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Re: Proposed Rules 64B8-0.019 and 64B15-14.014, Standards of Practice for the Treatment of Gender Dysphoria in Minors

The National Center for Transgender Equality, together with 119 co-signatories, 16 of which are based in Florida (see Appendix 1 and 2), writes today in opposition to proposed rules 64B8-0.019 and 64B15-14.014, which would prohibit treatments for gender dysphoria in minors by medical doctors and doctors of osteopathy, respectively. These proposed rules not only fly in the face of currently-accepted medical science – endorsed by every major medical association that has reviewed the issue – they also create a dangerous precedent whereby the Boards of Medicine and Osteopathic Medicine for the first time declare clinically-appropriate care wholly off-limits through the regulatory process. That this is being done to target a minority group subjected to extreme discrimination, seemingly in response to pressure from political actors, is particularly worrisome. Finally, the proposed rules violate Section 1557 of the federal Affordable Care Act's prohibition on discrimination on the basis of sex, which the United States Supreme Court has found to include gender identity.

About the National Center for Transgender Equality

Founded in 2003, the National Center for Transgender Equality ("NCTE") works to improve the lives of the nearly two million transgender people in the United States and their families through sound public policy, public education, and groundbreaking research. NCTE has worked with countless health and human service providers as well as local, state, and federal agencies on policies to ensure equal access to vital health and human services. In 2015, NCTE conducted the U.S. Transgender Survey, the largest survey to date of transgender people, with nearly 28,000 respondents from all 50 states and the U.S. territories.[1] At the time of

[1] Sandy E. James et al., "The Report of the 2015 U.S. Transgender Survey" (Washington: National Center for Transgender Equality, 2016) (hereinafter "James, USTS"), available at https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf.

writing, NCTE is in the process of conducting the follow-up 2022 U.S. Transgender Survey, which has already collected more than 75,000 responses from transgender people in all 50 states and every U.S. territory.

The Proposed Rules Defy Established Medical Science Regarding Gender-Affirming Care for Transgender Youth

There is a broad consensus among medical researchers that gender-affirming care is medically necessary and should be made available to transgender people, including transgender youth. This position has been endorsed by every major medical association that has considered the issue, including the American Academy of Pediatrics ("AAP"),[2] Endocrine Society,[3] Pediatric Endocrine Society ("PES"),[4] American Medical Association ("AMA"),[5] American Psychiatric Association ("APA"),[6] American Academy of Child and Adolescent Psychiatry ("AACAP"),[7] the American College of Osteopathic Pediatricians ("ACOP"),[8] the National Association of Pediatric Nurse Practitioners ("NAPNAP"),[9] the American College of Obstetricians and Gynecologists ("ACOG"),[10] and the World Professional Association for Transgender Health ("WPATH").[11] The proposed rules stand in defiance of this established science.

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[2] *See* Jason Rafferty, *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents*, AMERICAN ACADEMY OF PEDIATRICS, 142 (2018), *available at* https://publications.aap.org/pediatrics/article/142/4/e20182162/37381/Ensuring-Comprehensive-Care-and-Support-for?autologincheck=redirected?nfToken=00000000-0000-0000-0000-000000000000.

[3] *See* Endocrine Society, *Transgender Health: An Endocrine Society Position Statement* (Dec. 16, 2020), *available at* https://www.endocrine.org/advocacy/position-statements/transgender-health.

[4] *See* Pediatric Endocrine Society, T*ransgender Care: Introduction to Health for Transgender Youth* (July 17, 2020), *available at* https://pedsendo.org/patient-resource/transgender-care/.

[5] *See* American Medical Association, *Issue brief: Health insurance coverage for gender-affirming care of transgender patients* at 5 (2019), *available at* https://www.ama-assn.org/system/files/2019-03/transgender-coverage-issue-brief.pdf.

