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October 3, 2022

Submitted electronically via Regulations.gov

Melanie Fontes Rainer
Acting Director
Office for Civil Rights
Department of Health and Human Services
200 Independence Avenue, SW
Room 509F, HHH Building
Washington, D.C. 20201

RE: RIN 0945-AA17, Nondiscrimination in Health Programs and Activities

Dear Acting Director Fontes Rainer:

The NAACP Legal Defense and Educational Fund, Inc. (LDF) writes in response to the Department of Health and Human Services (HHS) Office for Civil Rights' (OCR) proposed rule on Nondiscrimination in Health Programs and Activities (hereinafter "Proposed Rule"). When Congress passed the Affordable Care Act (ACA), it extended the protections of Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and other civil rights laws to health care providers that receive federal funding.[1] In doing so, Congress intended to "remedy the shameful history of invidious discrimination and the stark disparities in outcomes in our health care system" so that all may reap the benefits "equally without discrimination."[2] We applaud the administration for strengthening the ACA's anti-discrimination requirements (known as Section 1557), and call upon OCR to further clarify and enhance those protections. In particular, OCR should explicitly prohibit discrimination based on termination of pregnancy, transgender status, or a combination of protected characteristics, such as race and sex. It should also state that harmed individuals can bring claims for disparate impact as well as disparate treatment. These measures would help address longstanding health inequities and strengthen society as a whole.

The ACA's anti-discrimination protections have never been more important. The legacy of discriminatory practices and present-day bias continues to drive disparate health outcomes for

[1] 42 U.S.C. 18116.
[2] 156 Cong. Rec. S1842 (daily ed. Mar. 23, 2010) (statement of Sen. Leahy).

Black people and other people of color.[3] As discussed in more detail below, communities of color have a lower life expectancy and experience higher rates of diabetes, hypertension, obesity, asthma, and heart disease.[4] Following the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization,*[5] pregnant people face a growing array of barriers that impede their access to abortion and other reproductive care. Black people are also at increased risk of arrest and prosecution for pregnancy-related crimes.[6] Between 1973 and 2020, the National Advocates for Pregnant Women documented more than 1,700 cases in which pregnant people—overwhelmingly, people of color—were arrested, prosecuted, convicted, detained, or forced to undergo medical interventions because of their pregnancy status or outcomes.[7] This disproportionate targeting of pregnant people of color will likely continue following *Dobbs*. Strong federal anti-discrimination protections and vigorous enforcement are necessary to address these longstanding disparities and new barriers. We applaud the administration for confronting these challenges in its proposed Section 1557 rule.

Founded in 1940 by Thurgood Marshall, LDF is the nation's oldest civil rights law organization.[8] LDF was launched at a time when America's aspirations for equality and due process of law were stifled by widespread state-sponsored racial inequality. For more than 80 years, LDF has relied on the Constitution and federal and state civil rights laws to pursue equality and justice for Black Americans and other people of color. LDF's mission has always been transformative: to achieve racial justice, equality, and an inclusive society.

Throughout its history, LDF has fought to ensure equal treatment and high-quality medical services, care, and opportunities to Black people.[9] Given its long history advancing anti-discrimination protections in public life, LDF has also opposed efforts to discriminate against LGBTQ+ individuals and address the unique issues faced by Black LGBTQ+ individuals, who are

