequities in access to care and disparities in health status and outcomes. These disparities are especially well-documented among women and LGBTQI+ people in the United States.

1. Sex Discrimination in Health Care

Disparities in health care for women are widespread and can have catastrophic effects. For example, delays in diagnosis and treatment of heart disease, as well as disparate outcomes from

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[34] George Richard Brown and Kenneth T. Jones, *Mental Health and Medical Health Disparities in 5135 Transgender Veterans Receiving Healthcare in the Veterans Health Administration: A Case-Control Study*, 3 LGBTQ HEALTH 1, 4-5 (2015).

[35] LGBTQI+ veterans are 34% more likely to be in fair or poor mental or emotional health, and 9% more likely to be in fair or poor physical health. *Id.* Women veterans are additionally 5% more likely to be in fair or poor physical health. *Id.*

[36] *Ensuring Equitable Representation and Support for Minority Veterans, Hearing on H.R. 6039, H.R. 6082, H.R. 4908, H.R. 2791, H.R. 4526, H.R. 3582, H.R. 96, H.R. 4281, H.R. 3010, H.R. 7163, H.R. 7111, H.R. 2435, H.R. 7287, H.R. 3228, H.R. 6141, and Several Discussion Drafts Before the H. Comm. on Veterans Affairs*, 116th Cong. (2020), available at http://minorityvets.org/wp-content/uploads/2020/10/Ensuring-Equitable-Representation-and-Support-for-Minority-Veterans-1.pdf (statement of Lindsay Church, Executive Director, MVA).

heart attacks, demonstrate the effects of sex-based inequities in health care.[37] Though heart disease is the leading cause of death among both men and women, women are more likely to die following a heart attack than are men.[38] Gender biases of male physicians may be a contributing factor here, as some evidence suggests that women treated by male physicians for heart attacks experience higher mortality rates.[39] Similarly, gender biases are also known to affect outcomes in pain management.[40] The literature indicates that this stems from gender stereotypes that men are "stoic" and "in control," while women are "more sensitive to pain."[41] These biases also appear to affect treatment, as women are less likely to receive aggressive analgesic treatment and men are less likely to receive psychosocial treatment.[42] Gender-based biases are a reality within the modern health care system.

2. SOGISC Discrimination in Health Care

Discrimination against LGBTQI+ people in health care has similarly detrimental effects on treatment and outcomes. A 2019 literature review analyzed all English-language, peer-reviewed articles published before October 2018 that assessed the effects of discrimination on the health of LGBT people in the U.S. The review found that 82% of articles included "robust evidence that

[37] *See* Vidhi Doshi, *Why Doctors Still Misunderstand Heart Disease in Women*, ATLANTIC (Oct. 26, 2015), https://www.theatlantic.com/health/archive/2015/10/heart-disease-women/412495.
[38] Justin A. Ezekowitz, et al., *Is There a Sex Gap in Surviving an Acute Coronary Syndrome or Subsequent Development of Heart Failure?*, 142 CIRCULATION 2231, 2231 (2020), available at https://www.ahajournals.org/doi/epub/10.1161/CIRCULATIONAHA.120.048015.
[39] Brad N. Greenwood, et al., *Patient-Physician Gender Concordance and Increased Mortality Among Female Heart Attack Patients*, 115 PROC. NAT'L ACAD. SCI. 8569, 8569 (2018), available at https://www.pnas.org/doi/epdf/10.1073/pnas.1800097115.
[40] *See* Anke Samulowitz et al., *"Brave Men" and "Emotional Women": A Theory-Guided Literature Review on Gender Bias in Health Care and Gendered Norms Towards Patients with Chronic Pain*, 2018 PAIN RES. & MGMT. 1, 9-10, available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5845507/pdf/PRM2018-6358624.pdf (providing gender bias in pain management stems from "a variety of gendered norms about men's and women's experience and expression of pain, their identity, lifestyle, and coping style."); *see also* Danielle M. Wesolowicz et al., *The Roles of Gender and Profession on Gender Role Expectations of Pain in Health Care Professionals*, 11 J. PAIN RES. 1121, 1121 (2018) (illustrating providers tend to believe that men are underreporting their pain in comparison to women).
[41] Samulowitz et al., *supra* note 40, at 9.
[42] Wesolowicz et al., *supra* note 40, at 1121.

discrimination on the basis of sexual orientation or gender identity is associated with harms to the health of LGBT people."[43] This discrimination has been associated with increased rates of anxiety, suicide, and substance or alcohol abuse, and LGBT persons self-report being in poorer health than non-LGBT individuals.[44] Additionally, research suggests that discrimination and harassment can induce stress responses in the body, and the cumulative impact of those reactions over time can lead to negative health outcomes and behaviors.[45]

LGBTQI+ people also report facing a host of discriminatory behaviors from health care providers. In a recent survey of transgender people in the United States, 33% of respondents who had seen a health care provider in the past year reported having "at least one negative experience related to being transgender, such as verbal harassment, refusal of treatment, or having to teach the health care provider about transgender people to receive appropriate care."[46] LGBTQI+ people also fear denial of care: 17% of LGBQ respondents to a 2022 survey reported having concerns that if they disclosed their sexual orientation to a health care provider, they could be denied good medical care.[47] This problem is particularly acute for transgender or nonbinary and intersex people: 49% of transgender or nonbinary respondents and 61% of intersex respondents reported concerns about disclosing their gender identity or sex characteristics to health care providers.[48] These fears

[43] What We Know Project, *What Does the Scholarly Research Say About the Effects of Discrimination on the Health of LGBT People?*, CORNELL UNIV. (2019), https://whatweknow.inequality.cornell.edu/topics/lgbt-equality/what-does-scholarly-research-say-about-the-effects-of-discrimination-on-the-health-of-lgbt-people.
[44] 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 INT. MED. 135, 135 (2015), available at https://nap.nationalacademies.org/read/25877/chapter/1.
[45] Logan S. Casey, et al., *Discrimination in the United States, Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Americans*, 54 HEATH SERV. RSCH. (SPECIAL ISSUE) 1454, 1455 (2019).
[46] Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey*, NAT'L CTR. TRANSGENDER EQUALITY 93 (Dec. 2016), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf.
[47] Caroline Medina & Lindsay Mahowald, *Advancing Health Care Nondiscrimination Protections for LGBTQI+ Communities*, CTR. AM. PROGRESS (2022), https://www.americanprogress.org/article/advancing-health-care-nondiscrimination-protections-for-lgbtqi-communities.
[48] *Id.*

are well-founded: 15% of LGBQ respondents and 32% of transgender or nonbinary respondents reported experiencing some form of care refusal in the year prior.[49]

LGBTQI+ people also regularly report that they avoid seeking care due to discrimination from health care providers, which can further jeopardize health outcomes.[50] A 2020 study found that 15% of LGBTQ+ people in the United States reported postponing or avoiding medical treatment due to discrimination.[51] In a 2022 survey, LGBTQI+ respondents were three times more likely than non-LGBTQI+ respondents to report that they postponed or avoided getting necessary medical care due to disrespect or discrimination from health care providers.[52] This problem is particularly serious for transgender people—nearly three in ten transgender people report avoiding medical treatment due to discrimination.[53]

C. Sex and SOGI Discrimination Are Pervasive Within the VHA System

Discrimination on the basis of a veteran's sex and SOGI status is a particularly acute problem within the VHA system in part because decades of exclusionary policies have cultivated a culture of hostility and discrimination towards women and LGBTQI+ people in the military and veteran communities. This culture extends into the VHA system and results in detrimental effects on the quality of health care for all minority veterans.

1. Women Veterans

Women veterans are the fastest growing group in the veteran population,[54] and they have long faced harassment and discrimination within the military and VHA facilities, some of which

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[49] *Id.*
[50] *Understanding the Well-Being of LGBTQI+ Populations*, NAT'L ACADS. 351 (2020), https://doi.org/10.17226/25877.
[51] Sharita Gruberg et al., *The State of the LGBTQ Community in 2020*, CTR. AM. PROGRESS (2020), https://www.americanprogress.org/issues/lgbtq-rights/reports/2020/10/06/491052/state-lgbtq-community-2020.
[52] Medina & Mahowald, *supra* note 47.
[53] *Id.*
[54] *Women Veterans in Focus*, *supra* note 4.

stems from the early view—still held by some—that women did not belong in the Armed Forces.[55] Women face unique health challenges after returning home from their service, including high rates of post-traumatic stress disorder ("PTSD") associated with military sexual trauma ("MST"). VHA facilities, however, often only exacerbate these problems. Women veterans report high rates of sexual harassment, discriminatory procedures, and inadequate care within VHA facilities.

a. Military Discrimination Against Women Service Members

For centuries, exclusionary policies towards women have contributed to gender inequity in the military and veteran community. Following the passage of the Women's Armed Services Integration Act in 1948, the U.S. military allowed women to serve as official members of the U.S. military.[56] Before the statute, women unofficially served in the military and openly served in World War I.[57] But after WWII, women veterans faced challenges in securing veteran status and benefits for their service. In fact, the United States did not recognize many of these women as veterans until 1979.[58] The military's historically exclusionary policies and resulting culture of hostility continue to affect the ability of women service members to advance to higher ranks. Because the United States did not completely lift its prohibition on women serving in combat roles until 2015,[59] there are also disparities in the gender diversity of military leadership,[60] which

[55] *See, e.g.*, Lolita C. Baldor, *Mattis: Jury is Out on Women Succeeding in Combat Jobs*, ASSOCIATED PRESS (Sept. 25, 2018), https://apnews.com/article/north-america-ap-top-news-va-state-wire-army-politics-04473932a9d04748bbc95c57f172ab55 (quoting former Defense Secretary Jim Mattis: "Clearly the jury is out on [women in combat roles] . . . .").

[56] *Women's Armed Services Integration Act*, ENCYCLOPAEDIA BRITANNICA, https://www.britannica.com/event/Womens-Armed-Services-Integration-Act.

[57] Danielle DeSimone, *Over 200 Years of Service: The History of Women in the U.S. Military*, USO (June 7, 2022), https://www.uso.org/stories/3005-over-200-years-of-service-the-history-of-women-in-the-us-military.

[58] *Id.*

[59] Cheryl Pellerin, *Carter Opens All Military Occupations, Positions to Women*, U.S. DEP'T DEFENSE (Dec. 3, 2015), https://www.defense.gov/News/News-Stories/Article/Article/632536/carter-opens-all-military-occupations-positions-to-women.

[60] Missy Ryan, *Presence of Women in Military Has Grown Only Slightly in Recent Years, Study Finds*, WASH. POST (May 20, 2020), https://www.washingtonpost.com/national-security/presence-of-women-in-military-has-grown-only-slightly-in-recent-years-study-finds/2020/05/20/5088b4ac-9aa8-11ea-b60c-3be060a4f8e1_story.html (explaining that women remain "far outnumbered, especially in the military's higher echelons").

contributes to a culture that sees women service members as "less than" men—less qualified, less deserving, less capable, and less welcome. This disparity is likely to persist for several more generations.[61]

Even as they were allowed into the military, service women were historically subject to unrelenting sexual harassment, mistreatment, and assault. In 1992, for example, Navy Lieutenant Paula Coughlin came forward with allegations of widespread sexual assault at the Navy's annual Tailhook Symposium.[62] A Department of Defense investigation into the allegations found that during the three-day conference, at least 83 women were sexually assaulted.[63] The Tailhook scandal revealed to the public the culture of misogyny and the extensive sexual assault that women in the military have battled for decades. Despite purported efforts to make changes, sexual assault and harassment remains a serious concern for women in the military. For example, for the 2021-2022 school year, 21.4% of women at military academies said that they experienced unwanted sexual contact,[64] and in 2018, more than half of women service members reported experiencing sexual harassment.[65]

Because of these historical—and ongoing—disparities, women continue to face challenges in receiving the same veteran status as their male counterparts, a phenomenon that affects their health care. In a survey conducted by Service Women's Action Network, 75% of women

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[61] Katie Miller & Lindsay Rosenthal, *Women and Warfare: Denying Combat Recognition Creates 'Brass Ceiling'*, CTR. AM. PROGRESS (Dec. 20, 2012), https://www.americanprogress.org/article/women-and-warfare-denying-combat-recognition-creates-brass-ceiling (identifying the combat exclusion policy as a major barrier to career progression).

[62] *Revisiting the Tailhook Sexual Assault*, WNYC STUDIOS (May 16, 2013), https://www.wnycstudios.org/podcasts/takeaway/segments/293511-what-tailhook-scandal.

[63] Norman Kempster, *What Really Happened at Tailhook Convention: Scandal: The Pentagon Report Graphically Describes How Fraternity-Style Hi-Jinks Turned into Hall of Horrors*, L.A. TIMES (Apr. 24, 1993), https://www.latimes.com/archives/la-xpm-1993-04-24-mn-26672-story.html.

[64] Juliana Kim, *In Military Academies, 1 in 5 Female Students Said They Experienced Sexual Assault*, NAT'L PUB. RADIO (Mar. 12, 2023, 6:42 PM ET), https://www.npr.org/2023/03/12/1162861309/military-academies-sexual-assault-survey.

[65] Melinda Wenner Moyer, *'A Poison in the System': The Epidemic of Military Sexual Assault*, N.Y. TIMES (Aug. 3, 2021), https://www.nytimes.com/2021/08/03/magazine/military-sexual-assault.html.

respondents said "no" when asked if their service is recognized and valued by the general public, citing gender bias as a significant problem facing women veterans.[66] The devaluing of women's service has detrimental effects on women veterans' health and quality of life, because women veterans are traditionally hesitant to take advantage of the resources available to them.[67] Women veterans also find that the available resources do not take into account their unique needs. For example, compared to civilian counterparts, women veterans are three to four times more likely to experience homelessness and 2.5 times more likely to die by suicide.[68] Hostility towards women service members and veterans negatively influences health outcomes and makes access to equitable health care critical.

b. Discrimination at VHA Facilities

Over 550,000 women veterans use VHA services, and 30% of all new VHA patients are women.[69] Compared to male veterans enrolled in the VHA system, women veterans are more likely to require certain health care services, including family planning and contraception.[70] Women veterans also experience higher rates of MST and harassment than male veterans, which can affect both physical and mental health care needs. Systemic discrimination within the VHA system begins even before a woman veteran enters a VHA facility, because VA has been historically more likely to grant PTSD benefit claims for non-MST-related claims than for MST-related claims.[71] And since female veterans' PTSD claims are more likely to be based on MST-

[66] *First Annual Planning Summit: Historic Changes, Significant Challenges*, SERV. WOMEN'S ACTION NETWORK 10 (Feb. 2017), http://www.servicewomen.org/wp-content/uploads/2017/02/SWANannual2016_online.pdf.
[67] Sarah Maples, *The Inconvenience of Being a Woman Veteran*, ATLANTIC (Nov. 22, 2017), https://www.theatlantic.com/politics/archive/2017/11/the-inconvenience-of-being-a-woman-veteran/545987.
[68] *Id.*
[69] *Women Veterans Health Care*, U.S. DEP'T VETERANS AFFS., https://www.womenshealth.va.gov/about-us.
[70] MacDonald et al., *supra* note 10, at 2.
[71] Yale Law School Veterans Legal Services Clinic, *Battle for Benefits: VA Discrimination Against Survivors of Military Sexual Trauma*, AM. CIV. LIBERTIES UNION 1 (Nov. 2013), https://www.aclu.org/sites/default/files/assets/lib13-mst-report-11062013.pdf.

related PTSD than are male veterans' PTSD claims—between 2008 and 2012, nearly two-thirds of the MST-related PTSD disability benefits claims were made by women veterans—women veterans face structural challenges in receiving basic benefits necessary to access health care.[72]

Women enrolled in the VHA system also report high rates of gender discrimination within VHA facilities. According to a May 2020 study, over one third of women veterans enrolled in the VHA system perceived gender-based discrimination when receiving care through the VHA.[73] Approximately 26% of respondents felt that they had been "treated with less respect because [they] are a woman," and approximately 22% of respondents felt that they had "received poorer service because [they] are a woman."[74] A 2020 study of specialty care within VA indicated that women veterans surveyed did not feel that their VA specialty care providers "listened to them or took them seriously," and respondents noticed differences in care based on whether the VA specialty provider was a man or a woman.[75]