[6] *See* Jack Drescher & Eric Yarbrough, American Psychiatric Association, *Position Statement on Discrimination Against Transgender and Gender Diverse Individuals* at 2 (2018), *available at* https://www.psychiatry.org/File%20Library/About-APA/Organization-Documents-Policies/Policies/Position-2018-Discrimination-Against-Transgender-and-Gender-Diverse-Individuals.pdf.

[7] *See* AACAP, *Transgender and Gender Diverse Youth* (2020), *available at* https://www.aacap.org/AACAP/Families_and_Youth/Facts_for_Families/FFF-Guide/transgender-and-genderdiverse-youth-122.aspx.

[8] *See* American College of Osteopathic Pediatricians, *ACOP Statement Against Anti-Transgender Health Laws in State Legislation* (Apr. 27, 2021), *available at* https://acopeds.org/acop-statement-against-anti-transgender-health-lawsin-state-legislation/.

[9] *See* National Association of Pediatric Nurse Practitioners et al., *NAPNAP Position Statement on Health Risks and Needs of Lesbian, Gay, Bisexual, Transgender, and Questioning Youth*, 33 J. PED. HEALTH CARE A12 (2019), *available at* https://www.jpedhc.org/article/S0891-5245(18)30679-5/pdf.

[10] *See* American College of Obstetricians and Gynecologists Committee on Gynecologic Practice and Committee on Health Care for Underserved Women, *Committee Opinion Number 823: Health Care for Transgender and Gender Diverse Individuals* (2021), *available at* https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2021/03/health-care-for-transgender-and-gender-diverse-individuals.

[11] *See* Eli Coleman et al., *Standards of Care for the Health of Transgender and Gender Diverse People, Version 8*, 23 INT'L J. OF TRANSGENDER HEALTH S1 (2022).

Pediatric-focused medical associations have been particularly vocal in their defense of gender-affirming care for minors. In a 2018 statement, the AAP endorsed a gender-affirming care model, in which "pediatric providers offer developmentally appropriate care that is oriented toward understanding and appreciating the youth's gender experience" through "the integration of medical, mental health, and social services, including specific resources and supports for parents and families."[12] The AAP expressly endorsed an individualized, rather than one-size-fits-all approach to providing gender-affirming care for transgender minors. "The decision of whether and when to initiate gender-affirmative treatment is personal and involves careful consideration of risks, benefits, and other factors unique to each patient and family. . . . There is no prescribed path, sequence, or end point."[13]

Per the AAP, appropriate care for minors may include:

- Treatment with gonadotropin-releasing hormones (commonly referred to as puberty blockers) "to prevent development of secondary sex characteristics and provide time up until 16 years of age for the individual and family to explore gender identity, access psychosocial supports, developing coping skills, and further define appropriate goals."[14] Gonadotropin-releasing hormones have been used since the 1980s to treat precocious puberty in cisgender youths.
- Social affirmation, in which "children and adolescents express partially or completely in their asserted gender identity by adapting hairstyle, clothing, pronouns, names, etc."[15]
- Legal affirmation, including changing the youth's name or gender marker on official identity documents, in school records, and elsewhere.[16]
- Prescribing cross-sex hormones "to allow adolescents who have initiated puberty to develop secondary sex characteristics" consistent with their gender identity.[17]
- Surgical affirmation, on a case-by-case basis.[18]

Furthermore, the AAP expressly advises against the approach known as "watchful waiting," "in which a child's gender-diverse assertions are held as 'possibly true' until an arbitrary age (often after pubertal onset) when they can be considered valid . . . . This outdated approach does not serve the child because critical support is withheld."[19]

The Endocrine Society has also come out strongly in support of providing care for transgender youth. According to a December 2020 statement, the Endocrine Society found that "medical intervention for

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[12] Rafferty, *supra* note 2, at 4.
[13] *Id.* at 5.
[14] *Id.*
[15] *Id.* at 6.
[16] *Id.*
[17] *Id.* at 6-7.
[18] *Id.* at 7 ("Although current protocols typically reserve surgical interventions for adults, they are occasionally pursued during adolescence on a case-by-case basis, considering the necessity and benefit to the adolescent's overall health and often including multidisciplinary input from medical, mental health, and surgical providers as well as from the adolescent and family."
[19] *Id.* at 4.