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[3] Centers for Disease Control, Impact of Racism on our Nation's Health, https://www.cdc.gov/healthequity/racism-disparities/impact-of-racism.html.
[4] *Id.*
[5] *Dobbs v. Jackson Women's Health,* 597 U.S. ___ (2022), https://www.supremecourt.gov/opinions/21pdf/19-1392_6j37.pdf
[6] NAT'L ADVOCATES FOR PREGNANT WOMEN, CONFRONTING PREGNANCY CRIMINALIZATION (2022), https://www.nationaladvocatesforpregnantwomen.org/wp-content/uploads/2022/06/1.Confronting-Pregnancy-Criminalization_6.22.23-1.pdf.
[77] *Id.*
[8] LDF has been fully separate from the National Association for the Advancement of Colored People (NAACP) since 1957.
[9] *E.g., Linton v. Comm'r of Health & Env't*, 65 F.3d 508 (6th Cir. 1995) (preservation of Medicaid-certified hospital and nursing home beds to prevent eviction of patients in favor of admitting more remunerative private-pay individuals); *Bryan v. Koch*, 627 F.2d 612 (2d Cir. 1980) (challenge to closure of municipal hospital serving inner-city residents); *Simkins v. Moses H. Cone Mem'l Hosp*., 323 F.2d 959 (4th Cir. 1963) (admission of African-American physician to hospital staff); *Mussington v. St. Luke's-Roosevelt Hosp. Ctr.*, 824 F. Supp. 427 (S.D.N.Y. 1993) (relocation of services from inner-city branch of merged hospital entity); *Rackley v. Bd. of Trs. of Orangeburg Reg'l Hosp*., 238 F. Supp. 512 (E.D.S.C. 1965) (desegregation of hospital wards); Consent Decree, *Terry v. Methodist Hosp. of Gary*, Nos. H-76-373, H-77-154 (N.D. Ind. June 8, 1979) (planned relocation of urban hospital services from inner-city community).

marginalized within Black and LGTBQ+ communities as well as within society as a whole.[10] LDF remains committed to promoting opportunity for Black people, including access to health care.

I. Black Americans continue to experience inequities in health care access, treatment, and outcomes, including in reproductive care.

As a result of discriminatory government policies and bias in the health care system, Black Americans have long confronted inequities in health care access, treatment, and outcomes. These disparities are particularly acute for Black pregnant and LGTBQ+ people, and weaken society as a whole.

Redlining and other discriminatory practices have fostered ongoing residential segregation that has kept Black Americans in under-resourced neighborhoods, left generations of Black communities disproportionately exposed to health hazards, and denied them equal access to health care.[11] Because redlined neighborhoods were often chosen as the sites for new factories or highways, people of color are more likely to live in polluted areas and near environmental hazards.[12] Furthermore, until the 1960s, hospitals were rigidly segregated and unequal.[13] While hospitals are now integrated, Black Americans still do not have equal access to health care facilities. Predominantly Black, racially-isolated neighborhoods are more likely to be in primary care deserts and "offer fewer ambulatory facilities, more limited access to physicians, and a lower supply of surgeons."[14] Black households also struggle to access healthy food: One out of every five Black households is situated in a food desert,[15] and communities of color have fewer large supermarkets than predominantly white neighborhoods, even when controlling for income.[16]

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[10] *E.g.,* Brief of Amici Curiae NAACP Legal Defense & Educational Fund, Inc. & Columbia Law School Center For Gender & Sexuality Law in Support of Plaintiff-Appellee Drew Adams, *Adams vs. School Board of St. John's County, FL,* Case No. 3:17-cv-00739-TJC-JBT (11th Cir., Nov. 24, 2021), https://www.naacpldf.org/wp-content/uploads/2021.11.24-Amicus-Brief-LDF-and-CGSL-1.pdf;

[11] *See generally* TOM SHAPIRO ET AL., LDF THURGOOD MARSHALL INST. & INST. ON ASSETS AND SOC. POL'Y AT BRANDEIS UNIV. THE BLACK-WHITE RACIAL WEALTH GAP (2019), https://tminstituteldf.org/wp-content/uploads/2019/11/FINAL-RWG-Brief-v1.pdf..

[12] Laura Wamsley, *Even many decades later, redlined areas see higher levels of air pollution*, NPR (Mar. 10, 2022), https://www.npr.org/2022/03/10/1085882933/redlining-pollution-racism; Daniel Cusick, *Past Racist "Redlining" Practices Increased Climate Burden on Minority Neighborhoods*, SCIENTIFIC AM. (Jan. 21, 2020), https://www.scientificamerican.com/article/past-racist-redlining-practices-increased-climate-burden-on-minority-neighborhoods/; SHAPIRO ET AL., *supra* note 11, at 13.