Sexual harassment is a similarly prevalent concern for women veterans at VHA facilities. In a 2019 study of women veterans enrolled in the VHA system, approximately one in four respondents reported inappropriate and unwanted comments or behavior by male veterans on VA grounds.[76] These incidents ranged from catcalls and sexual/derogatory remarks to propositioning and stalking.[77] Sexual harassment has been linked to chronic stress, which is an independent risk factor for chronic diseases, and chronic stress owing to sexism or discrimination is associated with

[72] *Id.*
[73] MacDonald, et al., *supra* note 10, at 2.
[74] *Id.* at 15.
[75] Kristin Mattocks, et al., *Women Veterans' Experiences with Perceived Gender Bias in U.S. Department of Veterans Affairs Specialty Care*, 30 WOMEN'S HEALTH ISSUES 113, 113 (2020).
[76] Ruth Klap, et al., *Prevalence of Stranger Harassment of Women Veterans at Veterans Affairs Medical Centers and Impacts on Delayed and Missed Care*, 29-2 WOMEN'S HEALTH ISSUES 107, 107 (2019).
[77] *Id.*

mental health disorders like PTSD.[78] Sexual harassment and discrimination at VA therefore have the potential to further exacerbate existing PTSD for women, particularly those coping with MST. Because about one in three women veterans report MST to their VA health care providers, this problem is particularly acute for women veterans.[79]

This structural sex-based discrimination drives women veterans away from the VHA care to which they are entitled. Gender-based harassment contributes to women feeling unsafe at VHA facilities and, as a result, delaying or missing medical care.[80] Women often attribute decisions to leave or avoid seeking VA health care to negative gender-based experiences at VHA facilities. Gender-based discrimination and harassment are also associated with high attrition rates from VA health care services.[81] Women veterans report a notably lower quality of health care at VA facilities due to gender discrimination. Nearly half of the women surveyed in a 2013 study who left VA's health care system reported that VA health care providers were "not skilled in treating women" and not "sensitive to the concerns of women patients."[82] For example, women veterans report that their VA specialty providers dismissed their health conditions or symptoms as resulting from hormonal fluctuations.[83] This is particularly concerning because women veterans often have "complex healthcare needs that require specialty care for service-connected conditions."[84]

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[78] Adrienne O'Neill, et al., *The #MeToo Movement: An Opportunity in Public Health?*, 391 LANCET 2587, 2587 (2018).
[79] *Military Sexual Trauma*, U.S. DEP'T VETERANS AFFS., https://www.womenshealth.va.gov/topics/military-sexual-trauma.asp.
[80] MacDonald, et al., *supra* note 10, at 3.
[81] Hamilton, et al., *supra* note 10, at S513.
[82] *Id.*
[83] Mattocks, et al., *supra* note 75, at 113.
[84] Brenda Mooney, *A Third of Women Treated in VA System Perceive Gender-Based Discrimination*, U.S. MED. (Mar. 10, 2020), https://www.usmedicine.com/late-breaking-news/a-third-of-women-treated-in-va-system-perceive-gender-based-discrimination (quoting Kristina Keenan, past-commander of Post 605, the Benjamin Franklin Post of the Veterans of Foreign Wars, before the Subcommittee on Health of the House Committee on Veterans' Affairs).

Women veterans face service-related health challenges that make them a particularly vulnerable population. Sex-based discrimination and harassment at VHA facilities therefore have an outsize impact on women veterans who avoid seeking care or report inadequate care within VA. Failure to address rampant discrimination and harassment within VA leaves vulnerable women veterans at risk of long-term adverse health effects and negative health outcomes.

2. LGBTQI+ Veterans

LGBTQI+ veterans also face unique health challenges within the military and at VHA facilities, due in part to the history and culture of LGBTQI+ harassment and discrimination in the military and veteran communities. The stressful social environment of the military caused by stigma contributes to a high rate of adverse health outcomes among LGBTQI+ service members and veterans. In addition to these unique challenges, LGBTQI+ veterans consistently receive inadequate and inconsistent care at VHA facilities.

a. Historical Discrimination Against LGBTQI+ Service Members

Although LGBTQI+ veterans comprise a significant portion of the veteran community, they have faced substantial systematic discrimination while serving.[85] Discrimination against LGBTQI+ veterans and service members stems from a long history of policing and criminalization of sexual identity and activity, as well as gender identity and expression, both within and outside military contexts.

For much of recent history, same-sex sexual activity was criminalized across large parts of the world, including the United States.[86] These criminal proscriptions even applied to consensual sexual activity between consenting adults in private settings. As recently as the late twentieth

[85] *See* Gates & Herman, *supra* note 7 and accompanying text.
[86] *See* Bowers v. Hardwick, 478 U.S. 186, 192, 192-94 (1986) (observing that "[p]roscriptions against [same-sex sexual] conduct have ancient roots" and that, by 1961, all 50 states had criminalized "sodomy").

century, so-called sodomy laws were upheld by the Supreme Court as valid exercises of the police power.[87] It was not until 2003 that such laws were struck down as unconstitutional.[88]

Military law operated to the same effect, but more intrusively and punitively. From the Articles of War of 1916 and continuing to the Uniform Code of Military Justice ("U.C.M.J.") in 1951, the military outlawed same-sex activity or "unnatural carnal copulation."[89] As interpreted by military courts, the prohibition applied to "sodomy whether it is consensual or forcible, heterosexual or homosexual, public or private."[90] Even after the Supreme Court struck down civilian sodomy laws in 2003, the military criminal justice system continued to punish consensual same-sex sexual activity in situations involving conduct or factors that fell outside a "zone of liberty," such as public sex or prostitution, or where the conduct affected "good order and discipline" or otherwise involved factors "unique to the military environment."[91]

The U.C.M.J.'s proscription against consensual same-sex sexual activity lasted until 2013, when Article 125, U.C.M.J., was amended to cover only sodomy by force or without consent and bestiality.[92] Three years later, "sodomy" itself was removed from the U.C.M.J., and the offenses it formerly covered were incorporated in the "Rape and Sexual Assault" offenses of Article 120, U.C.M.J.[93]

In addition to criminalization of behavior, military law also de facto criminalized non-heterosexual status and non-cisgender orientation. These regulations date back decades, at least to the 1950s. In 1982, Department of Defense ("DoD") Directive 1332.14, *Enlisted Personnel*

[87] *Id.* at 196.
[88] *See* Lawrence v. Texas, 539 U.S. 558 (2003).
[89] Art. 125, U.C.M.J., 10 U.S.C. § 925 (since repealed).
[90] U.S. v. Marcum, 60 M.J. 198, 202 (C.A.A.F. 2004).
[91] *Id.* at 206-08.
[92] *See* National Defense Authorization Act for Fiscal Year 2014, Pub. L. 113-66, § 1707, 127 Stat. 672, 961 (2013).
[93] *See* National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-328, § 5430 (Art. 120), § 5439 (Art. 125, kidnapping), 130 Stat. 2000, 2949, 2953 (2016).

Separations, proclaimed that non-heterosexual people were inferior, damaged, problematic, and harmful, stating: "Homosexuality is incompatible with military service. The presence in the military environment of [homosexuals] seriously impairs the accomplishment of the military mission [and] adversely affects the ability of the Military Services to maintain discipline, good order, and morale[.]"[94] Similar language was later codified into law in 1993, when President Clinton signed the infamous "Don't Ask, Don't Tell, Don't Pursue, Don't Harass" ("DADT") law.[95] DADT allowed lesbian, gay, and bisexual ("LGB") service members to join the service but prohibited them from declaring their sexual orientation or engaging in "homosexual conduct." Congress did not repeal DADT until 2011.[96]

Though attitudes toward LGBTQI+ people have improved generally over the last 50 years, negative cultural beliefs toward homosexuality proliferated historically, and in the military those attitudes were always much more negative toward LGBTQI+ people than in the general public. In the 1990s, for example—when many of today's veterans were serving—surveys found that allowing "gays" to serve in the military split the public somewhat evenly.[97] Among military personnel, however, the feelings were overwhelmingly negative, consistently finding that two-thirds or more were against serving with LGB people.[98]

For LGBTQI+ veterans, serving under these historical conditions caused unique stressors, such as needing to conceal important personal information, enduring harassment, and facing discharge or fear of discharge. These stressors have had lasting health effects on service members,

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[94] *See* Department of Defense Directive 1332.14 (1982), Appx. A, Part 1 ¶ H.1.a (Jan. 28, 1982); 47 Fed. Reg. 10162-02, 10178 (Mar. 9, 1982).
[95] 10 U.S.C. §654(a) (repealed 2010).
[96] Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. 111-321, § 2, 124 Stat. 3515, 3516 (repealing 10 U.S.C. § 654).
[97] *See* National Defense Research Institute, *Sexual Orientation and U.S. Military Policy: Options and Assessment*, RAND 206 (1993) [hereinafter "RAND"].
[98] *See id*. at 202-03 & tbl. 601; Armando X. Estrada & Arwen H. Decostanza, *Gays in the U.S. Military: Reviewing the Research and Conceptualizing a Way Forward*, 60 J. HOMOSEXUALITY 327, 329-32 tbl. 1 (2013).

leaving many LGBTQI+ veterans more traumatized by living under fear and anxiety of the constant threat of being scrutinized and investigated than by their combat experiences.[99] DADT also prevented LGBT service members from connecting with fellow service members and developing their own authentic sense of self, causing intense and devastating isolation and, for many, a sense of despair that was itself traumatizing.[100]

Moreover, despite the "Don't Harass" directive in the bill's name, DADT created an environment where, in practice, service members could share homophobic comments and inflict violence on service members believed to be LGBTQI+ without facing any consequences for their behavior.[101] Many LGBTQI+ service members experienced the trauma of investigations, "witch hunts," and even criminal conviction. The devastating effects of these experiences have followed LGBTQI+ service members into their post-service lives, leading to distrust of the military and VA.[102]

DADT also prevented some service members and veterans from accessing appropriate care for their physical and mental health. After experiencing sexual assault and harassment in the Air Force, transgender veteran Landon Marchant was discharged because they were unable to receive the mental health services they needed:

> Because I served under Don't Ask Don't Tell, I wasn't able to explicitly tell my supervisor, Operations Special Investigations, or mental health providers the rationalizations my attackers shared on why they targeted me, or why the sexual violence I had experienced was so destabilizing. Even as my case went to court-martial, I could not speak openly. This inability to engage in meaningful and transparent dialogue prevented me from accessing the care that I needed and resulted in my career ending before it truly began. . . . My mental health providers

[99] *Legislative Hearing, Hearing before the Subcomm. on Oversight and Investigations of the H. Comm. on Veterans Affairs*, *Creating a Welcoming VA and Building Equity for Veterans Through Legislation*, 117th Cong. (Sept. 22, 2021), available at https://www.congress.gov/117/meeting/house/114051/witnesses/HHRG-117-VR08-Wstate-ChurchL-20210922-U1.pdf (statement of Minority Veterans of America) [hereinafter *Open Legislative Hearing*].
[100] Maria Heliana Ramirez et al., *If We Ask, What They Might Tell: Clinical Assessment Lessons from LGBT Personnel Post- DADT*, 60 J. HOMOSEXUALITY 401, 406 (2013).
[101] *Open Legislative Hearing*, *supra* note 99.
[102] *Id.*

> came to similar conclusions and vocalized that the trauma I had experienced was compounded and aggravated by my inability to openly speak or identify. Despite their well-meaning intentions and the life-saving impact that this could have had for me. This information couldn't be included in any official reports, and it never came up in the associated trials. Being authentically myself was illegal and my chain of command and legal representation determined that I would be better served and protected if I hid this crucial aspect of my identity. My discharge was honorable, but the paperwork reads "inability to adapt," despite the contrary being true.[103]

Like their cisgender LGB counterparts, transgender service members also served in a constant state of stress and anxiety related to the regulation of their identity. Open and authentic service by transgender people was not permitted until 2016, then rescinded in 2017 and reinstated in 2021. Historically, though, non-conforming gender identities—which the military inaccurately referred to as transvestitism, cross-dressing, or transsexualism—were pathologized and criminalized. The first regulations appeared in 1963, when Army Medical Standards disqualified individuals with "behavioral disorders," including "as evidenced by . . . transvestism [sic]."[104] Regulations eventually declared transgender people as disordered and abnormal, both physically and mentally. For example, medical standards established as grounds for rejection "[t]ranssexualism and other gender identity disorders."[105] Other regulations classified gender identity ("transsexualism") and gender transition as "paraphilias"—that is, an abnormal or "deviant" sexual practice—that were disqualifying from service.[106] These same regulations characterized some gender-affirming medical transition procedures as "abnormalities."[107] Many of these regulations existed until 2016.

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[103] *Id.*
[104] Army Regulation 40-501 ¶ 6-32(b) (May 17, 1963).
[105] Department of Defense Directive 6130.3 ¶ 2-34(b) (Mar. 31, 1986).
[106] *See* Department of Defense Instruction ("DoDI") 6130.4 Encl. 1 ¶ E1.29 (Apr. 2, 2004) ("Current or history of psychosexual conditions … , including, but not limited to transsexualism, exhibitionism, transvestism [sic], voyeurism, and other paraphilias, are disqualifying.").
[107] *See id.* ¶¶ E1.12.13, E1.13.10 (stating that a history of "[m]ajor [a]bnormalities and [d]efects of the [g]enitalia, [s]uch as a [c]hange of [s]ex" was disqualifying).

In fact, policies prohibiting transgender individuals from serving in the military persisted even after the repeal of DADT. In 2012, the Obama administration reissued DoD Instruction 6130.03, which continued medical standards that effectively banned enlistment by transgender individuals.[108] In 2016, the military partially lifted the explicit ban against transgender service members by allowing transgender individuals to serve in their identified or assigned gender upon "complet[ing]" transition.[109] In 2017, the Trump Administration instituted the so called "trans ban," which prohibited transgender individuals from enlisting if they had medically transitioned, or if they had a history of gender dysphoria. They could only enlist under their gender assigned at birth after 36 months of "stability,"[110] suggesting mistrust of the transgender population and sex-stereotypical reasoning.

Although the military no longer has explicit policies discriminating against LGBTQI+ service members,[111] these historical attitudes did not disappear, and many veterans who served during those periods—as well as civilians and veterans who staff VA facilities—carry the vestiges of these attitudes with them even today. As a result, LGBTQI+ veterans and service members continue to experience discrimination and harassment.[112] For example, LGBTQI+ service members continue to be involuntarily "outed" by fellow service members, experience harassment from commanding officers, and are often forced to continue navigating a military ethos grounded

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[108] *See* DoDI 6130.03, Vol. 1, Encl. 4, ¶ 29(r) (Apr. 28, 2010, (revised by Change 1, Sept. 13, 2011) (providing that military candidates should not have ""[c]urrent or history of psychosexual conditions . . . including but not limited to transsexualism, exhibitionism, transvestism, voyeurism, and other paraphilias").

[109] *Transgender Service Member Policy Implementation Fact Sheet*, U.S. DEP'T DEFENSE 2 (Oct. 1, 2016), https://web.archive.org/web/20171205230011/https://www.defense.gov/Portals/1/features/2016/0616_policy/Transgender-Implementation-Fact-Sheet.pdf; *see generally* Directive Type Memorandum ("DTM")-16-005 (June 30, 2016), https://dod.defense.gov/Portals/1/features/2016/0616_policy/DTM-16-005.pdf (providing policies and procedures by which transgender individuals could serve in the military).

[110] *See* Memorandum from James N. Mattis, Sec'y of Def., Dep't of Def., to Donald Trump, President of the U.S. (Feb. 22, 2018), https://media.defense.gov/2018/Mar/23/2001894037/-1/-1/0/MILITARY-SERVICE-BY-TRANSGENDER-INDIVIDUALS.PDF; *see also* DTM-19-004 (Mar. 12, 2019).

[111] After taking office in 2021, President Joe Biden repealed the trans ban and allowed transgender individuals to enlist and serve. *See* Exec. Order No. 14,004, 3 C.F.R. § 7471 (2021).

[112] *See Open Legislative Hearing*, *supra* note 99.

in bias and judgment.[113] Air Force veteran Nathan Porter reflected on his experience in the Air Force in 2019, eight years after the repeal of DADT.