transgender youth and adults (including puberty suppression, hormone therapy and medically indicated surgery) is effective, relatively safe (when appropriately monitored), and has been established as the standard of care."[20]

In reaching this recommendation, the Endocrine Society noted the beneficial effects of gender-affirming care on transgender youth:

> Transgender/gender incongruent youth who had access to pubertal suppression, a treatment which is fully reversible and prevents development of secondary sex characteristics not in alignment with their gender identity, have lower lifetime odds of suicidal ideation compared to those youth who desired pubertal suppression but did not have access to such treatment. Youth who are able to access gender-affirming care, including pubertal suppression, hormones and surgery . . . experience significantly improved mental health outcomes over time, similar to their cis-gender peers. Pre-pubertal youth who are supported and affirmed in their social transitions long before medical interventions are indicated, experience no elevation in depression compared to their cis-gender peers. It is critical that transgender individuals have access to the appropriate treatment and care to ensure their health and well-being.[21]

In other words, far from being experimental, age-appropriate gender-affirming care has been proven effective on a number of different criteria.

The AMA has also endorsed gender-affirming care for minors and has actively discouraged states from adopting restrictions such as those in the proposed rules. In an April 26, 2021 letter to the National Governors Association, ABA CEO, Dr. James L. Madara, wrote:

> Empirical evidence has demonstrated that trans and non-binary gender identities are normal variations of human identity and expression. For gender diverse individuals, standards of care and accepted medically necessary services that affirm gender or treat gender dysphoria may include mental health counseling, non-medical social transition, gender-affirming hormone therapy, and/or gender-affirming surgeries. Clinical guidelines established by professional medical organizations for the care of minors promote these supportive interventions based on the current evidence and that enable young people to explore and live the gender that they choose. Every major medical association in the United States recognizes the medical necessity of transition-related care for improving the physical and mental health of transgender people.
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> . . .
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> Transgender children, like all children, have the best chance to thrive when they are supported and can obtain the health care they need. Studies suggest that improved body satisfaction and self-esteem following the receipt of gender-affirming care is protective against poorer mental health and supports healthy relationships with parents and peers. Studies also demonstrate dramatic reductions in suicide attempts, as well as decreased rates of depression and anxiety.

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[20] Endocrine Society, *Transgender Health: An Endocrine Society Position Statement* (Dec. 16, 2020), *available at* https://www.endocrine.org/advocacy/position-statements/transgender-health.
[21] *Id.*

> Other studies show that a majority of patients report improved mental health and function after receipt of gender-affirming care. Medically supervised care can also reduce rates of harmful self-prescribed hormones, use of construction-grade silicone injections, and other interventions that have potential to cause adverse events.
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> It is imperative that transgender minors be given the opportunity to explore their gender identity under the safe and supportive care of a physician.[22]

The AAP, Endocrine Society, and AMA are far from alone in endorsing age-appropriate gender-affirming care for transgender youth, however. In a 2020 statement, the Pediatric Endocrine Society also endorsed individualized care that might include aspects of social, medical, and surgical transition. According to the PES statement, "There is no 'right' path for transgender youth, but all require support from family, community, and their health care professionals."[23]

The American Academy of Child & Adolescent Psychiatry likewise endorsed an individualized approach that may include a combination of social, medical, and surgical transition for transgender youth, while noting that "surgery is not an option until late adolescence and adulthood."[24]

Similarly, a 2018 position paper by NAPNAP found that "pediatric health care is best delivered to youths in an individualized manner with a focus on health promotion and risk-reduction. Health care should be tailored to particular issues faced by the individual LGBTQ youth, especially when youth are questioning or struggling with sexual orientation or gender identity." NAPNAP further encourages pediatric nurse practitioners to "offer patients and their families referrals for counseling and appropriate support services, which may include hormone therapy or referral to a specialist when appropriate."[25]