[13] David Barton Smith, *The Politics of Racial Disparities: Desegregating the Hospitals in Jackson, Mississippi*, MILBANK Q., Jun. 2005, at 247, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2690142/

[14] Mariana C. Arcaya & Alina Schnake-Mahl, *Health in the Segregated City,* NYU FURMAN CTR. (Oct. 2017), https://furmancenter.org/research/iri/essay/health-in-the-segregated-city

[15] Michael Chui, et al., *A $300 billion opportunity: Serving the emerging Black consumer,* MCKINSEY Q. (Aug. 6, 2021), https://www.mckinsey.com/featured-insights/diversity-and-inclusion/a-300-billion-dollar-opportunity-serving-the-emerging-black-american-consumer.

[16] Kelly Brooky, *Research Shows Food Deserts More Abundant in Minority Neighborhoods,* JOHNS HOPKINS UNIV. MAG. (Spring 2014), https://hub.jhu.edu/magazine/2014/spring/racial-food-deserts/.

Research has also shown that Black Americans often receive inadequate health care due to racial bias. A 2003 literature review by the National Academy of Medicine found that people of color were less likely than white people to receive appropriate cardiac care; kidney dialysis or transplants; and are often also denied the most successful treatments for stroke, cancer, or AIDS.[17] The literature review further concluded that "provider and institutional bias are significant contributors" to health inequities.[18] A 2016 study similarly found that some medical students and medical residents hold false beliefs about biological differences between Black people and white people, leading them to discount Black patients' pain and make less accurate treatment recommendations.[19] These disparities persist today: as noted in the HHS' 2021 National Health Care Quality and Disparities Report, which found that Black people received worse care than white people across 43 percent of 195 quality measures.[20]

This disparate treatment by medical providers, as well as systemic disparities in health care needs and access, are often reproduced by the clinical algorithms providers increasingly rely on to help diagnose and treat patients. For example, although Black Americans are four times more likely to have kidney failure, the standard algorithm used around the country to determine transplant list placement explicitly uses race as a factor and puts Black patients lower on the list than white patients even when all other factors remain identical.[21] Many doctors now believe that the data that led the algorithm's developers to include the race coefficient is actually a reflection of both systemic health disparities and discrimination by providers, and that the continued use of the algorithm leads to worse outcomes for Black patients.[22] A 2019 study similarly found that algorithms used to identify sicker patients who would benefit from additional care led to Black patients receiving less quality care than their non-Black counterparts.[23].

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[17] H. Jack Geiger, *Racial and Ethnic Disparities in Diagnosis and Treatment: A Review of the Evidence and a Consideration of Causes,* INSTITUTE OF MEDICINE COMMITTEE ON UNDERSTANDING AND ELIMINATING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE, UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE. WASHINGTON (DC): NATIONAL ACADEMIES PRESS (Brian D. Smedley, et al., eds. 2003), *available at* https://www.ncbi.nlm.nih.gov/books/NBK220337/.
[18] *Id.*
[19] Kelly M. Hoffman et al., *Racial Bias in Pain Assessment and Treatment Recommendations, and False Beliefs About Biological Differences Between Blacks and Whites*, 113 PROC. OF THE NAT'L ACAD. OF SCI. 4296, 4301 (2016), https://www.pnas.org/doi/10.1073/pnas.1516047113.
[20] U.S. DEP'T OF HEALTH & HUMAN SERVS., AGENCY FOR HEALTHCARE RES. & QUALITY, 2021 NATIONAL HEALTHCARE QUALITY & DISPARITIES REPORT EXECUTIVE SUMMARY (2020), at ES–3, D–3–D–51, https:// www.ahrq.gov/sites/default/files/wysiwyg/research/ findings/nhqrdr/2021qdr.pdf.
[21] Rae Ellen Bitchell & Cara Anthony, *Kidney Experts Say It's Time to Remove Race From Medical Algorithms. Doing So Is Complicated,* HEALTH AFFAIRS (June 8, 2021), https://khn.org/news/article/black-kidney-patients-racial-health-disparities/?utm_campaign=KHN%3A%20Daily%20Health%20Policy%20Report&utm_medium=email&_hsmi=132394588&_hsenc=p2ANqtz--4ODxarsKPHQSQeAfuOeyLJlAbaGTNgUoPyX4KJJqtvaQOUyan-ZRycCujUe8kMR623a6e7lV0KBUtZgGVacR1ynlazQ_Tte4IvXmfHP2n4J1zvI0&utm_content=132394588&utm_source=hs_email.
[22] *Id.*
[23] Stare Vartan, *Racial Bias Found in a Major Health Care Risk Algorithm,* SCI. AM. (Oct. 24, 2019), https://www.scientificamerican.com/article/racial-bias-found-in-a-major-health-care-risk-algorithm/.