> Many people ask . . . "what more do you need? DADT was repealed, and you can get married now too. What more could you want?" For years I have lived a double life—starting with the conservative blue-collar town I grew up in where friends and family have cut communications with me because of who I am. This mindset of masking and hiding who I was followed me into an 11-year long career in the Air Force. The repeal of DADT came with a sigh of relief—but that only changed policy; it didn't change the mindsets of leadership and the lived experiences of LGBTQ folx. For a long time, I questioned whether hiding myself was justified, and I either ignored or was oblivious to the devastating effect it had on my mental and physical health. Trying to live my authentic life at home but putting on a mask when I went to work where I spent most of my day.[114]

Despite the discrimination LGBTQI+ individuals faced during service, VA has the opportunity to right historic wrongs post-service through issuing antidiscrimination regulations.

b. LGBTQI+ Veterans Face Discrimination at VHA Facilities

Even after the repeal of DADT and the trans ban, the culture of harassment towards LGBTQI+ individuals continues within VHA facilities.[115] In fact, a 2019 study found that the majority of LGBT veterans described experiencing discrimination based on their LGBT identity while receiving health care at VHA.[116] Many LGBTQI+ veterans feel as though they are unwelcome in VHA facilities: one in three LGBTQ veterans describe VHA as unwelcoming, and another one in three describe VHA as only somewhat welcoming.[117] As one VA LGBTQ+ Veteran

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[113] *See id.* ("When I was outed at my unit after the repeal of DADT, our E-9 held a briefing where I was explicitly excluded, and the discussion was about LGBTQ people in the ranks."); *see also id.* ("The constant jokes, ridicule and mistreatment from superiors hasn't gone away.").

[114] *Id.*

[115] *Cultural Barriers Impacting Women Veterans Access to Health Care, Hearing Before the Subcomm. on Health of the H. Comm. on Veterans Affairs*, 116th Cong. (May 2, 2019), available at https://www.congress.gov/116/meeting/house/109386/witnesses/HHRG-116-VR03-Wstate-ChurchL-20190502.pdf (statement of Lindsay Church, Chief Executive Officer, Minority Veterans of America).

[116] Mollie A. Ruben et al., *LGBT Veterans' Experiences of Discrimination in Healthcare and Their Relation to Health Outcomes: A Pilot Study Examining the Moderating Role of Provider Communication*, 3.1 HEALTH EQUITY 484 (2019).

[117] Kathleen A. McNamara et al., *"You Don't Want to Be a Candidate for Punishment": A Qualitative Analysis of LGBT Service Member "Outness"*, SEX. RES. SOC. POL'Y (2020); *see also VHA:IE's New Podcast Episode Highlights*

Care Coordinator put it, "the trauma caused by the military's decades-long policy of discrimination against LGBTQ+ people cannot be undone in a few short months."[118]

Moreover, LGBTQI+ veterans expect to experience discrimination at VHA facilities and fear inadequate care if they share their sexual orientation or gender identity.[119] A 2015 study found that 10% of surveyed lesbian veterans experienced mistreatment from VHA staff or providers, and nearly half feared that providers would mistreat them if they knew of their sexual orientation.[120] LGBTQI+ veterans also receive inadequate and inconsistent care at VHA facilities. In comparison to heterosexual veterans, LGB veterans report more problems across multiple measures of person-centered care, access to care, and care coordination.[121] Additionally, VHA providers ask about sexual orientation when it is not relevant to patient care or fail to ask important questions about sexual orientation when it is relevant to patient care, and therefore do not provide appropriate care.[122]

Fear of discrimination and inadequate care can have detrimental effects on the long-term health of LGBTQI+ veterans. Some lesbian women reported delaying or missing needed care, primarily due to concerns about interacting with other veterans.[123] Discrimination and harassment at VHA facilities is also associated with higher rates of tobacco use by LGBT veterans.[124] Notably,

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How VA Is Welcoming LGBQT Veterans into Care, U.S. DEP'T VETERANS AFFS. (July 25, 2018), https://news.va.gov/50752/vhaies-new-podcast-episode-highlights-va-welcoming-lgbqt-veterans-care.

[118] *Visibility and Care for Those Who Served in the Shadows*, U.S. DEP'T VETERANS AFFS. (Mar. 11, 2021), https://news.va.gov/85789/visibility-care-served-shadows.

[119] *Id*. ("Unfortunately, some LGBTQ Veterans expect to experience some sort of discrimination in VA medical facilities.").

[120] Kristin M. Mattocks et al., *Perceived Stigma, Discrimination, and Disclosure of Sexual Orientation Among a Sample of Lesbian Veterans Receiving Care in the Department of Veterans Affairs*, 2 LGBT HEALTH 147 (2015); *see also* McNamara et al., *supra* note 117, at 144.

[121] Tamara Grozdanic et al., *Primary Health care Experiences of Lesbian, Gay, and Bisexual Veterans*, U.S. DEP'T VETERANS AFFS. (June 2022), https://www.va.gov/HEALTHEQUITY/docs/VHA_OHE_LGB_SHEP_Chartbook_Final_508_June_2022.pdf.

[122] Mattocks et al., *supra* note 120, at 150.

[123] Jillian C. Shipherd et al., *Experiences in the Veterans Health Administration and Impact on Health Care Utilization: Comparisons Between LGBT and Non-LGBT Women Veterans*, 5 LGBT HEALTH 303 (2018).

[124] Ruben, *supra* note 116, at 484.

VA does not routinely collect data on sexual orientation or gender identity, making it difficult to assess health outcomes of LGBTQI+ veterans.[125] In general, though, LGBT veterans are less likely to report that they are in excellent or good health and are more likely to have multiple chronic conditions.[126]

Problems of harassment, discrimination, and inadequate treatment are particularly acute for transgender people. A 2008 survey completed by the Palm Center and the Transgender American Veterans Association found that more than one in five transgender veterans reported discriminatory treatment by VA doctors and non-medical staff.[127] This discriminatory treatment includes providers refusing to use veterans' correct pronouns or consistently using incorrect pronouns, salutations, and names even after veterans repeatedly correct them. Transgender veterans also report that VA providers and staff have refused to look at them, refused to provide general medical care, and referred to them in dismissive ways.[128] As transgender Air Force veteran Hanna Tripp described, "At VA, I was denied emergency care for no other reason than I was trans."[129] Additionally, transgender veterans face significant barriers in accessing gender-affirming care at VHA facilities, including by lack of medical provider expertise,[130] provider delays, and inconsistent services requiring veterans to travel long distances to access care.[131]

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[125] U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-69, VA HEALTH CARE: BETTER DATA NEEDED TO ASSESS THE HEALTH OUTCOMES OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER VETERANS 21 (2020).
[126] Lauren Korshak et al., *Health Disparities Among LGBT Veterans*, U.S. DEP'T VETERANS AFFS., https://www.va.gov/HEALTHEQUITY/docs/LGBT_Veterans_Disparities_Fact_Sheet_July2020_Final.pdf.
[127] Karl Bryant & Kristin Schilt, *Transgender People in the U.S. Military: Summary and Analysis of the 2008 Transgender American Veterans Association Survey*, PALM CTR. (Aug. 2008), https://palmcenterlegacy.org/wp-content/uploads/2017/12/TGPeopleUSMilitary.pdf.
[128] *Id.*
[129] *See generally Open Legislative Hearing*, *supra* note 99.
[130] Kris Rosentel et al., *Transgender Veterans and the Veterans Health Administration: Exploring the Experiences of Transgender Veterans in the Veterans Affairs Health Care System*, 1 TRANSGENDER HEALTH 108, 113 (2016).
[131] *Id.* at 108.

D. Section 1557 Provides a Solution

Section 1557 offers a statutory basis for resolving widespread sex and SOGISC discrimination at VA.[132] Section 1557 of the ACA provides:

> Except as otherwise provided for in this title (or an amendment made by this title), *an individual shall not*, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 794 of title 29, *be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments).* The enforcement mechanisms provided for and available under such title VI, title IX, section 794, or such Age Discrimination Act shall apply for purposes of violations of this subsection. [133]

Under Section 1557, HHS has promulgated several regulations in pursuit of sex and SOGISC non-discrimination. The most recent iteration thereof—the HHS NPRM—provides a good starting point from which VA could adapt to fit its unique needs.

1. HHS Rulemaking & Litigation Under Section 1557

HHS has promulgated two sets of regulations and proposed one rule under Section 1557—in 2016 ("2016 HHS Rule"), in 2020 ("2020 HHS Rule"), and the HHS NPRM in 2022. The Biden administration has taken a firm position on the inclusion of SOGI within their antidiscrimination agenda. On May 10, 2021, HHS announced it would interpret Section 1557's prohibition on sex discrimination to also prohibit SOGI discrimination, consistent with the Supreme Court's 2020 holding in *Bostock* ("*Bostock* notification"). On August 4, 2022, the Biden administration released the HHS NPRM confirming that its proposed regulations under Section 1557 include, among other items, a prohibition against SOGISC discrimination.

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[132] 42 U.S.C. § 18116(a) (2018).
[133] *Id.* (emphasis added).

a. 2016 HHS Rule

Following a Request for Information issued on August 1, 2013,[134] and a NPRM issued on September 8, 2015,[135] HHS promulgated its first Section 1557 regulation—the 2016 HHS Rule—on May 18, 2016.[136] The 2016 HHS Rule countered discrimination on the basis of gender, sexual orientation, and transgender status in several ways. First, the 2016 HHS Rule included "gender identity" in its definition of "sex": "the term 'on the basis of sex'; includes, but is not limited to, discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery from, childbirth or related medical conditions, sex stereotyping, and gender identity."[137]

Additionally, the 2016 HHS Rule explained that the prohibition of discrimination on the basis of sex included sexual orientation discrimination under a sex-stereotyping theory,[138] per the Supreme Court's opinion in *Price Waterhouse v. Hopkins*.[139] The 2016 HHS Rule also included a prohibition against "a categorical coverage exclusion or limitation for all health services related to gender transition."[140] Furthermore, through the 2016 HHS Rule, the agency prohibited the denial or limitation of coverage on the basis of gender identity or any action that "results in discrimination against a trans individual."[141]

b. 2020 HHS Rule

On June 14, 2019, the Trump administration HHS published a new NPRM.[142] It proposed rescinding the 2016 HHS Rule's definition of "on the basis of sex," anticipating the imminent

[134] 78 Fed. Reg. 46558 (Aug. 1, 2013).
[135] 80 Fed. Reg. 54171 (Sept. 8, 2015).
[136] 81 Fed. Reg. 31375 (May 18, 2016).
[137] *Id.* at 31387.
[138] *Id.* at 31384, 31389-90 ("OCR has decided not to resolve in this rule whether discrimination on the basis of an individual's sexual orientation status alone is a form of sex discrimination.").
[139] 490 U.S. 228, 250-51 (1989).
[140] 81 Fed. Reg. 31375, 31471-72 (May 18, 2016) (proposed § 92.207(b)).
[141] *Id*.
[142] 84 Fed. Reg. 27846 (June 14, 2019).

ruling in *Bostock v. Clayton County*.[143] It also suggested that the prohibition on sex discrimination would not extend to gender identity discrimination, by referring to sex in "binary and biological" terms.[144] On June 15, 2020, the Supreme Court issued its *Bostock* ruling, holding that SOGI discrimination is prohibited discrimination on the basis of sex under Title VII.[145] Three days before the *Bostock* ruling, on June 12, 2020, HHS publicly posted the final 2020 HHS Rule, which made no substantive changes from the 2019 NPRM.[146] The Rule was published in the Federal Register on June 19, 2020 with preamble language inconsistent with *Bostock*.[147] The Rule's effective date was August 18, 2020.[148]

Subsequently, in 2020, a judge on the United States District Court for the Eastern District of New York invalidated parts of the 2020 HHS Rule, resurrecting the 2016 HHS Rule's definitions of "on the basis of sex," "gender identity," and "sex stereotyping,"[149] as well as its requirement that health care providers treat individuals consistent with their gender identity and refrain from denying or limiting health care services to transgender people.[150] The most recent status report in this litigation was filed on March 19, 2023, confirming that "the case shall remain stayed during the ongoing administrative rulemaking proceedings implementing Section 1557 of the Affordable Care Act."[151] A judge on the United States District Court for the District of

[143] *Id.* at 27848.
[144] *Id.* at 27853-57.
[145] 140 S. Ct. 1731 (2020).
[146] 85 Fed. Reg. 37160 (June 19, 2019).
[147] *Id.* 37169, 37179-80.
[148] *Id.* at 37160.
[149] Walker v. Azar, 480 F. Supp. 3d 417, 430 (E.D.N.Y. 2020).
[150] Walker v. Azar, No. 1:20-cv-2834-FB-VMS, 2020 WL 6363970, at *3-4 (E.D.N.Y. Oct. 29, 2020) (ensuring the preliminary injunction of the above-listed terms remains in effect and additionally enjoining the repeal of 45 C.F.R. § 92.206, which requires health care providers to "treat individuals consistent with their gender identity" and prohibited them from "deny[ing] or limit[ing] health services that are ordinarily or exclusively available to individuals of one sex, to a transgender individual based on the fact that the individual's sex assigned at birth, gender identity, or gender otherwise recorded is different from the one to which such health services are ordinarily or exclusively available").
[151] Electronic Order, Walker v. Azar, No. 1:20-cv-02834-FB-VMS (E.D.N.Y. Mar. 19, 2023).

Columbia also resurrected the definitions of the 2016 HHS Rule.[152] That case was also stayed during the HHS NPRM process in 2022, with the injunction currently remaining in place.[153] (All other pending litigation over the 2020 rule is similarly stayed until the conclusion of HHS's ongoing rulemaking process.[154])

c. *Bostock*'s Interpretation of 1557 Aligns with HHS NPRM

On May 10, 2021, the Biden HHS issued the *Bostock* notification, announcing that it would interpret Section 1557's prohibition on sex discrimination to include SOGI discrimination.[155] The *Bostock* notification also noted that its enforcement would comply with all other legal requirements, [156] including the Religious Freedom Restoration Act ("RFRA") and applicable court orders issued in prior litigation that rejected the Trump HHS's approach to SOGI discrimination.[157]

d. 2022 HHS NPRM

On March 2, 2022, HHS published Notice and Guidance providing that Section 1557 prohibits gender identity discrimination in access to covered health programs and activities. The guidance also affirmed that entities restricting an individual's ability to receive gender-affirming

[152] Whitman-Walker Clinic, Inc. v. Azar, 485 F. Supp. 3d 1 (D.D.C. 2020) (enjoining the 2020 HHS Rule's repeal of the definition of "on the basis of sex," insofar as it includes discrimination on the basis of sex stereotyping).
[153] Status Report, Whitman-Walker Clinic, Inc. v. Azar, No. 1:20-cv-01630 (D.D.C. June 22, 2020).
[154] N.Y. v. U.S. Dep't of Health & Hum. Servs., No. 1:20-cv-05583 (S.D.N.Y. July 20, 2020) (APA and Fifth Amendment claims); Boston All. of Gay, Lesbian, Bisexual & Transgender Youth v. U.S. Dep't of Health & Hum. Servs., No. 20-cv-11297 (D. Mass. July 9, 2021) (APA and Fifth Amendment claims) (most recent status report filed on Sept. 30, 2022, regarding the notice-and-comment process for the HHS NPRM); Chinatown Serv. Ctr. v. U.S. Dep't of Health & Human Servs., No. 1:2021cv00331 (D.D.C. Oct. 13, 2021) (APA claims) (most recent status report filed on Sept. 30, 2022, regarding the notice-and-comment process for the HHS NPRM).
[155] 86 Fed. Reg. 27984, 27895 (May 25, 2021) (HHS's "Notification of Interpretation and Enforcement of Section 1557 of the Affordable Care Act and Title IX of the Education Amendments of 1972").
[156] *Id.*; *see also* Hammons v. Univ. of Md. Med. Sys. Corp., 551 F. Supp. 3d 567, 590 (D. Md. 2021) (explaining that *Bostock* "made clear that the position stated in HHS' [*Bostock* Notification] was already binding law.").
[157] Walker v. Azar, 480 F. Supp. 3d 417, 430 (E.D.N.Y. 2020) (resurrecting the 2016 HHS Rule's definitions of "on the basis of sex," "gender identity," and "sex stereotyping," as well as its requirement that health care providers treat individuals consistent with their gender identity and refrain from denying or limiting health care services to transgender individuals); Whitman-Walker v. Azar, 485 F. Supp. 3d 1 (D.D.C. 2020) (enjoining the 2020 HHS Rule's repeal of the definition of "on the basis of sex," insofar as it includes discrimination on the basis of sex stereotyping).

care from their health care provider likely violate Section 1557.[158] On March 31, 2022, the U.S. Department of Justice ("DOJ") issued a letter to State Attorneys General on the importance of ensuring that transgender youth are protected from gender identity discrimination and are not denied gender-affirming care, including under Section 1557 protections.[159] On August 4, 2022, HHS published a NPRM regarding Section 1557.[160]

The HHS NPRM made several advances in pursuit of antidiscrimination. On the insurance mandate, the HHS NPRM clarified that Section 1557 "generally applies to many health insurance issuers, and also prohibits discrimination in health insurance and other health-related coverage."[161] The HHS NPRM also expressly prohibited SOGISC discrimination consistent with *Bostock* and related case law, as well as subsequent federal agency interpretations.[162] Additionally, the HHS NPRM prevented covered entities from categorically excluding gender-affirming care[163] or denying or limiting health services on the basis of gender identity.[164]

Regarding religious exemptions and prior lawsuits, the HHS NPRM allowed for individualized exemptions based on applicable federal conscience and religious freedom laws.[165]

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[158] *HHS Notice and Guidance on Gender Affirming Care, Civil Rights, and Patient Privacy*, U.S. DEP'T HEALTH & HUM. SERVS. (Mar. 2, 2022), https://www.hhs.gov/sites/default/files/hhs-ocr-notice-and-guidance-gender-affirming-care.pdf.