In 2021, the American College of Osteopathic Pediatricians issued a statement in opposition to state efforts to ban access to gender-affirming care for minors. The ACOP statement noted that while "transgender teens carry a higher risk of homelessness, poverty, drug and alcohol abuse, involvement in sex work, mental illness and suicidality," "one intervention that has been shown to lower this level of mental and emotional distress is

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[22] Letter from James L. Madara to National Governors Association (April 26, 2021), *available at* https://searchlf.ama-assn.org/letter/documentDownload?uri=%2Funstructured%2Fbinary%2Fletter%2FLETTERS%2F2021-4-26-Bill-McBride-opposing-anti-trans-bills-Final.pdf. *See also* Press Release: AMA Reinforces Opposition to Restrictions on Transgender Medical Care (June 15, 2021), *available at* http://ama-assn.org/press-center/press-releases/ama-reinforces-opposition-restrictions-transgender-medical-care.

[23] Pediatric Endocrine Society, *Transgender Care: Introduction to Health for Transgender Youth* (July 17, 2020), *available at* https://pedsendo.org/patient-resource/transgender-care/.

[24] AACAP, *Transgender and Gender Diverse Youth* (2020), *available at* https://www.aacap.org/AACAP/Families_and_Youth/Facts_for_Families/FFF-Guide/transgender-and-genderdiverse-youth-122.aspx.

[25] National Association of Pediatric Nurse Practitioners et al., *NAPNAP Position Statement on Health Risks and Needs of Lesbian, Gay, Bisexual, Transgender, and Questioning Youth*, 33 J. PED. HEALTH CARE A12 (2019), *available at* https://www.jpedhc.org/article/S0891-5245(18)30679-5/pdf.

access to gender affirming healthcare." Banning access to gender-affirming care "will certainly have a tremendous negative impact on the psychological and physical well-beings of these teens."[26]

Each of these medical associations has considered the question of gender-affirming healthcare with great attention, care, and detail. Each of them has reached the same basic conclusion: individualized, age-appropriate gender-affirming healthcare is critical for the wellbeing of transgender youths. Denial of such care comes at a significant cost to their mental and physical health.

And yet, the proposed rules disregard all of this evidence, and instead impose a blanket ban on gender-affirming healthcare until transgender individuals reach adulthood. Contrary to the individualized treatment endorsed by every major medical association, the proposed rules have the effect of enforcing the outdated watchful waiting approach specifically condemned by the AAP. In doing so, they disregard the individualized needs of the patient, the expert medical opinion of the treating physician, and the weight of medical evidence in support of care.

The evidence goes far beyond the statements of medical authorities, however. In July 2022, a group of medical researchers led by Dr. Meredithe McNamara, Assistant Professor of Pediatrics at the Yale School of Medicine, provided a comprehensive survey of existing science on gender-affirming care ("Yale Review") in response to the Florida Agency for Health Care Administration's June 2, 2022 report calling gender-affirming care experimental. The Yale Review cited extensive evidence supporting the non-experimental nature of gender-affirming care, including gender-affirming care for minors. As the Yale Review demonstrates, numerous studies into the efficacy of gonadotropin-releasing hormones and gender-affirming hormone treatments on both transgender and cisgender youths demonstrate their long-term efficacy and gender-affirming care has positive psychosocial impacts on transgender youth, increasing positive mental health outcomes, and decreasing suicidal ideation into adulthood.[27] The proposed rules stand in defiance of this broad consensus in peer-reviewed medical science.

The Proposed Rules Go Significantly Further than Board of Medicine or Board of Osteopathic Medicine Precedents

The draft rules far exceed the extent of intervention in other areas of medicine the Boards have previously regulated. Notably, this would be the first time the Boards would forbid an entire area of practice. We call upon the Boards to look to and respect their own precedent for when and how to intervene in medical practice.

