April 24, 2019

Roger Severino, Director
Department of Health and Human Services
Office for Civil Rights
200 Independence Avenue SW, Room 516E
Washington, DC 20201

Dear Director Severino,

The National Center for Transgender Equality writes to urge that the Department of Health and Human Services immediately pause the review process for the proposed rule “Nondiscrimination in Health Programs and Activities” (RIN 0945-AA11) in light of the Supreme Court’s decision to grant certiorari for three cases potentially impacting the legal underpinnings of this rule. The first two consolidated cases, Bostock v. Clayton County Georgia, No. 171618, and Altitude Express, Inc. v. Zarda, No. 17-1623 present the question of whether the prohibition of sex-based discrimination in Title VII of the Civil Rights Act of 1964 applies to discrimination based on an individual’s sexual orientation. In a third case to be heard separately, R.G. & G.R. Harris Funeral Homes v. Equal Employment Opportunity Commission, No. 18107, the Supreme Court will decide whether Title VII prohibits discrimination against transgender people based on (1) their transgender status or (2) sex stereotyping under Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

In its status report of December 14, 2018 filed in the District Court for the Northern District of Texas in Franciscan Alliance v. Azar, No. 7:16-CV-00108-O, the Department stated that these three cases “may well have an impact on the resolution of the rulemaking in this case,” and informed the Court that “Defendants are evaluating their draft proposed rule in light of these developments.” In light of the Department’s own statements of the potential impact of the Supreme Court’s now-pending decisions in these cases on the present rulemaking, we urge you to wait until a Supreme Court decision is issued to move forward with this rulemaking.

Although Section 1557 of the Affordable Care Act is a separate and distinct statute from Title VII of the Civil Rights Act, the resolution of these cases could potentially have the effect of altering the contours of, or even invalidating, the legal underpinnings of the current rulemaking. This could render any resulting regulation either invalid or unnecessary, or require further rulemaking to clarify or correct its provisions. As such, proceeding with rulemaking at this time could lead to overwhelming confusion and legal uncertainty for health care industry stakeholders, health care professionals, and patients. While we have strongly criticized the Government’s failure to defend the current regulation and contest the preliminary injunction in Franciscan Alliance, this state of affairs means that pausing the current rulemaking would maintain the status quo while the Supreme Court considers these three cases.

Thank you for considering our views on this important matter. You may reach NCTE’s Director of Policy, Harper Jean Tobin, at (202) 804-6047 or hjtobin@transequity.org with any questions you may have.
Sincerely,

Mara Keisling  
Executive Director