[159] Letter from Kristen Clarke, Assistant Att'y Gen., Civil Rights Div., U.S. Dep't Justice, to State Att'ys Gen. (Mar. 31, 2022), https://www.justice.gov/opa/press-release/file/1489066/download.

[160] 87 Fed. Reg. 47824 (Aug. 4, 2022).

[161] *Id.* at 47828 ("The proposed rule would also reinstate the rule clarifying that Section 1557 . . . furthering a central goal of the ACA— to increase access to health-related coverage—by ensuring that Section 1557's robust civil rights protections apply to health insurance and other health-related coverage.").

[162] *Id.* ("The Department also proposes to address nondiscrimination on the basis of sex, including gender identity and sexual orientation, consistent with *Bostock* and related case law . . . Further, the rule proposes to ensure equal program access on the basis of sex and prohibit discrimination on the basis of sex related to marital, family, or parental status."); *see also id.* at 47848 (clarifying that discrimination based on sex characteristics is prohibited by the proposed rule).

[163] *Id.* at 47867; *see also id.* at 47918 ("Proposed paragraph [92.205](b)(4) prohibits a covered entity from denying or limiting health services sought for the purpose of gender-affirming care that the covered entity would provide to a person for other purposes if the denial or limitation is based on a patient's sex assigned at birth, gender identity, or gender otherwise recorded.").

[164] *Id.* at 47918 (proposed § 92.205(b)(4)).

[165] *Id.* at 47841 ("Under RFRA, . . . even if the rule substantially burdened religious practices, a religious exemption would not be required if that burden was the result of the government's advancement of a compelling interest by

The HHS NPRM proposed a process for recipients to notify HHS that the application of a provision would "violate federal conscience or religious freedom laws," and the agency would "make a determination that recipients are exempt from, or entitled to a modification of the application of" that part.[166] The HHS NPRM explicitly elected not to incorporate Title IX's blanket religious exemption "because the statutory language of Section 1557 is best interpreted to not authorize, and at the very least not command, the Secretary to promulgate such an extension of the Title IX exceptions."[167]

2. Like HHS, VA Can Also Promulgate Antidiscrimination Rules Under Section 1557

Across three administrations, HHS has interpreted Section 1557 to apply broadly to health care and health insurance programs across federal agencies, such as VHA and CHAMPVA. In the NPRM that precipitated the 2016 HHS Rule, for example, HHS recognized the applicability of Section 1557 to other federal agencies, expressly encouraging them to follow its lead:

> Section 1557 applies to all health programs and activities, any part of which receives Federal financial assistance from any Federal Department . . . *[O]ther Federal agencies are encouraged to adopt the standards set forth in this proposed rule in their own enforcement of Section 1557*.[168]

Similarly, the 2020 HHS Rule recognized Section 1557's applicability to other agencies by specifying that its rule "only prescribes enforcement of Section 1557 by [HHS] and within [HHS's]

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means that were least restrictive of religious exercise in particular contexts. The U.S. Supreme Court has made it clear that a fact-sensitive, case-by-case analysis of such burdens and interests is needed under RFRA . . . .") (citing Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 430-31 (2006) (when applying RFRA, courts look "beyond broadly formulated interests justifying the general applicability of government mandates and scrutinized the asserted harm of granting specific exemptions to particular religious claimants")); *see also id.* (HHS "is fully committed to respecting conscience and religious laws when applying this rule, including an organization's assertion that the provisions of this rule conflict with their rights under federal conscience and religious freedom laws"); *cf.* Ramirez v. Collier, 142 S. Ct. 1264, 1281 (2022) (holding that the Religious Land Use and Institutionalized Persons Act, which applies RFRA's test for religious exemptions in the prison context, "requires that courts take cases one at a time, considering only 'the particular claimant whose sincere exercise of religion is being substantially burdened'" (quoting Holt v. Hobbs, 574 U.S. 352, 363 (2015))).

[166] 87 Fed. Reg. at 47885.

[167] *Id.* at 47840.

[168] 80 Fed. Reg. 54172, 54173 n.2 (Sept. 8, 2015) (emphasis added).

jurisdiction" and does "not include activities funded or administered solely by other Federal agencies *even if Section 1557 may apply in those instances*."[169]

Further confirming the applicability of Section 1557 across agencies, the HHS NPRM expressly invites other federal agencies to follow its lead:

> While the Section 1557 statute applies to all Executive Agencies, the Department continues to believe that it is appropriate to limit this proposed rule to health programs or activities that receive Federal funding from the Department, which is within the Department's area of expertise. *We encourage other Federal agencies to use this proposed rule as a template for developing their own Section 1557 regulations and policies applicable to their federally assisted health programs or activities*.[170]

Using the HHS NPRM as a template for VA's antidiscrimination policy is precisely what Petitioners propose here. Given that three presidential administrations have interpreted Congress's antidiscrimination mandate in Section 1557 to apply broadly across federal agencies that fund or administer health care, VA should follow HHS's model and establish clear antidiscrimination regulations to help relieve minority veterans of the unlawful discrimination they currently face.

II. PETITIONERS

MVA has a statutory right to petition VA for rulemaking under 5 U.S.C. § 553(e) (2022), which requires that "[e]ach agency [to] give an interested person the right to petition for the issuance, amendment, or repeal of a rule."

MVA is a nationwide, non-partisan, nonprofit organization that works to foster belonging and advance equity for the minority veteran community, many of whom have felt marginalized, underserved, and underrepresented both during their time in military service and afterward. MVA aims to transform the narrative of the American veteran by building an interconnected community,

[169] 85 Fed. Reg. 37169, 37170 (June 19, 2020) (emphasis added).
[170] 87 Fed. Reg. 47824, 47842 (Aug. 4, 2022) (emphasis added).

fostering greater understanding of its members' identities, and serving minority veterans through the development of targeted programming and advocacy.

MVA's mission is to create belonging and advance equity and justice for our nation's most marginalized and historically underserved veterans—the more than 10.2 million veterans who are women, people of color, LGBTQI-identifying, or who are non-religious or religious minorities. MVA provides direct legal consulting and advising to service members and veterans and advocates before Congress, DoD, and VA on issues that affect minority veterans. MVA's central belief is that effectively supporting minority service members and veterans begins by recognizing that social and structural inequities lie at the heart of the problem. MVA's advocacy efforts therefore focus on systemic policy changes that will improve the lives of vulnerable service members and veteran populations.

In submitting this petition, MVA's purpose is to advocate on behalf of its members who are not protected by regulation and encounter harassment or discrimination in VA-provided health care based on sexual orientation and/or gender identity, or on the basis of other protected characteristics, whether such harassment or discrimination is based on a single one of those characteristics or an intersection of them. This petition therefore advances a central tenet of MVA's organizational mission, which operates in concert with the stated mission of VA: namely, to achieve equity for all veterans, especially those who have been historically marginalized and underserved. If VA were to issue regulations to protect veterans from discrimination in health care, these regulations would significantly increase the physical and mental health of MVA members and other LGBTQI+ veterans who receive VA health care.

The other organizations who join MVA in submitting this petition share MVA's commitment to equity and justice in the nation's veteran community, including specifically the

rights of LGBTQI+ veterans, women veterans, and racial minority veterans. First, Black Veterans Project ("BVP") furthers research and storytelling to advance racial equity in and out of uniform. BVP aims to lead a movement for racial inclusion and justice across the United States military while ensuring the welfare of all Black veterans who have served. BVP collaborates with writers, journalists, visuals storytellers, and artists to capture and amplify the experiences of Black veterans in and out of uniform. BVP advances data-driven research and digital scholarship to further public education on inequities facing Black veterans across generations of service.

Second, Iraq and Afghanistan Veterans of America ("IAVA") is an innovative nationwide nonprofit organization dedicated to the newest generation of veterans. IAVA's mission is to connect, unite, and empower post-9/11 veterans. IAVA's work is focused on six priorities identified by IAVA members: suicide, burn pits and toxic exposures, modernizing VA, women veterans, alternative therapies, and education benefits. IAVA works towards these priorities through multiple programs including advocacy and research collection and analysis. IAVA also operates the Quick Reaction Force, which is a high-tech, high-touch care management and referral services program designed to help veterans in need.

Third, Connecticut Veterans Legal Center's mission is to provide free legal assistance to veterans who are in recovery from homelessness, mental illness, and substance abuse to help them overcome legal barriers to housing, healthcare, and income. Our vision is for all military veterans in Connecticut to live with adequate means, safe and secure housing, and affordable health care.

Fourth, the Modern Military Association of America ("MMAA") is the nation's largest organization of LGBTQ+ service members, military spouses, veterans, their families, and allies. Formed through the merger of the American Military Partner Association and OutServe-SLDN, MMAA is a united voice for the LGBTQ+ military and veteran community. As a non-partisan,

non-profit organization, MMAA works to make a real difference in the lives of modern military families through education, advocacy, and support.

Fifth, the National Center for Transgender Equality ("NCTE") is a nationwide, non-profit, non-partisan organization founded in 2003 to promote public understanding, opportunity, and well-being for the millions of Americans who are transgender. In addition to conducting public education and groundbreaking national survey research, NCTE works in the nation's capital and throughout the country to replace disrespect, discrimination, and violence with empathy, opportunity, and justice. NCTE envisions a society in which transgender people not only survive, but thrive, with accepting families and communities, full self-determination over their identities and bodies, and freedom from disrespect, discrimination, and violence. For this vision to become a reality, we must also create equity, equal opportunity, safety, health, and economic well-being for all people over their entire lifetimes.

Sixth, the National Veterans Council for Legal Redress ("NVCLR") is a Connecticut-based veterans service organization founded in 1982. NVCLR provides veterans with support in obtaining employment, medical benefits, educational benefits, meals, clothing, transportation, and housing. NVCLR efforts have resulted in the construction of a monument in New Haven to commemorate the Vietnam War, as well as the establishment of the Chuck Hagel memo. The work of NVCLR and the Hagel memo has provided an opportunity for veterans with less-than-honorable discharges to test for PTSD and, if confirmed, have their discharge upgraded and receive benefits.

Seventh, the National Veterans Legal Services Program ("NVLSP") is a national nonprofit organization that has worked since 1981 to ensure that the government delivers to our nation's veterans and active-duty personnel the benefits to which they are entitled because of disabilities resulting from their military service to our country.

Eighth, Protect Our Defenders ("POD") is the preeminent national human rights organization dedicated to ending sexual violence, victim retaliation, misogyny, sexual prejudice, and racism in the military and combating a culture that has allowed it to persist. POD honors, supports, and gives voice to survivors of military sexual violence. POD seeks reform to ensure all service members are provided a safe and respectful work environment free from misogyny and racism and have access to a fair, impartially administered system of justice. Every day, through policy reform, advocacy, public education, and pro bono support, POD works to provide those who serve in our military a safe and respectful environment free from harassment and abuse and to create a justice system that can fairly and effectively adjudicate these crimes.

Ninth, Service Women's Action Network ("SWAN") is a nationwide nonprofit organization that advocates for and supports the needs of both service women and women veterans, regardless of rank, military branch, or years of experience. SWAN aims to see service women receive the opportunities, protections, benefits, and respect they earned. SWAN efforts have included opening all military jobs for which they are qualified to women, expanding access to services for a broad range of reproductive health care services, working to hold sex offenders accountable in the military justice system, and eliminating barriers to disability claims for those who have experienced military sexual trauma.

Tenth, founded by veterans in 1974, Swords to Plowshares ("Swords") is a community-based not-for-profit 501(c)(3) organization that provides needs assessment and case management, employment and training, housing, and legal assistance to approximately 3,000 veterans in the San Francisco Bay Area each year. The Legal Services Unit at Swords provides pro bono advice and representation to low-income and homeless veterans in the San Francisco Bay Area on their VA benefits claims and Department of Defense discharge upgrades. Swords focuses its resources on

helping the most vulnerable of the veteran population—homeless veterans, those experiencing mental illness, and veterans who are precluded from VA benefits, employment, and other resources due to a less than honorable discharge.

Eleventh, the Transgender American Veterans Association ("TAVA") is a 501(c)3 organization that acts proactively with other concerned gay, lesbian, bisexual and transgender organizations to ensure that transgender veterans will receive appropriate care for their medical conditions in accordance with the Veterans Health Administration's Customer Service Standards promise to "treat you with courtesy and dignity . . . as the first class citizen that you are." TAVA helps educate VA and DoD on issues regarding fair and equal treatment of transgender and transsexual individuals. TAVA also offers a retreat conference for transgender military members to educate and build community support.

Twelfth, the Veterans Advocacy Project ("VAP") fights for individuals who are living with mental health conditions. VAP services provide access to health care and benefits, prevent incarceration and further justice involvement, keep veterans and their families in their homes, and empower veterans by removing barriers to success. VAP has three program areas. The first is a civil legal practice that ensures housing and income stability through homelessness prevention with social services agencies and medical-legal partnerships with Vet Centers and community health clinics. The second is VAP's veterans law practice, which focuses on gaining access to the vast federal resources available through VA. Finally, VAP's Discharge Upgrade Clinic fights to restore honor to veterans who were unjustly discharged.

Thirteenth, Vietnam Veterans of America ("VVA") is a national nonprofit organization and is the only national veterans' organization congressionally chartered and exclusively dedicated to Vietnam-era veterans and their families. VVA's goals are to promote and support the full range

of issues important to Vietnam veterans, to create a new identity for this generation of veterans, and to change public perception of Vietnam veterans. VVA strives to achieve the following: aggressively advocate on issues important to veterans, seek full access to quality health care for veterans, identify the full range of disabling injuries and illnesses incurred during military service, hold government agencies accountable for following laws mandating veterans' health care, create a positive public perception of Vietnam veterans, seek the fullest possible accounting of America's POWs and MIAs, support the next generation of America's war veterans, and serve our communities.

III. SUMMARY OF A PROPOSED RULE

VA should promulgate regulations under Section 1557 to prohibit discrimination on the basis of race, color, national origin, sex, age, or disability in all VA federally funded health programs and activities consistent with the plain meaning of the Section 1557's statutory text and Congressional intent.

This petition for rulemaking focuses on sex discrimination in response to the recent changes to sex-discrimination civil rights case law[171] and the subsequent regulatory changes that have been made under Section 1557 as a result.[172] This petition requests that VA prohibit discrimination on the basis of sex, including sexual orientation, gender identity, and sex characteristics, consistent with *Bostock* and related case law, and subsequent federal agency interpretations.[173]

[171] *See supra* Section I.D.1.c-d.; *see also* Bostock v. Clayton Cnty. Ga., 140 S. Ct. 1731 (2020).
[172] *Id.; see e.g.*, 87 Fed. Reg. 47824 (Aug. 4, 2022); Memorandum from Pamela S. Karlan, Principal Deputy Assistant Att'y Gen., to Fed. Agency Civil Rights Dirs. & Gen. Counsels (Mar. 26, 2021); 86 Fed. Reg. 32637 (June 22, 2021) (DOE notice of interpretation).
[173] *See supra* Section I.D.1.c-d.

