



## Trump Administration Plan to Expand Religious Refusal Rights of Health Professionals: Legal Issues and Concerns

On January 18, 2018, the U.S. Department of Health & Human Services announced a new rule under which its Office of Civil Rights will create a new division dedicated to permitting health professionals to refuse to provide medically appropriate services or perform other job duties based on their religious or moral beliefs. The rule is entitled “Ensuring Compliance with Certain Statutory Provisions in Health Care; Delegations of Authority” and the new unit will be called the “Conscience and Religious Freedom Division.” It is designed to facilitate refusals of medically necessary care for individuals who are transgender or in a same-sex relationship, as well as the full range of reproductive health services and any other services to which an employee or a licensed health facility might object. In so doing, the new division will invite health professionals to misunderstand and to ignore governing law and medical standards, and to put patients in jeopardy and themselves at risk of legal liability.

This proposal continues the Trump administration’s alarming practice of elevating certain preferred religious interests over the rights of LGBT people, religious minorities, women, public health, and other important public interests. We have become all too familiar with this type of religious license to discriminate over the course of this past year, as this administration has systematically undermined civil rights protections and nominated a series of religious extremists and other unqualified individuals to the federal bench and to top Executive Branch positions.

The religion-based attacks on the rights of LGBT people and women, in particular, began in February of 2017, two weeks after President Trump’s inauguration, when the public saw a Christian religious extremist wish list in a [leaked, draft presidential executive order](#), which set out an encyclopedia of religious exemptions based substantially on the explicitly anti-LGBT “First Amendment Defense Act.” An outraged public response and litigation threats apparently put that version on hold, however, in May, [Trump announced](#) a more limited “religious liberty” order. Among other things, it directed Attorney General Jeff Sessions to revise federal policies to facilitate religious exemptions to the extent permitted by federal law.

Attorney General Sessions followed that direction in early October, issuing a lengthy “protecting religious liberty” [legal memo](#) that endorsed religion-based conduct and ignored laws protecting third parties. Around that time, Sessions also [withdrew the legal memo](#) issued three years earlier by the Obama administration, which had recognized that, under existing court decisions, the federal ban on sex discrimination in employment covers gender identity discrimination.

Session’s religious issues legal memo set the stage for multiple anti-LGBT actions by federal agencies, which Lambda Legal has strongly opposed. These include:

- HHS proposed exemptions to the nondiscrimination terms in federal contracts and grants to allow federally funded faith-based organizations to discriminate more freely against workers based on religion, and to allow these agencies also to discriminate based on

religion against those who receive services. Lambda Legal's [opposition](#) explained the harmful impacts of this discrimination against LGBT people in social and medical services, backed up with many examples.

- HHS and the Departments of Labor and Treasury also proposed new rules to allow many employers to exclude contraception coverage from their employee health plans and also to impede employees' ability to access the coverage separately. In opposition, Lambda Legal [stressed](#) that these religious exemptions will invite more, harmful religious objections to medical care needed by LGBT people and people living with HIV.

The announced plan to create a new "religious liberty" division within HHS raises serious legal questions. While freedom of religion is a fundamental right protected by our Constitution and federal laws, it does not give anyone the right to use religious or moral beliefs as grounds for violating the rights of others. Instead, the Constitution commands that any religious or moral accommodation must be "measured so that it does not override other significant interests" or "impose unjustified burdens on other[s]."<sup>1</sup> Indeed, when the Supreme Court recently addressed this question in [\*Hobby Lobby v. Burwell\*](#), it explained that a religious accommodation should be provided in that case because the impact on third parties would be "precisely zero."<sup>2</sup>

The work of this proposed new division defies the avoid-harm-to-others test in multiple ways. First, it is inconsistent with two core constitutional guarantees: (1) each of us is entitled to equal protection under law; and (2) our government must not elevate the religious wishes of some above the needs of others to be protected from harm, including the harms of discrimination. In addition, all federal agencies must comply with the federal statutes that protect LGBT people and others from discrimination, specifically including the Affordable Care Act. The new proposal also wrongfully elevates religious dogma above medical ethics rules that forbid health professionals from discriminating against patients based on gender identity, sexual orientation, sex, or other invidious grounds.

Lambda Legal has been defending LGBT people and people living with HIV from religiously based discrimination for forty-five years.<sup>3</sup> In the health care field, where patients are especially vulnerable, religion-based harassment and refusals of medically necessary care have been a

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<sup>1</sup> *E.g., Cutter v. Wilkinson*, 544 U.S. 709, 722, 726 (2005).

<sup>2</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2760 (2014). Indeed, every member of the Court, whether in the majority or in dissent, reaffirmed that the burdens on third parties must be considered. See *id* at 2781 n.37.; *id.* at 2786–87 (Kennedy, J., concurring); *id.* at 2790, 2790 n.8 (Ginsburg, J., joined by Breyer, Kagan, and Sotomayor, JJ., dissenting).