Existing administrative rules under Florida Administrative Code Chapters 64B8-9 and 64B15-14 establish general standards of care, rather than designate what practice areas are broadly permitted. For example, Sections 64B8-9.012 and 9.013 establish in great detail when and how physicians may prescribe drugs to

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[26] American College of Osteopathic Pediatricians, *ACOP Statement Against Anti-Transgender Health Laws in State Legislation* (Apr. 27, 2021), *available at* https://acopeds.org/acop-statement-against-anti-transgender-health-lawsin-state-legislation/.

[27] Meredithe McNamara et al., *A Critical Review of the June 2022 Florida Medicaid Report on the Medical Treatment of Gender Dysphoria* (July 8, 2022), *available at* https://medicine.yale.edu/lgbtqi/research/gender-affirming-care/florida-medicaid/.

treat obesity or acute pain, respectively, but do not undermine the ability of physicians to care for these illnesses in toto.[28] These sections, along with others in Chapter 64B8-9, establish the ways in which care is to be provided, rather than define areas of care as inherently worthy of censure by the Boards.

That is, however, what the proposed rules would do: entirely strip Florida physicians and osteopaths of their ability to provide age-appropriate and clinically-supported treatment for their transgender patients. That the Boards take this dramatic step in contravention of medical science and the recommendations of major medical associations is particularly worrisome.

The Proposed Rules Would Create Significant Confusion for Doctors Licensed in Multiple Jurisdictions and Would Diminish the Influence of Board Actions in Other States

Presently, actions of the Florida Boards of Medicine and Osteopathic Medicine are given wide deference by their peer boards in other states. When the Florida Boards act to censure practitioners, boards in other states inevitably open up their own investigations, and typically impose similar penalties. The proposed rules threaten to disrupt the respect with which Florida Board decisions are given in other states, as the proposed rules would for the first time entirely bar an entire category of care in contravention of the medical consensus. They would establish the decisions of the Florida Boards as anti-science and anti-evidence, calling into question not only actions under the proposed rules, but under existing rules as well.

Furthermore, the rules are likely to cause significant confusion on the part of practitioners licensed in multiple jurisdictions. The proposed rules do not restrict their application within the state of Florida, leaving open the possibility that the Boards could open investigations and take disciplinary actions for care provided in other states that have not adopted similar policies. Even if the Boards never initiate such actions, the existence of the rules is likely to serve as a deterrent for practitioners who might otherwise have sought to become certified in Florida.

The Proposed Rules Perpetuate Discrimination against Transgender People, Particularly Transgender Youth

Transgender people, including transgender youth, face longstanding and pervasive social stigma. Because of this, many transgender people have struggled to get access to any and all medical care – including not only gender-affirming care or other care recommended to treat gender dysphoria, but also medical care for wholly unrelated conditions. The proposed rules will compound this discrimination, increasing barriers to healthcare for both transgender youths and adults.

Numerous studies have documented the widespread and pervasive discrimination experienced by transgender people in the United States' healthcare system.[29] In 2015, NCTE conducted the U.S. Transgender

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[28] *See* Florida Administrative Code 64B15-14.004-14.005 for comparable provisions adopted by the Board of Osteopathic Medicine.

[29] *See, e.g.,* Janis Renner et al., *Barriers to Accessing Health Care in Rural Regions by Transgender, Non-Binary, and Gender Diverse People: A Case-Based Scoping Review*, 12 FRONTIERS IN ENDOCRINOLOGY at 2 (2021), *available at* https://www.frontiersin.org/articles/10.3389/fendo.2021.717821; Michelle Teti et al., *A Qualitative Scoping Review of Transgender and Gender Non-conforming People's Physical Healthcare Experiences and Needs*, 9 FRONTIERS IN PUBLIC HEALTH at 18-19 (2021), *available at* https://www.frontiersin.org/articles/10.3389/fpubh.2021.598455.