This petition also requests that the final rule encompass antidiscrimination provisions for every protected class listed in Section 1557, which includes those based on race, color, national origin, age, disability, and sex. Regulatory protections for all these protected classes will create consistency across VA's health care programs and activities and reflect Section 1557's application to all federally funded health programs and activities.

IV. LEGAL AUTHORITY

The VA Secretary has general "authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department and are consistent with those laws."[174] VA regulations implementing antidiscrimination protections are "necessary" and "appropriate" to clarify the manner and scope of VA's compliance with its antidiscrimination mandate under Section 1557. Furthermore, VA regularly promulgates regulations under 38 U.S.C. § 501(a) to protect against discrimination and to incorporate compliance with other federal statutes that constrain and apply to VA.[175]

The VA Secretary also has specific statutory authority to promulgate regulations pertaining to Section 1557's antidiscrimination provision.[176] This is clear from the plain meaning of the statutory text.[177] Section 1557 applies to "any health program or activity, any part of which is

[174] 38 U.S.C. § 501(a) (2018).
[175] *See, e.g.*, 38 C.F.R. §21.4258(E) (2023) (citing 38 U.S.C. § 501(a) in ensuring "[c]ompliance with equal opportunity laws, including Title VI, Title IX, Section 504, the ADA, and [a]ll Department of Veterans Affairs regulations adopted to carry out these laws" for agencies offering licensing or certification tests) (internal quotation omitted); 38 C.F.R. § 21.292(b)(3) (2023) (citing 38 U.S.C. § 501(a) in providing that VA training and rehabilitation services must operate in "compliance with Title VI of the Civil Rights Act of 1964, section 503(a) Veterans Readjustment Act of 1972, and sections 501 through 504 of the Rehabilitation Act of 1973"); 38 C.F.R. § 61.15(a)(8) (2023) (citing 38 U.S.C. § 501 in mandating that applicants for capital grants must submit "[i]nformation necessary for VA to ensure compliance with the provisions of the National Environmental Policy Act"); 38 C.F.R. § 50 (2023) (citing 38 U.S.C. § 501 as its authority for promulgating regulations regarding equal treatment for faith-based organizations).
[176] *See* 42 U.S.C. § 18116(c) (2018) ("The Secretary may promulgate regulations to implement this section.").
[177] *See id.* § 18116(a) ("[A]n individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 et seq.), the Age

receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency."[178] The VHA is one such health program administered by an executive agency,[179] and VA administers or funds various other health programs and activities.[180]

In addition to the plain text of Section 1557, this statutory interpretation is corroborated by the current and former administrations' understanding of the statute's meaning and implementation in other agencies. As noted above, current and former administrations have interpreted Section 1557 to apply broadly to federal health insurance programs.[181] HHS recently explained that applying Section 1557 to its health insurance programs "demonstrates Congress' intent to apply Section 1557 nondiscrimination requirements to health insurance and other health-related coverage where an entity receives federal financial assistance . . . ."[182] Furthermore, VA has specifically recognized that it is bound by Section 1557 with respect to protection of LGBTQI+ veterans, and petitions for rulemaking. In transition materials before the 2016 election, VA noted that:

> VA currently provides many services for transgender Veterans to include hormone therapy, mental health care, preoperative evaluation, and long-term care following sex reassignment surgery. Increased understanding of both gender dysphoria and surgical techniques in this area has improved significantly. Once funding becomes available, VA will need to resolve this issue *to ensure that the Department is compliant with Section 1557 of the Affordable Care Act (ACA)*, which prohibits sex discrimination in services. The Department of Health and Human Services has stated that discrimination based on gender identity is substantively sex discrimination. Resolution will also address the "Petition for Rulemaking to Promulgate Regulations Governing Provision of Sex Reassignment Surgery to

Discrimination Act of 1975 (42 U.S.C. § 6101 et seq.), or section 794 of title 29, be excluded from participation in, be denied the benefits of, or be subjected to discrimination.").

[178] *Id.*

[179] *See* 38 U.S.C. § 7301(b) (2018) ("The primary function of the [VHA] is to provide a complete medical and hospital service for the medical care and treatment of veterans . . . .").

[180] *See supra* Section I.A.

[181] *See* 87 Fed. Reg. 47824, 47868 (Aug. 4, 2022); *see also supra* Section I.D.2 (discussing former Secretaries' interpretations of Section 1557's broad applicability to federal health programs generally).

[182] *See* 87 Fed. Reg. 47824, 47869 (Aug. 4, 2022). Just as HHS interprets Section 1557 to apply to its health insurance programs, so too can VA with VHA and CHAMPVA.

Transgender Veterans" filed with VA by Lambda Legal Defense and Education, Inc., and the Transgender Law Center on May 9, 2016.[183]

In conclusion, multiple administrations have agreed: Section 1557's antidiscrimination provisions apply to other federal agencies, such as VA.

Like HHS, VA should implement the statutory command of Section 1557 to create clear and expansive regulatory protections for veterans who experience or are at risk of sex and SOGISC discrimination in VA's health care system. Applying HHS's interpretation of Section 1557, VA has both general and specific statutory authority to promulgate regulations related to antidiscrimination.

V. REASONS FOR PROPOSED RULEMAKING

VA should undertake this rulemaking given the gravity of the issues faced by women and the LGBTQI+ community at VA health care facilities. As described in Part I, there is a long history of discrimination against these populations at VA. Specifically, the culture engendered by decades of this discrimination in the military and at VA has had spillover effects into the health care provided to these populations in the VHA system. Many LGBTQI+ and women veterans remain suspicious of VA because of prior experiences of discrimination or harassment at VA facilities or during their military service.[184] LGBTQI+ veterans are often misgendered, harassed, and otherwise minimized when they bring their health care concerns to VA. Women similarly face barriers to receiving VA treatment to which they are entitled after their service. Similarly, veterans of color, disabled veterans, and other veterans from historically marginalized communities routinely face

[183] U.S. DEP'T VETERANS AFFS., PRESIDENTIAL TRANSITION BRIEFING BOOK 88 (2016), https://www.va.gov/FOIA/docs/Updated_Documents/AO/2016_Presidential_Transition_User_Guide.pdf.
[184] Michelle D. Sherman et al., *Communication Between VA Providers and Sexual and Gender Minority Veterans: A Pilot Study*, 11 PSYCH. SERVS. 235 (2014), available at https://pubmed.ncbi.nlm.nih.gov/24588107.

mistreatment and minimization when seeking care at VA facilities. It is not uncommon for people in these communities to experience intersectional discrimination based on more than one of these identities.

The discrimination experienced by these groups only compounds the health problems for which they need treatment in the first place. LGBTQI+ and women veterans are disproportionately likely to experience certain health challenges. For instance, LGBTQI+ veterans are more likely to be in poor physical health and are at higher risk of psychological distress, PTSD, and suicide.[185] There is empirical evidence that VHA facilities do not always provide adequate care to LGBT and women veterans,[186] and discrimination can contribute to this failure.[187] Discrimination in health care "is associated with poorer mental health and lower nonmental health care utilization."[188] Promulgating regulations under Section 1557 would enable VA to provide higher quality health care by clarifying VA's policies on sex discrimination and ensuring greater consistency across VA facilities. These regulations would also encourage veterans to report incidents of discrimination by providing mechanisms to hold VA employees and leadership accountable. For LGBTQI+ and

[185] Julia McGirr, Kenneth Jones & Ernest Moy, *Chartbook on the Health of Lesbian, Gay, and Bisexual Veterans*, VETERANS HEALTH ADMIN. (2021), https://www.va.gov/HEALTHEQUITY/docs/LGB_Veteran_Health_Chartbook_Final.pdf; *This Pride Month, VA Is Proud of All LGBTQ+ Veterans*, U.S. DEP'T VETERANS AFFS. (June 28, 2022), https://news.va.gov/104780/this-pride-month-va-is-proud-of-all-lgbtq-veterans ("LGBTQ+ Veterans are more than twice as likely to have indicators of housing instability in their VHA medical records compared with non-[LGBTQ+] Veterans."); *Interrelationships Between LGBT-based Victimization, Suicide, and Substance Use Problems in a Diverse Sample of Sexual and Gender Minorities*, 19 PSYCHOLOGY, HEALTH & MED. 1 (2013), available at https://www.tandfonline.com/doi/abs/10.1080/13548506.2013.780129 (finding that LGBT veterans are at higher risk for suicide and other poor health outcomes); Bryan N. Chochran et al., *Mental Health Characteristics of Sexual Minority Veterans*, 60 J. HOMOSEXUALITY 419 (2013), available at https://pubmed.ncbi.nlm.nih.gov/23414280 (finding that 15% of LGBTQ+ veterans and 41% of transgender veterans report attempting suicide).

[186] Mollie A. Ruben et al., *LGBT Veterans' Experiences of Discrimination in Health Care and Their Relation to Health Outcomes: A Pilot Study Examining the Moderating Role of Provider Communication*, 3.1 HEALTH EQUITY 480 (Sept. 2019), available at https://www.researchgate.net/publication/335462689_LGBT_veterans.

[187] *Id*.; Michelle D. Sherman et al., *Provider Beliefs and Practices About Assessing Sexual Orientation in Two Veterans Health Affairs Hospitals*, 1 LGBT HEALTH 185 (2014), available at https://pubmed.ncbi.nlm.nih.gov/26789711 (finding that VHA providers fail to ask important questions about sexual orientation).

[188] McGirr, Jones & Moy, *supra* note 185.

women veterans who are uncomfortable seeking care at VA facilities, these regulations would send a clear message that VA will not tolerate discrimination.

Denial of adequate health care also makes it more difficult for LGBTQI+ and women veterans to transition to civilian life. When LGBTQI+ and women veterans are denied benefits because of their gender identity or sexual orientation, they do not always know about or have access to mechanisms to challenge those discriminatory policies. Therefore, these veterans may experience discrimination but feel they cannot speak openly about what they have experienced. This experience can compound the trauma that LGBTQI+ and women veterans experienced during service and make it harder for them to adjust to civilian life. As MVA Executive Director Lindsay Church has testified, some LGBTQI+ veterans "do not feel respected or welcomed in traditional veterans' spaces," and "[m]any . . . do not even feel that they deserve to call themselves 'veterans.'"[189]

Moreover, this discrimination runs afoul of the very point of providing VA health care: to provide care for veterans who put their bodies on the line for this country. While this harm, as described above, "cannot be undone in a few short months," this rulemaking provides an important path to repairing the harm they have experienced and—importantly—to preventing future harm. VA hospitals are treating an increasing number of LGBTQI+ and women veterans. While VA once served "an almost entirely male population," more than 450,000 women now rely on VA for their care.[190] As VA must also serve a large LGBTQI+ population with health care entitlements, this is a pressing, urgent issue that demands VA's attention via rulemaking.

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[189] *Joint Session on VSO Legislative Priorities Presentation Before the H. & S. Comms. on Veterans' Affs.*, 117th Cong. 2 (Mar. 3, 2022) (statement of Lindsay Church, Executive Director, MVA).

[190] Serena MacDonald et al., *Experiences of Perceived Gender-based Discrimination among Women Veterans: Data from the ECUUN Study*, 58 MED CARE 483, 484 (2020), available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7607520; *see also* Nat'l Ctr. Veterans Analysis & Stat., *The Past, Present, and Future of Women Veterans*, U.S. Dep't VETERANS. AFFS. 7 (2017),

This rulemaking also aligns with Secretary McDonough's stated goals of addressing discrimination against LGBTQI+ veterans and creating a more inclusive VA. For instance, Secretary McDonough has consistently affirmed VA's commitment to "reviewing our policies, reviewing our procedures, and changing our behavior, to ensure we're fostering a welcoming, open environment for all Veterans."[191] In the spirit of this commitment, Secretary McDonough announced the creation of an 18-member task force to focus on Inclusion, Diversity, Equity and Access (I-DEA).[192] Based on the I-DEA Task Force's recommendations, VA has revisited its policies that exclude LGBTQI+ veterans from VA programs. In September 2021, VA directed its adjudicators to find that "all discharged Service members whose separation was due to sexual orientation, gender identity or [HIV] status are considered 'Veterans' who are eligible for VA benefits, so long as the record does not implicate a statutory or regulatory bar to benefits."[193] This year, VA announced that survivors of LGBTQI+ veterans who were unable to wed before the 2015 *Obergefell v. Hodges* Supreme Court decision may be eligible for survivor benefits under certain circumstances.[194] These efforts go hand-in-hand with the military's efforts to make the armed forces more receptive to LGBTQI+ veterans, including President Biden's 2021 Executive Order reversing a ban on transgender troops serving in the military.[195] And most recently, VA announced

https://www.va.gov/vetdata/docs/SpecialReports/Women_Veterans_2015_Final.pdf (observing that "[a]t the time of the 1980 decennial census, women made up just over 2 percent of the Veteran population. Today, that proportion has increased to over 9 percent").

[191] *See Remarks by Secretary Denis R. McDonough*, U.S. DEP'T VETERANS AFFS. (June 1, 2022), https://www.va.gov/opa/speeches/2022/06_01_2022.asp [hereinafter Secretary McDonough Pride Month Remarks].

[192] *Inclusion, Diversity, Equity, & Access (I-DEA) Action Plan*, U.S. DEP'T VETERANS AFFS. 1 (Sept. 2021), https://www.va.gov/ORMDI/docs/VA_I-DEA_Action_Plan-SIGNED.pdf [hereinafter I-DEA Action Plan].

[193] *VA LGBTQ+ Outreach*, U.S. DEP'T VETERANS AFFS., https://www.patientcare.va.gov/LGBT/VA_LGBT_Outreach.asp.

[194] Press Release, Off. Pub. & Intergovernmental Affs., *VA Closes Gap in Benefits for LGBTQ+ Veterans and Their Survivors*, U.S. DEP'T VETERANS AFFS. (Oct. 13, 2022), https://www.va.gov/opa/pressrel/pressrelease.cfm?id=5832.

[195] *See* Helene Cooper & Michael D. Shear, *Biden Overturns Trump's Transgender Military Ban*, N.Y. TIMES (Jan. 25, 2021), https://www.nytimes.com/2021/01/25/us/politics/biden-transgender-military.html.

that it will drop the male-specific language from its official motto.[196] In explaining this move towards inclusivity for women as well as trans, non-binary, and other gender diverse people, Secretary McDonough said: "Whenever any veteran, family member, caregiver, or survivor walks by a VA facility, we want them to see themselves in the mission statement on the outside of the building."[197]

VA has evinced a specific commitment to providing comprehensive, high-quality care to LGBTQI+ veterans. In June 2021, Secretary McDonough announced that VA will offer gender confirmation surgery for transgender veterans,[198] although the rulemaking process is still ongoing.[199] That same month, VA announced it will expand its PRIDE in All Who Served Program, a ten-week health education program focused on reducing health care disparities for LGBTQI+ veterans.[200] As of October 2021, Veterans Experience Office Trust Surveys now include questions about gender identity, sexual orientation, race, and ethnicity.[201] VA is also improving its national medical records system by allowing veterans to enter and edit their gender identity and preferred name on VA's website.[202] Undertaking rulemaking under Section 1557 is a natural extension of Secretary McDonough's ongoing actions and stated goals.

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[196] *See* Leo Shane III, *VA to Change Its Motto, Dropping Male-Only Language*, MIL. TIMES (Mar. 16, 2023), https://www.militarytimes.com/veterans/2023/03/16/va-to-change-its-motto-droppin-male-only-language.
[197] *Id.*
[198] Annie Karni, *V.A. Plans to Offer Gender Confirmation Surgeries for Transgender Veterans*, N.Y. TIMES (July 9, 2021), https://www.nytimes.com/2021/06/20/us/politics/veterans-transgender-surgery.html.
[199] *See* Secretary McDonough Pride Month Remarks, *supra* note 191; Leo Shane III, *Transgender Veterans Still Waiting on VA's Promise of Surgery Options*, MIL. TIMES (June 17, 2022), https://www.militarytimes.com/veterans/2022/06/17/transgender-veterans-still-waiting-on-vas-promise-of-surgery-options.
[200] Press Release, Off. Pub. & Intergovernmental Affs., *VA Expands "PRIDE In All Who Served" Program for LGBTQ+ Veterans*, U.S. DEP'T VETERANS AFFS. (June 29, 2021), https://www.va.gov/opa/pressrel/pressrelease.cfm?id=5688.
[201] I-DEA Action Plan, *supra* note 192, at 7.
[202] Press Release, Off. Pub. & Intergovernmental Affs., *VA Health Records Now Display Gender Identity*, U.S. DEP'T VETERANS AFFS. (Jan. 12, 2022), https://www.va.gov/opa/pressrel/pressrelease.cfm?id=5753.