Disproportionate exposure to health hazards and discrimination by health care providers, including through the use of clinical algorithms, create vast disparities in health outcomes for Black people. Black people have higher rates of diabetes, hypertension, and heart disease than other groups. [24] Black infants die at a rate 2.3 times higher than white infants,[25] and Black children have a 500% higher death rate from asthma compared with white children.[26] Black people and other people of color were also more likely to be hospitalized and die due to COVID-19.[27] As a result, even before the pandemic, Black Americans' life expectancy was four years lower than that of white Americans.[28]

Black Americans confront particularly stark disparities in maternal health outcomes. Pregnant women of color are often subjected to discrimination throughout pregnancy and the postpartum period, including mistreatment during labor and delivery.[29] People of color are also more likely to experience certain birth risks and adverse birth outcomes.[30] As a result, Black women are three-to-four times more likely to die from pregnancy-related complications than white women.[31] According to a recent study by the CDC, many of these deaths are preventable.[32]

Black LGBTQ+ people also experience additional health care barriers due to their gender identity and/or transgender status. As noted in a recent report by the Center for American Progress, Black LGBTQ+ people face high rates of discrimination from medical providers.[33] Transgender people

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[24] Risa Lavizzo-Mourey & David Williams, *Being Black Is Bad for Your Health,* U.S. NEWS (Apr. 14, 2016), https://www.usnews.com/opinion/blogs/policy-dose/articles/2016-04-14/theres-a-huge-health-equity-gap-between-whites-and-minorities.

[25] U.S. Dep't of Health & Human Svcs. Office of Minority Health, Infant Mortality and African Americans, https://minorityhealth.hhs.gov/omh/browse.aspx?lvl=4&lvlid=23#:~:text=Non%2DHispanic%20blacks%2FAfrican%20Americans,to%20non%2DHispanic%20white%20infants (last visited Sept. 23, 2022).

[26] Lavizzo-Mourey & Williams, *supra* note 24.

[27] Centers for Disease Control, Risk for COVID-19 Infection, Hospitalization, and Death By Race/Ethnicity, https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html (last visited Sept. 23, 2022).

[28] Centers for Disease Control, Life expectancy at birth, age 65, and age 75, by sex, race, and Hispanic origin: United States, selected years 1900–2018 (2019), https://www.cdc.gov/nchs/data/hus/2019/004-508.pdf.

[29] Saraswathi Vedam, et al., *The Giving Voice to Mothers study: inequity and mistreatment during pregnancy and childbirth in the United States*, Reproductive Health (June 2019), https://reproductive-health-journal.biomedcentral.com/articles/10.1186/s12978-019-0729-2.

[30] Samantha Artiga, et al., *What are the Implications of the Overturning of Roe v. Wade for Racial Disparities?*, Kaiser Family Foundation (July 15, 2022), https://www.kff.org/racial-equity-and-health-policy/issue-brief/what-are-the-implications-of-the-overturning-of-roe-v-wade-for-racial-disparities/.

[31] Donna L. Hoyert, Centers for Disease Control, Maternal Mortality Rates in the United States, 2020, https://www.cdc.gov/nchs/data/hestat/maternal-mortality/2020/maternal-mortality-rates-2020.htm.

[32] Nada Hassanein, *'Staggering' and 'sobering': More than 80% of US maternal deaths are preventable, CDC study shows*, USA TODAY (Sept. 19, 2022 1:53 PM), https://www.usatoday.com/story/news/health/2022/09/19/cdc-us-maternal-deaths-preventable/10425271002/.