<sup>3</sup> Because LGBT people and those living with HIV so frequently experience discrimination in health care services, and are especially vulnerable to breaches of confidentiality in medical settings, and to violations of their personal autonomy regarding reproductive decisions, sexual health, gender expression, transition-related care, HIV care and other matters, Lambda Legal works to address this discrimination nationally with litigation, policy advocacy, community education, and education to ensure that medical professionals and healthcare facilities understand their responsibility to treat LGBT and HIV-positive patients fairly. See Lambda Legal, Health Care, available at <http://www.lambdalegal.org/issues/health-care-fairness>.

persistent, profoundly harmful problem. This new proposal is alarming because it invites an increase in such religion-based mistreatment of LGBT people and others by licensed health professionals, including those receiving substantial federal funding.

Lambda Legal has provided HHS information about this type of discrimination repeatedly in response to agency requests and proposed rules.<sup>4</sup> Just a few examples of Lambda Legal cases include the following:

- Lambda Legal client Naya Taylor, a transgender woman in Mattoon, Illinois, sought hormone replacement therapy (HRT), a treatment for gender dysphoria, from the health clinic where she had received care for more than a decade. When her primary care physician refused her this standard treatment, clinic staff told her that, because of the religious beliefs of the clinic’s doctors, they do not have to treat “people like you.”<sup>5</sup>
- Lambda Legal client Jionni Conforti, was refused a medically necessary hysterectomy despite his treating physician’s desire to perform the surgery. The hospital where the surgeon had admitting privileges was religiously affiliated and withholds permission for all gender transition-related care.<sup>6</sup>
- Lambda Legal client Guadalupe Benitez, was refused standard infertility treatment by infertility specialists in a for-profit medical practice based on the physicians’ religious objections to treating lesbian patients like the doctors’ other patients.<sup>7</sup>
- Lambda Legal client Melody Rose was refused a necessary operation for her gallbladder disease due to her HIV status. The medical center defended this refusal of care based on their status as a religiously affiliated institution.<sup>8</sup>

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<sup>4</sup> See, e.g., Lambda Legal Response to Request for Information Regarding Nondiscrimination in Certain Health Programs or Activities, 1557 RFI (RIN 0945-AA02 & 0945-ZA01) (submitted Sept. 30, 2013) (“Lambda Legal 1557 Response”), available at [http://www.lambdalegal.org/in-court/legal-docs/ltr\\_hhs\\_20130930\\_discrimination-in-health-services](http://www.lambdalegal.org/in-court/legal-docs/ltr_hhs_20130930_discrimination-in-health-services).

<sup>5</sup> In April 2014, Lambda Legal filed a claim of sex discrimination on Ms. Taylor’s behalf under Section 1557 of the ACA; however, Ms. Taylor subsequently passed away and her case was voluntarily dismissed. See Complaint, *Taylor v. Lystila*, 2:14-cv-02072- CSB-DGB (C.D. Ill., April 15, 2014), available at [https://www.lambdalegal.org/in-court/legal-docs/taylor\\_il\\_20140416\\_complaint](https://www.lambdalegal.org/in-court/legal-docs/taylor_il_20140416_complaint).

<sup>6</sup> See *Conforti v. St. Joseph’s Medical Center* case documents at <https://www.lambdalegal.org/in-court/cases/nj-conforti-v-st-josephs>. See also A. Littlefield, “Catholic Hospital Denies Transgender Man a Hysterectomy on Religious Grounds,” available at <https://rewire.news/article/2016/08/31/catholic-hospital-denies-transgender-man-hysterectomy-on-religious-grounds/>.

<sup>7</sup> See *North Coast Women’s Care Med. Grp., Inc. v. San Diego Cty. Superior Court (Benitez)*, 189 P.3d 959 (Cal. 2008) and case documents at <https://www.lambdalegal.org/in-court/cases/benitez-v-north-coast-womens-care-medical-group>.

<sup>8</sup> See *Rose v. Cahee* case documents at <https://www.lambdalegal.org/blog/rose-v-cahee-hiv-discrimination-in-medical-care>.

Other examples from published court decisions include:

- A counseling student challenged her expulsion from a counseling program due to her refusal to counsel patients in same-sex relationships.<sup>9</sup>
- A visiting nurse argued that she had a free-exercise right to engage in anti-gay proselytizing to a home-bound AIDS patient.<sup>10</sup>
- A lab technician refused to do tests on specimens labeled with HIV because he believed “AIDS is God’s plague on man and performing the tests would go against God’s will.”<sup>11</sup>
- A physician argued that his religious beliefs justified refusing to employ gay people.<sup>12</sup>

Although courts routinely have rejected such religious objections to treating LGBT people and people living with HIV as impermissible discrimination, distressing examples of discriminatory treatment in health care contexts continue to occur with regularity.<sup>13</sup> This discrimination contributes to persistent health disparities for LGBT people and people living with HIV.<sup>14</sup>

Such religion-based discrimination in medical services is disturbingly consistent with the widespread religion-based discrimination against LGBT people and people living with HIV in

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<sup>9</sup> See *Keeton v. Anderson-Wiley*, 664 F.3d 865 (11th Cir. 2011) and case documents at <https://www.lambdalegal.org/in-court/cases/keeton-v-anderson-wiley>.