Moreover, since many LGBTQI+ veterans experience harassment at VA facilities, Congress has mandated improvements to VA's harassment reporting mechanisms. The Deborah Sampson Act of 2020[203] required VA to implement clear mechanisms to report harassment and sexual assault experienced and witnessed by patients and employees.[204] In response, in March 2022, VA updated its Harassment Prevention Program procedures.[205] LGBTQI+ patients can now report SOGISC-based harassment through a variety of channels: the Harassment Prevention Program Office, Patient Advocate Program, VA Management, Harassment Prevention Coordinator, VA Police, Disruptive Behavior Reporting System, External Civil Rights Discrimination Complaints Program, Office of the Inspector General, and VA LGBTQ+ Program.[206] Secretary McDonough has announced that VA has a zero-tolerance policy for harassment and sexual assault,[207] and he has called on VA employees to step up to prevent and report harassment.[208] Despite these changes, rulemaking under Section 1557 is still necessary to give antidiscrimination protections the full weight and anchor of binding regulation rather than merely internal policy.

VA is also working to rebuild trust with LGBTQI+ veterans, many of whom are not comfortable receiving care at VA hospitals because of VA's history of discrimination. In June 2021, Secretary McDonough raised an LGBTQ+ Pride flag at VA's Central Office for the first

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[203] Pub. L. 116-315, Title V, §§ 5001-5503, 134 Stat. 4932, 5021-5050 (2021) (codified in scattered sections of 38 U.S.C.).
[204] U.S. DEP'T VETERANS AFFS., HARASSMENT PREVENTION PROGRAM (HPP) PROCEDURES 1 (Mar. 21, 2022), https://www.va.gov/ORMDI/docs/handbook_5979_21_mar_2022.pdf.
[205] *Id.*
[206] *Id.* at 11.
[207] Letter from Denis McDonough, Sec'y of the Dep't Veterans Affs., to Veterans (Nov. 18, 2021), https://www.va.gov/STOP-HARASSMENT/docs/OriginalSecVAAnnualDistributionAntiHarassmentandSexualAssaultLetter.pdf; *see also* U.S. DEP'T VETERANS AFFS, VA'S ZERO TOLERANCE POLICY, https://www.va.gov/STOP-HARASSMENT/docs/HarassmentPreventionandRecourseBrochure.pdf (describing VA's policy).
[208] VHA Assault & Harassment Prevention Off., *Stand Up to Stop Harassment Now!*, U.S. DEP'T VETERANS AFFS. (Nov. 19, 2021), https://www.va.gov/STOP-HARASSMENT/StandUpToStopHarassmentNow.asp.

time.[209] The next year, Secretary McDonough encouraged all VA facilities to raise the Pride flag during Pride month,[210] and some facilities held ceremonies to commemorate raising the flag for the first time.[211] This rulemaking represents a critical next step in this rebuilding process in order to make VA health care facilities safe, comfortable, and supportive spaces for LGBTQI+ veterans.

In addition to these mission-driven reasons, VA should undertake this rulemaking in order to vindicate the ACA, keep pace with recent developments in civil rights law, and clear up existing confusion over compliance—as well as to complement the advancements made by other agencies in this area. As explained in Part IV, Section 1557 of the ACA applies to all executive agencies, including VA. VA's failure to promulgate regulations implementing the antidiscrimination provision of Section 1557 would be especially egregious in light of HHS's actions. As HHS points out in its own recent NPRM implementing Section 1557, disparities in health care act to further marginalize already subjugated communities, including communities of color, people with disabilities, women, the LGBTQI+ community, and older individuals.[212]

This proposed rulemaking also aligns with recent developments in civil rights case law. As discussed in Section I.D, *Bostock* represents a recognition by the Supreme Court that statutory prohibitions of sex discrimination encompass prohibitions of SOGI discrimination. On January 20, 2021, President Biden, in Executive Order 13988, directed agencies to review all agency actions, including regulations, that prohibit discrimination on the basis of sex to determine if they were inconsistent with the Court's reasoning in *Bostock*.[213] While HHS has since issued an NPRM that accords with *Bostock*, VA has not yet done so. Moreover, since *Bostock*, courts have repeatedly

[209] I-DEA Action Plan, *supra* note 192, at 7.
[210] Secretary McDonough Pride Month Remarks, *supra* note 191.
[211] *Kansas City VA Raises the Pride Flag*, U.S. DEP'T VETERANS AFFS. (June 19, 2022), https://news.va.gov/104824/kansas-city-va-raises-the-pride-flag.
[212] 87 Fed. Reg. 47824, 47831-37 (Aug. 4, 2022).
[213] 86 Fed. Reg. 7023, 7023-24 (Jan. 25, 2021).

held that federal sex-discrimination prohibitions, including Section 1557 and Title IX, cover SOGI discrimination.[214] To be consistent with these developments, VA should implement an understanding of sex discrimination that reflects its key holding—that SOGISC discrimination is illegal under statutory prohibitions of sex discrimination.

Finally, failure to undertake this rulemaking would promote confusion in compliance. VA currently provides no guidance as to how it will fulfill its compliance responsibilities under Section 1557, and, in particular, as to whether those responsibilities incorporate *Bostock*. The resulting uncertainty is particularly concerning given the history and extent of discrimination outlined above. Although VA has made recent, significant progress in removing barriers to access for LGBTQI+ and women veterans, the persistent reports of discrimination at VA health care facilities demonstrate that there is more work to be done. This rulemaking offers an opportunity for VA to provide clear, unambiguous instructions to its health care facilities and programs about the behaviors that constitute impermissible sex discrimination under Section 1557. Through this rulemaking, VA can further express its commitment to eradicating discrimination against LGBTQI+ and women veterans.

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[214] *See, e.g.*, Doe v. Snyder, 28 F.4th 103, 113-14 (9th Cir. 2022); Grimm v. Gloucester Cnty. Sch. Bd., 972 F.3d 586, 616 (4th Cir. 2020), *as amended* (Aug. 28, 2020), *cert. denied*, 141 S. Ct. 2878 (Mem.) (2020); Kadel v. Folwell, No. 1:19–cv–00272, 2022 WL 2106270, at *28-*29 (M.D.N.C. June 10, 2022); Scott v. St. Louis Univ. Hosp., No. 4:21–cv–01270–AGF, 2022 WL 1211092, at *6 (E.D. Mo. Apr. 25, 2022); C.P. *ex rel.* Pritchard v. Blue Cross Blue Shield of Ill., No. 3:20–cv–06145–RJB, 2021 WL 1758896, at *4 (W.D. Wash. May 4, 2021); Koenke v. Saint Joseph's Univ., No. CV 19–4731, 2021 WL 75778, at *2 (E.D. Pa. Jan. 8, 2021); Doe v. Univ. of Scranton, No. 3:19–cv–01486, 2020 WL 5993766, at *11 n.61 (M.D. Pa. Oct. 9, 2020); Maxon v. Fuller Theological Seminary, No. 2:19–cv–9969, 2020 WL 6305460 (C.D. Cal. Oct. 7, 2020); B.P.J. v. W. Va. State Bd. of Educ., No. 2:21–cv–00316, 2021 WL 3081883, at *7 (S.D.W. Va. July 21, 2021); Clark Cty. Sch. Dist. v. Bryan, 478 P.3d 344, 354 (Nev. 2020).

Although some post-*Bostock* decisions have placed limits on Section 1557's application to discrimination against transgender people, these decisions have focused on whether RFRA exempts specific entities from potential future enforcement by HHS of Section 1557's requirements against them. On balance, they do not call into question *Bostock*'s application to Section 1557, and none implicate VA. *See* Franciscan All., Inc. v. Becerra, 47 F.4th 368 (5th Cir. 2022); Religious Sisters of Mercy v. Azar, 55 F.4th 583 (8th Cir. 2022); *but see* Neese v. Becerra, No. 2:21–cv–00163–Z, 2022 WL 1265925, at *14 (N.D. Tex. Apr. 26, 2022) (denying motion to dismiss based on possibility that neither Section 1557 nor *Bostock* prohibit health care providers from discriminating on the basis of sexual orientation and gender identity).

VI. PROPOSED PROVISIONS

In promulgating regulations under Section 1557, VA should closely follow Congress's purpose for the statute, which is to ensure that antidiscrimination protections reach federally funded health care. The standards, definitions, and provisions contained in the HHS NPRM provide a helpful framework that VA can build on in drafting its own rule. Because veterans face unique health challenges, however, VA should expand upon the framework established by the HHS NPRM and address limitations in it that fail to provide adequate protections for veterans.[215] As outlined below, VA should ensure that its proposed rule includes more robust protections than those proposed by the HHS NPRM for its most vulnerable veterans, including LGBTQI+ people and women.[216]

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[215] Minority Veterans Am., Comment Letter on Proposed Rule, Comments in Response to RIN 0945-AA17, Docket ID HHS-OS-2022-0012-0001 Proposed Rule, "Nondiscrimination in Health Programs and Activities" (Oct. 3, 2022), available at https://www.regulations.gov/comment/HHS-OS-2022-0012-73952 (outlining the limitations of the HHS NPRM as it relates to veteran communities).

[216] For further guidance on ways to strengthen the protections proposed in the HHS NPRM, VA should incorporate relevant language proposed by LGBTQ+, women's rights, and racial justice advocacy groups in their commentary on the HHS NPRM, where such proposals are consistent with the language proposed in this petition. *See, e.g.*, Lambda Legal Defense & Educ. Fund, Inc., Comment Letter on Proposed Rule, Comments in Response to RIN 0945-AA17, Docket ID HHS-OS-2022-0012-73935 Proposed Rule, "Nondiscrimination in Health Programs and Activities" (Oct. 3, 2022), available at https://www.regulations.gov/comment/HHS-OS-2022-0012-73935 (outlining ways to strengthen protections for LGBTQ+ individuals under Section 1557); Equitas Health, Comment Letter on Proposed Rule, Comments in Response to RIN 0945-AA17, Docket ID HHS-OS-2022-0012-43572 Proposed Rule, "Nondiscrimination in Health Programs and Activities" (Oct. 3, 2022), available at https://www.regulations.gov/comment/HHS-OS-2022-0012-43572 (same); Nat'l Women's L. Ctr., Comment Letter on Proposed Rule, Comments in Response to RIN 0945-AA17, Docket ID HHS-OS-2022-0012-72716 Proposed Rule, "Nondiscrimination in Health Programs and Activities" (Oct. 3, 2022), available at https://www.regulations.gov/comment/HHS-OS-2022-0012-72716 (outlining ways to strengthen protections for women under Section 1557); Ctr. Reproductive Rts., Comment Letter on Proposed Rule, Comments in Response to RIN 0945-AA17, Docket ID HHS-OS-2022-0012-70262 Proposed Rule, "Nondiscrimination in Health Programs and Activities" (Oct. 3, 2022), available at https://www.regulations.gov/comment/HHS-OS-2022-0012-70262 (outlining ways to strengthen protections for reproductive health care under Section 1557); NAACP Legal Defense & Educ. Fund, Inc., Comment Letter on Proposed Rule, Comments in Response to RIN 0945-AA17, Docket ID HHS-OS-2022-0012-73941 Proposed Rule, "Nondiscrimination in Health Programs and Activities" (Oct. 3, 2022), available at https://www.regulations.gov/comment/HHS-OS-2022-0012-73941 (outlining ways to strengthen protections for Black Americans); Nat'l Counc. Asian Pacific Ams., Comment Letter on Proposed Rule, Comments in Response to RIN 0945-AA17, Docket ID HHS-OS-2022-0012-69671 Proposed Rule, "Nondiscrimination in Health Programs and Activities" (Oct. 3, 2022), available at https://www.regulations.gov/comment/HHS-OS-2022-0012-69671 (outlining ways to strengthen protections for communities of color under Section 1557).

VA provides significant health services and insurance to veterans and their families and dependents, who have already faced danger in the military and have every right to a smooth transition to civilian life. A rule in line with this petition would help VA realize the promise of its new, gender-neutral motto and achieve its mission of providing equitable, quality health care to veterans, including and especially its most marginalized populations.

A. Nondiscrimination Provisions

The proposed rule includes (1) a general prohibition of discrimination on the basis of race, color, national origin, sex, age, or disability under health programs or activities undertaken by VA; (2) a clarification regarding discrimination on the basis of sex; and (3) specific forms of prohibited discrimination. The proposed rule protects against discrimination based on an individual's actual or perceived race, color, national origin, sex, age, or disability, which finds support in case law[217] and federal civil rights enforcement.[218] To strengthen the proposed rule as it appears in the HHS NPRM, VA should include explicit references to intersectional discrimination. Intersectional discrimination is prevalent in veteran communities specifically,[219] so throughout the regulatory text, VA should explicitly prohibit discrimination on the basis of "race, color, national origin, sex, age, or disability, *or any combination thereof*."

The proposed rule clarifies that discrimination on the basis of sex stereotypes constitutes sex discrimination, which is consistent with the Supreme Court's holdings in *Price Waterhouse v.*

[217] *See* 87 Fed. Reg. 47824,47858 n.333 (Aug. 4, 2022) (collecting cases).
[218] *See id.* at 47858 n.334 (collecting federal agency enforcement policies).
[219] *See, e.g.*, Caroline Medina, et. al, *Protecting and Advancing Health Care for Transgender Adult Communities*, CTR. AM. PROGRESS (Aug. 18, 2021), https://www.americanprogress.org/article/protecting-advancing-health-care-transgender-adult-communities (showing that transgender people of color experience more discrimination than white transgender people).

Hopkins[220] and *Bostock v. Clayton County*.[221] It also includes sex characteristics and intersex traits because those characteristics are inherently sex-based,[222] a reading of *Bostock* that the DOJ has affirmed.[223] In keeping with HHS's interpretation of Title IX,[224] the proposed rule includes "pregnancy or related conditions" under the prohibition on sex discrimination.

In accordance with the Supreme Court's decision in *Bostock* and the *Bostock* notification, this proposed provision also includes "sexual orientation" and "gender identity" under the prohibition on sex discrimination. In *Bostock*, the Court held that the Title VII prohibition on discrimination "because of sex" includes discrimination on the basis of gender identity and sexual orientation.[225] Because courts look to Title VII to inform Title IX interpretation,[226] and Section 1557 incorporates Title IX by reference, the *Bostock* reasoning should therefore inform VA's understanding of Section 1557's prohibition on sex-based discrimination as it relates to sexual orientation and gender identity.

While the HHS NPRM defines discrimination on the basis of sex to include sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity,[227] this language should go further to ensure protection from discrimination for the most vulnerable

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[220] 490 U.S. 228, 250-51 (1989) ("In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.").
[221] 140 S. Ct. 1731, 1742-43 (2020) ("[A]n employer who fires both [a woman] and [a man] for failing to fulfill traditional sex stereotypes doubles rather than eliminates Title VII liability.").
[222] 87 Fed. Reg. 47824, 47858 (Aug. 4, 2022).
[223] *See* Memorandum from Kristen Clarke, Assistant Att'y Gen., Civil Rights Div., U.S. Dep't Justice, to Dep't Justice Office of Justice Programs, Office Cmty. Oriented Policing Servs., Office Violence Against Women, & Money Laundering & Asset Recovery Section, 2 (Mar. 10, 2022), https://www.justice.gov/crt/page/file/ 1481776/download; *see also Title IX Legal Manual, Title IX Cover Addendum post*-Bostock, U.S. DEP'T JUST. (Aug. 12, 2021), https:// www.justice.gov/crt/title-ix#Bostock.
[224] 45 C.F.R. § 86.21(c)(2)-(3) (2023); *id.* § 86.40(b)(1), (4)-(5); *id.* § 86.51(b)(6); *id.* § 86.57(b)(d) (providing Title IX regulations).
[225] *Bostock*, 140 S. Ct. at 1744.
[226] *See, e.g.*, Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 616 n.1 (1999) (Thomas, J., dissenting) (explaining that courts "look[] to [the Supreme Court's] Title VII interpretations of discrimination in illuminating Title IX").
[227] 87 Fed. Reg. 47924, 47916 (Aug. 4, 2022).

veterans. Notably, transgender people, intersex people, and people seeking to terminate a pregnancy should be explicitly protected under this proposed rule. Since there have been instances in which those seeking to permit discrimination against transgender people have justified it by pressing distinctions between "gender identity" and "transgender status,"[228] VA should specify that the definition of "discrimination on the basis of sex" explicitly includes transgender status and intersex folks.