[33] Lindsay Mahowal, *Black LGBTQ Individuals Experience Heightened Levels of Discrimination*, CENTER FOR AM. PROGRESS (Jul. 13, 2021), https://www.americanprogress.org/article/black-lgbtq-individuals-experience-heightened-levels-discrimination/.

of color experience denial of care and medical abuse more frequently than white transgender people,[34] including for conditions such as asthma or diabetes.[35]

These health disparities hurt society as a whole, increasing health care spending and removing people from the workforce. An analysis by the W.K. Kellogg Foundation and Altarum estimated that health disparities cost the United States approximately $93 billion in excess medical care and $42 billion in lost productivity per year, as well as additional losses due to unnecessary and premature deaths.[36] Improving health equity is essential to creating a more just and vital society.

II. Abortion restrictions further imperil Black American's health and deny their dignity.

In *Dobbs,* a conservative majority of the United States Supreme Court reversed nearly a half a century of legal precedent and stripped the constitutional right to bodily autonomy from over a hundred million people.[37] The proliferation of abortion restrictions after *Dobbs* will only exacerbate health inequities for Black Americans.

Historically, Black Americans have been denied control over their bodies, their reproduction, and their fertility. As Howard University School of Law's Human and Civil Rights Clinic noted in its brief in *Dobbs,* "During slavery, Black women were denied all bodily autonomy; the law expressly endorsed the notion that they lacked humanity and could be 'bred' for their owner's profit."[38] Birth control gave Black people control over their health and their lives.[39]

Unfortunately, Black Americans continue to face unique obstacles to controlling if, when, and how to become parents. For example, women of color report that "some physicians brush off their fertility concerns, assume they can get pregnant easily, emphasize birth control over procreation, and may dissuade them from having children."[40] Additionally, Black women are more likely to live in "contraceptive deserts" where pharmacies make it more difficult to

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[34] Caroline Medina, et al., *Protecting and Advancing Health Care for Transgender Adult Communities*, CENTER FOR AM. PROGRESS *(*Aug. 18, 2021), https://www.americanprogress.org/article/protecting-advancing-health-care-transgender-adult-communities/.
[35] *Id.*
[36] ANI TURNER, ALTARUM & W.W. KELLOGG FOUNDATION, THE BUSINESS CASE FOR RACIAL EQUITY 9 (2018), https://altarum.org/sites/default/files/uploaded-publication-files/WKKellogg_Business-Case-Racial-Equity_National-Report_2018.pdf.
[37] *Dobbs,* 597 U.S. ___.
[38] Br. for Howard U. Sch. of L. Hum. & Civ. Rts. Clinic, *Dobbs v. Jackson Women's Health,* 597 U.S. ___ (2022) (No. 19-1392), at 3, *available at* https://reproductiverights.org/wp-content/uploads/2021/09/Black-Womens-Procreative-Liberty-Amicus-Brief.pdf.
[39] *Id.* at 13 ("The ability to control whether to give birth is a fundamental component of freedom for all women. But for Black women, whose procreation had been forced, monetized, and monitored since they arrived on American shores, access to birth control represented a unique form of liberty.").
[40] ETHICS COMM. OF THE AM. SOC. FOR REPRODUCTIVE MEDICINE, DISPARITIES IN ACCESS TO EFFECTIVE TREATMENT FOR INFERTILITY IN THE UNITED STATES: AN ETHICS COMMITTEE OPINION (2021), https://www.asrm.org/globalassets/asrm/asrm-content/news-and-publications/ethics-committee-opinions/disparities_in_access_to_effective_treatment_for_infertility_in_the_us-pdfmembers.pdf.