Survey ("USTS"), which examined the experiences of transgender people in the United States, with 27,715 respondents from all fifty states, the District of Columbia, American Samoa, Guam, Puerto Rico, and U.S. military bases overseas.[30] Of these, 1,099 respondents were Florida residents at the time of the survey.[31] Among Florida respondents, one-third (33%) of those who had seen a healthcare provider in the year prior to the survey reported having negative experiences related to their transgender status, including being refused treatment, being verbally harassed, or even being physically or sexually assaulted by a healthcare provider. In part because of this pervasive harassment and discrimination, one-quarter (25%) of Florida respondents stated they had not seen a doctor in the previous year despite needing to do so because they feared mistreatment due to their transgender status.[32]

Such overt discrimination is even worse for transgender people of color and transgender people with disabilities. While 23% of respondents to the USTS reported not seeing a health provider in the prior year due to fear of mistreatment, the rates were significantly higher for communities of color, including American Indian (37%), Black (26%), Latino/a (26%), Middle Eastern (34%), and multiracial (28%) respondents.[33] Similarly, while one-third (33%) of respondents reported one or more negative experiences with a health provider in the prior year, the rate jumped to 42% for transgender people with disabilities.[34]

Unfortunately, the situation has not improved in the seven years since the USTS. According to a 2020 national survey conducted by the Center for American Progress and the University of Chicago, nearly half (47%) of transgender respondents reported having experienced at least one form of discrimination from healthcare providers due to their gender identity; for transgender people of color, the rate jumped to over two-thirds (68%).[35] Discriminatory treatment included physically rough or abusive treatment (20% of all transgender respondents; 38% of transgender people of color respondents); using harsh or abusive language while treating the transgender patient (19%; 29%); or even refusing to provide any care to the patient at all (18%; 28%).[36] As a result, 28% of transgender respondents reported delaying or not receiving necessary medical care in the prior year due to the fear of discrimination, with 40% (54% of transgender respondents of color) avoiding preventative screenings.[37] According to a 2022 survey, just under half (49%) of transgender or nonbinary respondents reported that they feared being denied medical care if they revealed their gender identity to a healthcare provider.[38] Sadly, this fear was not groundless, as nearly one-third (32%) of

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[30] James, USTS, *supra* note 1, at 21.
[31] Sandy E. James et al, "2015 U.S. Transgender Survey: Florida State Report" (National Center for Transgender Equality, October 2017) [hereinafter James, Florida State Report], *available at* https://transequality.org/sites/default/files/docs/usts/USTSFLStateReport(1017).pdf.
[32] *Id.*
[33] James, USTS, *supra* note 1, at 98.
[34] *Id.* at 97.
[35] Caroline Medina et al., *Protecting and Advancing Health Care for Transgender Adult Communities* (2021), *available at* https://www.americanprogress.org/article/protecting-advancing-health-care-transgender-adult-communities/.
[36] *Id*.
[37] *Id.*
[38] Caroline Medina et al., *Advancing Health Care Nondiscrimination Protections for LGBTQI+ Communities* (2022), *available at* https://www.americanprogress.org/article/advancing-health-care-nondiscrimination-protections-for-lgbtqi-communities/.

transgender or nonbinary respondents reported having experienced at least one denial of healthcare due to their gender identity.[39]

While these surveys focus on the experiences of transgender adults rather than transgender youth, they demonstrate the pervasiveness of discrimination against trans people of all ages. Transgender youths are not immune to healthcare discrimination because they have not yet reached the age of 18, and transgender adults do not suddenly experience an entirely different medical system at that same threshold. Instead, the widespread discrimination against all transgender people – whether specific to healthcare or more broadly societal – creates significant barriers for transgender youth seeking healthcare, no matter what it is for.