Additionally, access to comprehensive reproductive health care, including abortion care, is crucial for many veterans.[229] Abortion care is particularly important for veterans of color[230] and low-income veterans.[231] Accordingly, VA should provide explicit protections to people who terminate their pregnancies or seek to do so, in line with VA's robust commitment to eradicating sex discrimination. VA's definition of discrimination on the basis of sex should therefore include "discrimination on the basis of sex stereotypes; sex characteristics, including intersex traits; pregnancy or related conditions, *including termination of pregnancy*; sexual orientation; *transgender status*; and gender identity." VA should also be consistent throughout their proposed rule and include all of the aforementioned categories when defining sex discrimination.

Bostock is instructive here because Title VII, Title IX, and Section 1557 are statutorily similar. First, all three statutes specifically prohibit sex discrimination against an individual,[232] on

[228] *See, e.g.*, 85 Fed. Reg. 44811 (July 24, 2020).
[229] 87 Fed. Reg. 55287, 55288 (Sept. 8, 2022) (providing abortion care to veterans "if determined needed by a health care professional when: (1) the life or health of the pregnant veteran would be endangered if the pregnancy were carried to term; or (2) the pregnancy is the result of an act of rape or incest").
[230] Anne Brannigan & Samantha Chery, *Women of Color Will Be Most Impacted by the End of Roe, Experts Say*, WASH. POST (June 24, 2022, 8:04 PM EST), https://www.washingtonpost.com/nation/2022/06/24/women-of-color-end-of-roe.
[231] Elizabeth Harned & Liza Fuentes, *Abortion Out of Reach: The Exacerbation of Wealth Disparities After Dobbs v. Jackson Women's Health Organization*, GUTTMACHER INST. (Jan. 25, 2023), https://www.guttmacher.org/article/2023/01/abortion-out-reach-exacerbation-wealth-disparities-after-dobbs-v-jackson-womens.
[232] 42 U.S.C. § 2000e–2(a)(1) (2018); 20 U.S.C. § 1681(a) (2018); 42 U.S.C. § 18116 (2018).

which the Supreme Court focused in *Bostock*.[233] Second, Title VII's prohibition on discrimination "because of" sex can be read interchangeably with Title IX's prohibition on discrimination "on the basis of sex," as the Supreme Court did in *Bostock.*[234] The *Bostock* Court's interpretation of sex discrimination under Title VII to include discrimination based on sexual orientation or gender identity should therefore be applied to Title IX and Section 1557's prohibitions of discrimination on the basis of sex. This proposed provision thus clarifies that Title IX and Section 1557 prohibit discrimination on the basis of gender identity and sexual orientation.

This proposed provision also incorporates by reference the prohibitions on the specific forms of discrimination defined in the regulations implementing Title VI, Title IX, the Age Discrimination Act of 1975 ("Age Act"), and Section 504. This is consistent with Section 1557, which expressly adopts language that prohibits an individual from being "excluded from participation in, . . . denied the benefits of, or . . . subjected to discrimination under'' a specified program or activity.[235] Additionally, because Section 1557 draws this language from the four referenced statutes, it is "reasonable and appropriate to look to those statutes' implementing regulations to further clarify what it means to discriminate on the grounds prohibited by those statutes."[236]

B. General Provisions

This proposed provision should correspond closely with the HHS NPRM, which builds on existing, experience-tested regulations and applies recent civil rights precedent, including *Bostock*. Because many of these provisions have been upheld in the courts already, VA would potentially

[233] 140 S. Ct. 1731, 1740-41 (2020) ("[The statute] tells us three times—including immediately after the words 'discriminate against'—that our focus should be on individuals.'').
[234] *Id.* at 1737 ("[I]n Title VII, Congress outlawed discrimination in the workplace *on the basis of* race, color, religion, sex, or national origin.") (emphasis added).
[235] 20 U.S.C. § 1681(a) (2018).
[236] 87 Fed. Reg. 47824, 47859 (Aug. 4, 2022).

have less litigation and save agency resources by proposing rules that another agency has already piloted. However, as outlined below, VA should expand upon the protections included in the HHS NPRM to address the unique challenges that veterans face and guard against a different set of litigation risks. As a result, the proposed general provisions will reflect VA's adaptation of the HHS NPRM and preexisting Section 1557 regulations.

1. Purpose

The purpose of this proposed provision is to promulgate regulations under Section 1557, as it applies to VA health programs or activities, including VHA, CHAMPVA and Community Care. Section 1557 prohibits discrimination in certain health programs and activities as corresponds with existing civil rights laws.[237] Congress's intent for the ACA was to increase access to affordable, nondiscriminatory health care,[238] and it would thus be inconsistent with congressional intent to read Section 1557 in a way that limits an individual's ability to access nondiscriminatory health care.

In accordance with the HHS NPRM, this proposed provision interprets the text of Section 1557 to prohibit discrimination based on race, color, national origin, sex, age, or disability and to incorporate the "enforcement mechanisms" of the statutes.[239] Section 1557 does not, however, "invalidate or limit the rights, remedies, procedures, or legal standards" established by the statutes.[240]

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[237] 42 U.S.C. § 18116(a) (2018) (providing coverage "on the ground[s] prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. §§ 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. §§ 6101 et seq.), or section 794 of title 29").
[238] *About the Affordable Care Act*, U.S. DEP'T HEALTH & HUM. SERVS., https://www.hhs.gov/health care/about-the-aca/index.html ("The Patient Protection and Affordable Care Act, referred to as the Affordable Care Act or 'ACA' for short, is the comprehensive health care reform law enacted in March 2010. The law has 3 primary goals: Make affordable health insurance available to more people.").
[239] 87 Fed. Reg. at 47837.
[240] 42 U.S.C. § 18116(b) (2018).

2. Application

This proposed provision applies to: (1) every health program or activity, any part of which receives any federal financial assistance from VA, and (2) every health program or activity administered by VA. Consistent with the HHS NPRM,[241] the word "health" should be read to modify "programs or activities" operated by VA, thus limiting the provision to health programs or activities. In keeping with that limitation, this proposed provision should apply only to enforcement of antidiscrimination laws in health care provision and not to enforcement of other antidiscrimination laws in other contexts.[242]

While Section 1557 incorporates the grounds of prohibited discrimination and the enforcement mechanisms of Title VI, Title IX, the Age Act, and Section 504, it does not require that this proposed provision incorporate any of the exceptions set forth in Title IX. Title IX's prohibition on sex-based discrimination includes exceptions for military service academies, admissions decisions of educational institutions, membership practices of certain organizations, and educational institutions controlled by religious organizations.[243] Title IX is the only one of the four referenced statutes that includes exceptions to its antidiscrimination requirements, and the exceptions in Title IX refer specifically to educational institutions such that they are irrelevant or inappropriate to VA's provision of health care.[244] VA therefore has discretion over whether to incorporate those exceptions.[245] Allowing health care providers to deny essential health care

[241] 87 Fed. Reg. at 47838.
[242] *Id.* ("[E]mployment discrimination complaints alleging violations of similar protections against discrimination to those that are covered under Section 1557 be handled by other federal agencies under the statutes they enforce . . . .").
[243] 20 U.S.C. § 1681(a) (2018).
[244] The religious exception is particularly concerning in health care contexts, though it does not apply to VA. An individual's choice to obtain health care is more informed by "availability, convenience, urgency, geography, cost, insurance network restrictions, and other factors unrelated to the question of whether the health care provider is controlled by or affiliated with a religious organization." 87 Fed. Reg. at 47840.
[245] *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984) (holding that courts should give "considerable weight to an executive department's construction of a statutory scheme it is entrusted to administer").

services based on disapproval of a particular group or for other non-medical reasons would put the health and wellbeing of already vulnerable individuals at risk, so this proposed provision should not include any of the Title IX exceptions.

In accordance with the HHS NPRM, VA should read Section 1557's prohibition of discrimination "on the grounds prohibited under" Title IX to refer to the basis on which discrimination is prohibited.[246] This reading finds support in recent Supreme Court decisions that used the term "grounds" to mean prohibited bases for discrimination.[247] Additionally, the text of Section 1557 makes reference only to the "grounds" and "enforcement mechanisms" of the referenced statutes, without referencing any other parts of the statutes.[248]

3. Relationship to Other Laws

Consistent with Section 1557, this proposed provision should not be read to limit, invalidate, or apply lesser standards for protection from discrimination than the standards under Title VI, Title VII, Title IX, Section 504, or the Age Act. Similarly, this provision should be read to complement, rather than limit, the Deborah Sampson Act of 2020.[249]

4. Definitions

VA should define terms necessary to interpret the rule in line with the definitions set forth in the HHS NPRM.[250]

5. Assurances Required

Consistent with the HHS NPRM, this proposed provision requires any recipient of VA funding to submit assurances of compliance to VA.[251] This will allow VA to better enforce

[246] 42 U.S.C. § 18116(b) (2018).
[247] *Id*.
[248] *Id*.
[249] Deborah Sampson Act of 2020, Pub. L. No. 116–315, 134 Stat. 5022 (codified in scattered sections of 38 U.S.C.).
[250] 87 Fed. Reg. 47824, 47911-13 (Aug. 4, 2022).
[251] *Id.* at 47913.

antidiscrimination requirements and will remind recipients of VA funding about their antidiscrimination regulations.[252] The federal government regularly requires covered entities to submit assurances of compliance when applying for federal financial assistance. In accordance with this proposed provision, any recipient of VA funding will be required to submit an assurance that its health programs and activities will be operated in compliance with Section 1557, Title VI, Title IX, Section 504, and the Age Act.

6. Remedial Action and Voluntary Action

This proposed provision clarifies that covered entities are required to take actions to remediate the effects of any discriminatory activities in violation of Section 1557. This is consistent with Title IX, Section 504, and the Age Act, which also require covered entities to take voluntary action to remedy any past discriminatory conduct.[253] Consistent with the HHS NPRM, "[w]here a covered entity is required to take remedial actions under Title VI, Section 504, Title IX, or the Age Act, such actions would likely satisfy the remedial actions required" by this proposed provision.[254]

7. Designation and Responsibilities of a Section 1557 Coordinator

This proposed provision sets forth guidelines for covered entities with fifteen or more employees to ensure compliance with the entity's responsibilities under Section 1557. Under this proposed provision, any covered entity with fifteen or more employees shall designate an

[252] *See, e.g.*, 28 C.F.R. § 50.3 pt. 1.B.1 (2023) (listing various "[p]ossibilities of judicial enforcement" of Title VI, including suits to enforce contractual assurances).
[253] 45 C.F.R. § 86.3(a)-(b) (2023) (re Title IX); *id.* § 84.6(a)-(b) (same for Section 504); *id.* § 91.48 (same for Age Discrimination in Employment Act).
[254] 87 Fed. Reg. at 47846.

employee to serve as a Section 1557 coordinator, which has duties further outlined in the HHS NPRM.[255]

8. Policies and Procedures

This proposed provision requires covered entities to establish written procedural requirements across discrimination bases, creating procedural consistency regardless of the type of discrimination alleged. These written procedures will allow claimants to allege discrimination on multiple bases, such as sex and SOGISC status; will provide clarity to covered entities on their procedural requirements regardless of the basis of discrimination alleged; and will create a simpler enforcement scheme.

Consistent with the HHS NPRM, each covered entity should be required to adopt a series of "Section 1557 Policies and Procedures," which include "a nondiscrimination policy, grievance procedures (for covered entities employing fifteen or more persons), language access procedures, auxiliary aids and services procedures, and procedures for reasonable modifications for individuals with disabilities."[256] These Policies and Procedures are intended to increase covered entities' awareness of their Section 1557 responsibilities and support employees in their efforts to avoid discrimination and ensure statutory compliance. These policies would also help individuals to resolve civil rights concerns before VA's enforcement office intervenes.

9. Training

HHS's Office of Civil Rights ("OCR") and other federal agencies have found that public

[255] *Id.* at 47846-47 (proposing that the Section 1557 coordinator: "(1) receives, reviews, and processes grievances filed under the grievance procedure as set forth in proposed § 92.8(c); (2) coordinates the covered entity's recordkeeping requirements as set forth in proposed § 92.8(c); (3) coordinates effective implementation of the covered entity's language access procedures as set forth in proposed § 92.8(d); (4) coordinates effective implementation of the covered entity's effective communication procedures as set forth in proposed § 92.8(e); (5) coordinates the covered entity's procedures for providing reasonable modifications for individuals with disabilities in accordance with proposed § 92.8(f); and (6) coordinates training of relevant employees as set forth in proposed § 92.9, including maintaining the required documentation").

[256] *Id.*

education and outreach, as well as training materials, lead to improved compliance with civil rights obligations.[257] VA should therefore engage in proactive efforts to prevent discriminatory conduct in health activities and programs. To that end, this proposed provision includes a training requirement for relevant employees to ensure that they are knowledgeable about the Section 1557 Policies and Procedures and can effectively prevent discrimination.

Under this proposed provision, covered entities should retain independent discretion to develop training policies, including as to which staff members are considered "relevant staff." This provision, however, would require training to occur whenever an employee's role is materially changed by the Section 1557 Policies and Procedures, within a reasonable time after such change was made. The rule also requires covered entities to document their employees' completion of training and maintain documentation for at least three years.

10. Notice of Nondiscrimination

Under the proposed rule, each covered entity shall be required to provide, in keeping with the HHS NPRM, a "notice of nondiscrimination, relating to its health programs and activities, to participants, beneficiaries, enrollees, and applicants of its health programs and activities, and members of the public."[258] The notice of nondiscrimination would require covered entities to assert that they do not discriminate on the basis of race, color, national origin (including limited English proficiency and primary language), sex (including pregnancy, sexual orientation, gender identity, or sex characteristics), age, disability, or any combination thereof. This proposed provision requires entities to provide the notice on an annual basis and upon request, and to place the notice

[257] *Id.* at 47850 ("Federal agency technical assistance materials on language access consistently highlight the important role training plays in delivering services effectively," including "a DOJ assessment and planning tool for federally conducted and federally assisted programs included 'training staff on policies and procedures' as one of the key six steps for developing an effective language access policy.").
[258] *Id*. at 47852.

at a conspicuous location on their website and in all physical locations. This notice can be combined with the notices required by Title VI, Section 504, Title IX, and the Age Act.[259]

11. Data Collection

Until 2022, VA collected very little data on the sexual orientation and gender identity of the veterans who received care at VHA facilities. In 2020, for example, the U.S. Government Accountability Office ("GAO") reported that 89% of veteran patient records do not include information on gender identity, and VA had no standardized mechanism to collect sexual orientation data.[260] After the release of this report, VA adopted a series of policy changes recommended by GAO, including implementing a sexual orientation field in VHA's internal patient systems and consistently collecting self-identified gender identity data across enrollment, administrative, and health records systems.[261] VA also began to collect veterans' sexual orientation data and analyze health care outcomes based on this data.[262]

The HHS NPRM did not include a provision requiring a specific set of data collection measures,[263] but HHS expressed openness to a robust data collection strategy through existing authorities within OCR.[264] Following HHS's template, VA should determine the best avenue to ensure a robust, responsive data collection system that consistently collects and analyzes sexual

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[259] 45 C.F.R. § 80.6(d) (2023) (re Title VI); *id.* § 84.8 (same re Section 504, federally assisted); *id.* § 85.12 (same re Section 504, federally conducted); *id.* § 86.9 (same re Title IX); *id.* § 91.32 (same re Age Discrimination in Employment Act).