LDF Legal Defense Fund

purchase contraception,[41] or to struggle to afford birth control.[42] Moreover, even before *Dobbs,* existing abortion restrictions in many states which had caused numerous clinics to close, forced people to travel further for abortion care.[43] Because Black people are less likely to have health insurance that covers abortion, and are often less able to cover the costs of the procedure and related travel, these barriers often meant that they could not access abortion even where it was technically legal.[44]

The *Dobbs* decision has had immediate and significant impacts on Black communities. As of August 16, 2022, most abortions are now banned in 17 states, and five more states are expected to or likely to ban abortion imminently.[45] Accordingly, an estimated ten million Black women of childbearing age now face restrictions on abortion.[46]

Delays and denials of abortion care will hurt Black American's health. Since *Dobbs*, there have been several reports of people experiencing pregnancy complications necessitating abortion but being unable to access care.[47] Without adequate access to abortion care, more people are likely to die from pregnancy-related complications. For example, at some hospitals in Texas, abortion care for patients with ectopic pregnancies, a dangerous and life-threatening condition which occurs when a fertilized egg attaches outside of the uterus, is being delayed, to avoid violating the state's law that was triggered after the *Dobbs* decision.[48] A 2021 study by the University of Colorado estimated that Black people would see a 33% increase in deaths under a total abortion ban—the highest of any racial group.[49]

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[41] Jennifer Barber, et al., *Contraceptive Desert? Black-white differences in characteristics of nearby pharmacies*, J. RACIAL ETHNIC HEALTH DISPARITIES (August 2019), at 719, *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6660992/pdf/nihms-1017159.pdf.

[42] Claretta Bellamy, *Black women are underserved when it comes to birth control access. The Roe decision could make that worse*, NBC NEWS (June 30, 2022 3:50 AM), https://www.nbcnews.com/news/nbcblk/black-women-are-underserved-comes-birth-control-access-roe-decision-ma-rcna35924; Planned Parenthood, Who's Most Impacted by Attacks on Birth Control, https://www.plannedparenthoodaction.org/fight-for-birth-control/facts/whos-most-impacted-by-attacks-on-birth-control (last visited Sept. 23, 2022).

[43] Bellamy, *supra* note 42.

[44] Artiga, et al., *supra* note 30.

[45] Caroline Kitchener, et al., *Abortion is banned in these states: Mapping abortion law changes by state.*, Wash. Post, https://www.washingtonpost.com/politics/2022/06/24/abortion-state-laws-criminalization-roe/ (last visited Sept. 23, 2022).

[46] Taylor Johnson & Kelsey Butler, *Black Women Are Hardest Hit by Abortion Restrictions Sweeping the Deep South*, BLOOMBERG (Aug. 23, 2022 7:00 AM ET), https://www.bloomberg.com/news/articles/2022-08-23/black-women-are-hardest-hit-by-abortion-restrictions-sweeping-the-deep-south?leadSource=uverify%20wall.

[47] Carrie Feibel, *Because of Texas Abortion Law, Her Wanted Pregnancy Became a Medical Nightmare*, NPR (Jul. 26, 2022), https://www.npr.org/sections/health-shots/2022/07/26/1111280165/because-of-texas-abortion-law-her-wanted-pregnancy-became-a-medical-nightmare

[48] Associated Press, *Texas Hospitals Delaying Care Over Violating Abortion Law,* PBS NEWS HOUR (July, 15, 2022), https://www.pbs.org/newshour/nation/texas-hospitals-delaying-care-over-violating-abortion-law.

[49] Amanda Jean Stevenson, *The Pregnancy-Related Mortality Impact of a Total Abortion Ban in the United States: A Research Note on Increased Deaths Due to Remaining Pregnant*, 58 DEMOGRAPHY 2019 (2021), https://read.dukeupress.edu/demography/article/58/6/2019/265968/The-Pregnancy-Related-Mortality-Impact-of-a-Total.

III. <u>The final rule should clarify the scope of Section 1557 and ensure rigorous enforcement, including through private actions for disparate treatment.</u>

Section 1557 is an important tool to address health inequities, including disparities in access to abortion care. The Proposed Rule would clarify and strengthen its anti-discrimination protections. LDF agrees with OCR's interpretation that Section 1557 both provides an "independent basis for regulation of discrimination in covered health programs and activities" and is applicable to an expansive range of "health programs and activities," including programs administered by HHS, health insurance plans, and Medicare Part B.[50] LDF also supports OCR's decision to make explicit that Section 1557 prohibits discrimination in telehealth and by clinical algorithms.