<sup>10</sup> *Knight v. Connecticut Dep’t of Pub. Health*, 275 F.3d 156 (2d Cir. 2001).

<sup>11</sup> *Stepp v. Review Bd. of Indiana Emp. Sec. Div.*, 521 N.E.2d 350 (Ind. 1988).

<sup>12</sup> *Hyman v. City of Louisville*, 132 F. Supp. 2d 528 (W.D. Ky. 2001), vacated on other grounds by 53 Fed. Appx. 740 (6th Cir. 2002).

<sup>13</sup> See Lambda Legal Comments on Proposed Rule 1557 Re: Nondiscrimination in Health Programs and Activities, 1557 NPRM (RIN 0945-AA02) (submitted Nov. 9, 2015) (“Lambda Legal 1557 Comments”), available at [https://www.lambdalegal.org/in-court/legal-docs/hhs\\_dc\\_20151117\\_letter-re-1557](https://www.lambdalegal.org/in-court/legal-docs/hhs_dc_20151117_letter-re-1557) (detailing examples and describing precedent rejecting religious objections as justification for discrimination); Brief of Amici Curiae Lambda Legal Defense and Education Fund, Inc., et al., *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (Nos. 14–1418, 14–1453, 14–1505, 15–35, 15–105, 15–119, 15–191), available at <https://www.lambdalegal.org/in-court/cases/zubik-v-burwell>.

<sup>14</sup> See Inst. of Med., The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding (2011) (“IOM Report”) (undertaken at the request of the National Institutes of Health, and providing an overview of the public health research concerning health disparities for LGBT people and the adverse health consequences of anti-LGBT attitudes), available at <http://www.iom.edu/Reports/2011/The-Health-of-Lebian-Gay-Bisexual-and-Transgender-People.aspx>.

Additionally, in 2010, Lambda Legal conducted the first-ever national survey to examine the refusals of medical care, other barriers to care, and substandard treatment confronting LGBT people and those living with HIV. The report, WHEN HEALTH CARE ISN’T CARING (“Lambda Legal, Health Care”), is available at <http://www.lambdalegal.org/publications/when-health-care-isnt-caring>.

other contexts. Lambda Legal has provided many examples of such discrimination in our friend-of-the-court brief in the *Masterpiece Cakeshop* case now before the Supreme Court.<sup>15</sup>

Given this landscape, Lambda Legal is deeply concerned that the activities of the proposed new division within HHS will facilitate further discrimination by health professionals in contexts involving sexual orientation, gender identity, or HIV status. The many past examples of religiously-based discrimination indicate there is significant likelihood that individual and institutional care providers will demand exemptions from rules and standards designed to ensure that patients receive proper treatment regarding the following needs:

- Treatment of patients who need counselling, hormone replacement therapy, gender confirmation surgeries, or other treatments for gender dysphoria.
- For patients with a same-sex spouse or who are in a same-sex relationship, bereavement counseling after the loss of a same-sex partner or other mental health care that requires respectful acknowledgment of a person's sexual orientation or gender identity.
- Care for patients living with HIV, including the option of pre-exposure prophylaxis (PrEP), a highly effective medication that dramatically reduces the risk of HIV infection among those who are otherwise at high risk, including people who are in a sexual relationship with an HIV-positive partner.
- Treatment of patients who are unmarried or in a same-sex relationship and require infertility treatment or other medical services related to pregnancy, childbirth or pediatric needs.

## Conclusion

The “Conscience and Religious Freedom Division” to be created within HHS’s Office of Civil Rights is explicitly intended to facilitate refusals of medically necessary health care in the name of religion. The potential consequences for patients will range from life-endangerment to harassment that deters accessing of care, which harms both individuals and public health. By elevating religious interests this way, the misguided new policy invites health professionals to disregard both governing law and medical standards, not only threatening patients’ health but also risking their own legal liability.

Lambda Legal is prepared to act on behalf of patients wrongfully denied medical care or otherwise mistreated as a result of this improper elevation of religious interests. Anyone who experiences harassment, denial of service, or other discrimination in health care services on the basis of gender identity, sexual orientation, or HIV status is encouraged to contact Lambda Legal by visiting [www.lambdalegal.org/healthcarehelp](http://www.lambdalegal.org/healthcarehelp) or calling toll-free at 866-542-8336.

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<sup>15</sup> Brief of Amici Curiae Lambda Legal Defense and Education Fund, Inc., et al., *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, No. 16-111 (filed Oct. 30, 2017), available at <https://www.lambdalegal.org/in-court/cases/masterpiece-cakes-v-co-civil-rights-commission>.