[260] *VA Health Care: Better Data Needed to Assess the Health Outcomes of Lesbian, Gay, Bisexual, and Transgender Veterans*, U.S. GOV'T ACCOUNTABILITY OFF. (Oct. 19, 2020), https://www.gao.gov/products/gao-21-69.

[261] *Id.*

[262] *Id.*

[263] 87 Fed. Reg. 47824, 47857 (Aug. 4, 2022):

> We considered including a provision in the rule requiring covered entities to collect additional civil rights data given the vital role data can play in ensuring civil rights compliance and the fact that such data remain largely uncollected for many demographic subgroups. At this time, however, we are not including such a provision but are soliciting feedback and comments on such data collection to inform a final rule and OCR's overall civil rights work.

[264] *Id.* ("The Department believes that rather than codifying a specific set of data collection measures within this rulemaking, the Department—through OCR—is better positioned to create a dynamic and responsive civil rights data collection structure by using its existing authorities.").

orientation and gender identity data for veterans, including and especially by disaggregating "sex discrimination" or "sexual harassment" data by SOGISC status.

C. Specific Applications to Health Programs and Activities

As Section 1557 applies to health programs and activities, the proposed provisions necessarily mandate covered entities to take specific actions in health care and health insurance that affect individuals protected by Section 1557's antidiscrimination mandates.

1. Covered Entities Must Provide Equal Health Care Access on the Basis of Sex

This proposed provision clarifies that covered entities must ensure equal access to their health programs and activities without discrimination on the basis of sex, including discrimination on the basis of sex stereotypes; sex characteristics, including intersex traits; pregnancy or related conditions, including termination of pregnancy; sexual orientation; transgender status; and gender identity. Covered entities include hospitals, physical and mental health providers, and pharmacies. These provisions support and encourage providers' ability to discuss the full range of health care options available to individuals. They do not compel providers to perform services outside of their specialty area, as is consistent with Section 504.[265]

A covered entity may not, under these proposed provisions and Section 1557, deny gender-affirming care to any individual seeking it based upon their gender identity or transgender status. This prohibition applies even if individuals do not use the term "transgender" to describe their identity (for example, if they use terms such as "nonbinary," "gender-fluid," or "gender-queer"). The terminology or labels with which an individual identifies do not matter because the required antidiscrimination standard is the same under this proposed provision and Section 1557. To

[265] *See* 45 C.F.R. § ¶84, app. A, supt. F (2023) ("[A] burn treatment center need not provide other types of medical treatment to [individuals with disabilities] unless it provides such medical services to [persons without disabilities]. It could not, however, refuse to treat the burns of a deaf person because of his or her deafness.").

strengthen the protections for gender-affirming care set forth in the HHS NPRM, VA should state unequivocally that Section 1557, as federal law, preempts any such state or local law restricting access to this care.

Additionally, VA should make clear that while providers are not required to offer care outside of their specialty, it is not necessary to show that a provider offers the same services for purposes other than gender-affirming care in order to establish that a denial was discriminatory. To do so, VA should limit the language in the HHS NPRM that states that a covered entity must not "[d]eny or limit health services sought for purpose of gender transition or other gender-affirming care *that the covered entity would provide to an individual for other purposes* if the denial or limitation is based on a patient's sex assigned at birth, gender identity, transgender status, or gender otherwise recorded."[266] Instead, VA's rule should eliminate the language that limits discrimination to occurring only when the covered entity would provide the same care to an individual for other purposes. If the denial of care is based upon a protected characteristic—in this case, the patient's "sex assigned at birth, gender identity, or gender otherwise recorded"—that is sufficient to constitute unlawful discrimination under Section 1557. While the fact that a provider offers a similar service for other purposes can be used as *evidence* of discrimination, that is not the only circumstance in which unlawful discrimination can arise.

A provider is not mandated to prescribe a specific treatment that the provider decides not to offer after making a *bona fide* treatment decision based on nondiscriminatory criteria and commonly accepted standards of medical care. But Section 1557 does not allow a provider to deny care based on animus, stereotypes, or discriminatory beliefs, such as the belief that gender-affirming care is always cosmetic. If a provider categorically believes that gender transition or

[266] 87 Fed. Reg. at 47918 (emphasis added).

other gender-affirming care is never appropriate clinical treatment, that is not a sufficient basis to deny a treatment and is discriminatory under this proposed provision. This provision would also provide a general prohibition on the denial or limitation of health services, such as those predominantly used by people of a particular gender, to an individual on the basis of that individual's sex assigned at birth, gender identity, or recorded gender. Because there is continued discrimination against gender non-conforming, intersex, and transgender people when they seek basic medical care,[267] this specific provision naming and prohibiting SOGISC discrimination is necessary.

This provision also prevents covered entities from denying or limiting a health care professional's ability to provide health services on the basis of a patient's sex assigned at birth, gender identity, or gender otherwise recorded. Because prohibited discrimination could be channeled to place restrictions on individual providers so as to have the effect of discriminating against patients, this provision is warranted. This provision parallels Title VI's limited application to employment when discrimination has secondary effects impacting the ability of beneficiaries to meaningfully participate or receive benefits from federally assisted programs in a nondiscriminatory manner. Under this provision, a covered entity is prohibited from punishing or disciplining a provider for giving clinically appropriate care when doing so would limit the provider's ability to provide care on the basis of sex assigned at birth or gender identity.

2. Antidiscrimination in Health Insurance Coverage

This proposed provision prohibits discrimination on the basis of race, color, national origin, sex, age, or disability in the provision or administration of health insurance coverage and other health-related coverage. It would apply to all covered entities that provide or administer health

[267] See *supra* Section I.B.2.

insurance coverage or other health-related coverage that get federal financial assistance, and VA in the administration of its health-related coverage programs. This includes coverage at VHA facilities and under CHAMPVA and any other federally funded VA health care benefits, such as Community Care.

Under Section 1557, covered health entities are still empowered to inquire about individuals' relevant medical history and physical traits if medically necessary, as long as they do so in a nondiscriminatory, non-harassing manner and only when necessary. Just as a provider could inquire about medical treatments related to a condition, so too can health insurers for the purposes of determining medical necessity. Covered health entities are then able to evaluate whether the treatment is medically necessary. Covered health entities are not mandated to provide coverage of any health service where the covered entity has a legitimate, nondiscriminatory reason for determining that such health service fails to meet applicable coverage requirements, such as medical necessity requirements, in a particular case, as long as the eligibility or medical necessity standards themselves are not discriminatory.[268]

Under this proposed provision, covered entities are prohibited from limiting or refusing to issue or renew health insurance coverage or other health-related coverage; denying or limiting coverage; or imposing additional cost sharing or restrictions on coverage on the basis of race, color, national origin, sex, age, or disability. This includes discrimination on the basis of the individual's sex assigned at birth, gender identity, or recorded gender. In keeping with the explicit protections for transgender individuals throughout the rule, VA should strengthen this language to explicitly include transgender status. Additionally, covered health plans may not deny coverage

[268] Medical necessity is an example of a reasonable medical management technique that is permissible for covered entities under Section 1557. Such medical management standards are not inherently discriminatory and are not prohibited under Section 1557 or other federal law.

for a transgender person to receive preventative health care normally provided to cisgender individuals, even if they are enrolled in the health plan under their sex assigned at birth. Covered entities are further required to provide coverage for certain recommended preventative health services without imposing cost-sharing requirements under Section 2713 of the Public Health Service Act and its associated regulations.[269]

The HHS NPRM bars categorical coverage exclusions of services related to gender transition or other gender-affirming care.[270] However, the language from the HHS NPRM could be misconstrued to apply only if an insurer excludes "all" health services related to gender transition or other gender-affirming care, as opposed to applying if an insurer excludes "any" health services. To strengthen protections for veterans seeking gender-affirming care, VA should include language that prohibits categorical coverage exclusions or limitations for *any* health services related to gender transition or other gender-affirming care.[271]

3. Prohibition on Discrimination Related to Marital, Parental, or Family Status

Under the proposed provisions, covered entities are prohibited from discriminating on the basis of sex in their health programs and activities with respect to an individual's marital, parental, or family status. In determining whether an individual satisfies any policy or factor for access to VA health programs or activities, a covered entity should not take that individual's sex into account when applying any rule related to this individual's current, perceived, potential or past marital, parental, or family status. This includes conditions related to pregnancy status. This is similar to

[269] 45 C.F.R. § 147.130 (2023); 26 C.F.R. § 54.9815-2713 (2023); 29 C.F.R. § 2590.715-2713 (2023).
[270] 87 Fed. Reg. 47824, 47918 (Aug. 4, 2022) ("A covered entity must not, in providing or administering health insurance coverage or other health-related coverage: . . . [h]ave or implement a categorical coverage exclusion or limitation for all health services related to gender transition or other gender-affirming care.").
[271] Specifically, VA should remove the existing exclusions of gender-affirming care in 38 C.F.R. § 17.38(c)(4) (2023) and 38 C.F.R. § 12.272(a)(23) (2023), if they are not resolved beforehand by VA's response to the Petition for Rulemaking it received on May 9, 2016 regarding these exclusions. *See* 83 Fed. Reg. 31711 (July 9, 2018).

other agencies' Title IX regulations.[272] Because HHS's OCR has encountered family status discrimination in its Section 1557 enforcement, VA should preemptively include this clarification in their Section 1557 antidiscrimination provisions.

4. Antidiscrimination on the Basis of Association

This proposed provision prohibits discrimination against an individual on the basis of race, color, national origin, sex, age, or disability of an individual with whom the individual is known to have a relationship or association. Civil rights laws have long been interpreted to incorporate claims of associational discrimination, where the basis is a characteristic of the harmed individual or an individual who associates with the harmed individual.[273] The proposed prohibition of associational discrimination under Section 1557 corresponds with the prohibition on associational discrimination for an individual with a disability under Section 504,[274] suggesting that enforcement procedures will already be familiar to VA administrators.

5. Antidiscrimination in Telehealth

This proposed provision addresses antidiscrimination through the delivery of health programs and activities via telehealth. Some covered entities provide their health programs and activities through telehealth, which denotes the use of electronic information and telecommunications technologies to support long-distance clinical health care, patient and professional health-related education, public health, and health administration.[275] VA has a responsibility to ensure that all covered entities' telehealth services are accessible to individuals with disabilities and provide meaningful program access to non-English speakers. Current studies

[272] *See generally* 45 C.F.R. § 86.40(a) (2022) (regarding pregnancy-status regulations).
[273] *See* 87 Fed. Reg. at 47880 n.541 (collecting cases).
[274] *See id.* at 47880 n.542 (collecting cases).
[275] *What Is Telehealth?*, HEALTH RSCH. & SERVS. ADMIN., https://www.hrsa.gov/rural-health/telehealth/what-is-telehealth. Technologies include videoconferencing, the internet, store-and-forward imaging, streaming media, and terrestrial and wireless communications. *See What Is Telehealth? How Is It Different from Telemedicine?*, HEALTHIT.GOV, https://www.healthit.gov/faq/what-telehealth-how-telehealth-different-telemedicine.

suggest there is a disparity in access related to race and disability,[276] which may lead to worsening of pre-existing health disparities as the use of telehealth has grown due to the COVID-19 pandemic.[277] As such, it appears that telehealth is only facially covered under Section 1557 and requires express enumeration to ensure coverage. Because telehealth is increasingly used despite persistent disparities in access, this provision seeks to remedy current gaps and preempt future problems in supplying telehealth services to members of protected classes.

D. Procedures

This proposed provision would incorporate the enforcement provisions available for and provided in Section 1557, which sets forth that "[t]he enforcement mechanisms provided for and available under such [T]itle VI [of the Civil Rights Act of 1964], [T]itle IX [of the Education Amendments of 1972], section 794, [Section 504 of the Rehabilitation Act of 1973] or such Age Discrimination Act [of 1975] shall apply for the purposes of violations of this subsection."[278] Enforcement mechanisms include a private right of action.[279]

1. Application of Federal Conscience and Religious Freedom Laws

The proposed rule would specifically address the application of federal conscience and religious freedom laws, as did the HHS NPRM.[280] The proposed language of the rule would follow the precedent set forth by the HHS NPRM, which states:

> Under RFRA, exemptions from any of the antidiscrimination requirements of Section 1557 would depend in part on the ramifications of applying such

[276] Robert P. Pierce & James J. Stevermer, *Disparities in the Use of Telehealth at the Onset of the COVID-19 Public Health Emergency*, 29 J. TELEMED & TELECARE 3, 5 (2020), available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7578842/pdf/10.1177_1357633X20963893.pdf.
[277] Lok Wong Samson et al., *Issue Brief: Medicare Beneficiaries' Use of Telehealth Services in 2020: Trends by Beneficiary Characteristics and Location*, U.S. DEP'T HEALTH & HUM. SERVS. (2021), https://aspe.hhs.gov/sites/default/files/documents/a1d5d810fe3433e18b192be42dbf2351/medicare-telehealth-report.pdf.
[278] 42 U.S.C. § 18116 (2018).
[279] *See* Cummings v. Premier Rehab. Keller, P.L.L.C., 142 S. Ct. 1562, 1569-70 (2022) ("[I]t is 'beyond dispute that private individuals may sue to enforce' [Section 504 and Section 1557].").
[280] 87 Fed. Reg. 47824, 47841 (Aug. 4, 2022).

> exemptions. For example, even if the rule substantially burdened religious practices, a religious exemption would not be required if that burden was the result of the government's advancement of a compelling interest by means that were least restrictive of religious exercise in particular contexts. The U.S. Supreme Court has made it clear that a fact-sensitive, case-by-case analysis of such burdens and interests is needed under RFRA, something the Title IX exception does not allow. [The Department] will apply RFRA in this manner."[281]

Under this rule, VA will remain committed to complying with RFRA and all other legal requirements. In fact, this proposed rule would aid VA in fulfilling this commitment because recipients can raise concerns with VA's enforcement arm, which can evaluate on a case-by-case basis whether an exemption or modification of the application of certain provisions is appropriate under religious freedom or federal conscience law. The case-by-case basis will also determine what harm such an exemption or modification could pose on third parties.

2. Enforcement Mechanisms

VA's enforcement office must have clear procedures to apply in the enforcement of Section 1557, as it does under Title VI, Title IX, Section 504, and the Age Act. The proposed language will incorporate the existing enforcement procedures under each of these statutes for their enforcement office to apply them to discrimination under Section 1557. The existing enforcement procedures apply to discrimination on the basis of race, color, national origin, sex and disability under Title VI, Title IX, and Section 504. Under the Age Act, there are additional enforcement mechanisms with respect to age discrimination complaints. These procedures will apply to enforcement related to covered entities' health programs under Section 1557.

3. Procedures for VA Health Programs and Activities

The proposed rule requires that the existing procedures under the Section 504 federally conducted regulation at 45 C.F.R. §§ 85.61-85.62 will be applicable to all claims under Section

[281] *Id.* (citing Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418, 430-31 (2006)).

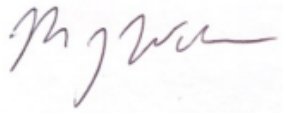
1557 for all protected bases, including race, color, national origin, sex, age, and disability. The proposed rule also requires that VA grant access to relevant information to evaluate compliance with Section 1557 to its enforcement office. Moreover, the proposed rule adopts Section 504's procedure for all claims of discrimination against any VA health program under Section 1557. This procedure has worked effectively for decades and is likely familiar to VA.

The proposed rule further prevents VA from retaliating against an individual or entity that has participated in an investigation, proceeding, or hearing under Section 1557. The ADA and Section 504 have similar prohibitions that the proposed language would seek to additionally incorporate through its Section 1557 anti-retaliation provisions. VHA would thus be held to the same standards as all recipients of federal financial assistance.

CONCLUSION

In the field, our service members faced danger and uncertainty, neither of which should continue when they seek the benefits and health care to which they are entitled upon coming home and integrating into civilian life. Yet minority veterans consistently report avoiding care due to reported discrimination at VHA facilities. Furthermore, when minority veterans do seek and receive care, it is often coupled with harmful discrimination. Section 1557 provides a means to mitigate the rampant sex and SOGISC discrimination faced by veterans seeking to utilize their VA health care entitlement. By promulgating regulations addressing discrimination on the basis of race, color, national origin, disability, age, and sex in VA health programs and activities, VA would set a clear standard of treatment for minority veterans.

Respectfully submitted,



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