LDF also strongly supports OCR's interpretation that a private right of action exists for all claims of discrimination under Section 1557. Often "private parties play a more important role in enforcing regulatory law in the U.S. legal system than in other advanced economies" and "bring significant additional resources to the task of enforcing public law . . . [as] state and federal agencies are chronically under-resourced and overworked."[51] Private enforcement of Section 1557 is crucial because the federal government has limited capacity to address health care discrimination claims, as demonstrated by the backlog of cases currently before OCR .[52] Judicial enforcement by private individuals will help protect patients and other beneficiaries from discriminatory conduct.

The final rule should further clarify that private litigants can bring disparate impact claims based on any form of discrimination prohibited by Section 1557 and its implementing regulations. As noted above, Congress intended Section 1557 to remedy both "invidious discrimination and the stark disparities in outcomes in our health care system."[53] In order to improve health outcomes for Black Americans and other people of color, we must address practices that, even if not explicitly motivated by race, have a clear disparate impact. Disparate impact claims are also essential to addressing the discriminatory outcomes which may arise from the use of clinical algorithms, which, as the Proposed Rule notes, "may result in discriminatory outcomes when variables are used as a proxy for a protected basis and may also result from correlations between a variable and a protected basis"—not just when they intend to discriminate.[54] The final rule should clearly assert what the Court held in *Rumble v. Fairview Health Services,* that Section 1557 creates a "health-specific, anti-discrimination cause of action that is subject to a singular standard, regardless of a plaintiff's protected class status,"[55] and that this includes a private right of action for disparate

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[50] Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. 47824, 47827 (Aug. 4, 2022).
[51] Michael Sant'Ambrogio, *Private Enforcement in Administrative Courts*, 72 Vanderbilt L. Rev. 425 (2019), https://scholarship.law.vanderbilt.edu/vlr/vol72/iss2/2.
[52] U.S. DEP'T OF HEALTH & HUMAN SERVS, HHS FY 2023 BUDGET IN BRIEF (2022), https://www.hhs.gov/about/budget/fy2023/index.html.
[53] 156 Cong. Rec. S1842 (daily ed. Mar. 23, 2010) (statement of Sen. Leahy).
[54] Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. at 47881.
[55] *Rumble v. Fairview Health Servs*., No. 14-CV-2037 SRN/FLN, 2015 WL 1197415, *11 (D. Minn. Mar. 16, 2015) (citation omitted).

Legal Defense Fund

impact claims. Even if the underlying statute does not detail the specific form of discrimination, this would allow for individuals to seek relief for discrimination in provision of healthcare.[56]

IV. **The final rule should explicitly prohibit intersectional discrimination.**

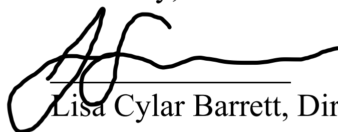
As noted above, Black women, Black LGBTQ+ people, and others may face discrimination simultaneously based on multiple protected characteristics, creating distinct harms. While we appreciate HHS' discussion of intersectional discrimination in the preamble, OCR should clarify that Section 1557 protects against intersectional discrimination throughout the regulatory text. This approach would avoid inconsistent application of Section 1557 and ensure that Section 1557 provides adequate redress for those living at the intersection of multiple identities.

V. **Conclusion**

In the face of persistent health inequities and renewed attempts to erode civil rights, strong federal anti-discrimination protections and robust enforcement are necessary to improve health outcomes for Black communities and other communities of color, particularly Black pregnant people and Black LGBTQ+ people. We commend OCR for undertaking this rulemaking and urge the agency to strengthen the final rule so that it achieves these aims.

Thank you for the opportunity to submit our comments on the proposed rule. If you have any questions, please contact Amalea Smirniotopoulos, Senior Policy Counsel (asmirniotopoulos@naacpldf.org), or Kristina Roth, Senior Policy Associate (kroth@naacpldf.org).

Sincerely,



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[56] Timothy Jost, *HHS Issues Health Equity Final Rule,* HEALTH AFFAIRS, (May 14, 2016), https://www.healthaffairs.org/do/10.1377/forefront.20160514.054868.