Unfortunately, the proposed rules will only make this worse, as they will create a system in which transgender youth will fear, rather than seek out, healthcare, and which will encourage patients to lie to their providers to protect themselves, their families, and those from whom they have received care in the past. For instance, a transgender boy visiting the emergency room for a respiratory infection might face intense scrutiny from hospital staff about what transition-related care he had received, who provided it, and whether it was provided in the state of Florida – all despite the fact that his transgender status is entirely unrelated to the issue for which he is seeking care. Knowing this is likely to be the case, he might simply decide to stay home and try to tough out the illness, causing the infection to become significantly worse than it would have been with proper treatment. This phenomenon, often referred to as Trans Broken Arm Syndrome, describes the all-too-common occurrence where healthcare providers are more concerned with transgender patient's gender identity than with the reason they present for care.[40]

More worrisome, the proposed rule may lead many healthcare providers across Florida to refuse to treat transgender youth for anything, regardless of whether it constitutes gender-affirming care or relates to their transgender status. Regardless of their clinical judgment of the medical necessity of gender-affirming care, many medical providers may reasonably conclude that the risk to their medical licenses for providing any care at all is simply too great, especially given the extensive history of discrimination against transgender people seeking access to healthcare noted above.

This discrimination will not abruptly end when the individual turns 18; instead, it is likely to reverberate into adulthood and can even have lifelong effects. According to the USTS, transgender people subjected to conversion therapy in the past were significantly more likely to be experiencing serious psychological distress at the time of the survey (47% vs. 34% of all respondents), to have attempted suicide at some point in their life (59% vs. 38%), to have run away from home (22% vs. 8%), and to have experienced homelessness (46% vs. 29%).[41] Furthermore, the habit of avoiding medical professionals as a minor is likely to continue well into

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[39] *Id.*

[40] *See, e.g.,* David Oliver, *"Being Transgender Is Not a Medical Condition": The Meaning of Trans Broken Arm Syndrome*, USA TODAY (July 27, 2021), *available at* https://www.usatoday.com/story/life/health-wellness/2021/07/27/trans-broken-arm-syndrome-what-it-how-combat-discrimination-health-care/8042475002/; Lisa Simons & Raina Voss, *Advocating for Transgender and Gender Expansive Youth in the Emergency Setting*, 21 CLINICAL PEDIATRIC EMERGENCY MEDICINE 100780 (2020), *available at* https://www.sciencedirect.com/science/article/abs/pii/S1522840120300343?via%3Dihub; Douglas Knutson et al., *"Trans Broken Arm": Health Care Stories From Transgender People in Rural Areas* 7 J. RESEARCH WOMEN & GENDER 30 (2016), *available at* https://digital.library.txstate.edu/handle/10877/12890.

[41] James, USTS, *supra* note 1, at 110.

adulthood, whether because the individual has learned to fear doctors or because they worry about facing harassing questions over treatment received (or not received) as a youth.[42]

In the end, the blanket prohibition on gender-affirming care for transgender youth in Florida will do little but exacerbate the healthcare disparities between transgender people and their cisgender peers, while doing nothing to improve the quality of care for transgender people themselves.

The Proposed Rules Violate Section 1557 of the Affordable Care Act, which Prohibits Discrimination on the Basis of Sex, Including on the Basis of Gender Identity, as well as the Equal Protection Clause of the Fourteenth Amendment

Finally, the proposed rules also violate Section 1557 of the federal Affordable Care Act[43] ("Section 1557"), which prohibits discrimination in access to healthcare on the basis of sex, as well as the Equal Protection Clause of the Fourteenth Amendment. Because the proposed rules permit access to types of care for cisgender youth that it denies to transgender youth, they constitute facial discrimination on the basis of sex.

Section 1557 is a landmark civil rights statute prohibiting discrimination in federally-funded healthcare and health insurance. It incorporates the antidiscrimination provisions of several pivotal civil rights statutes, including Title IX of the Education Amendments Act of 1972, which prohibits discrimination "on the basis of sex."[44] Federal courts, including the United States Supreme Court in *Bostock v. Clayton County,*[45] have determined that federal laws prohibiting sex discrimination encompass discrimination based on gender identity or transgender status because discrimination on these bases is inherently discrimination on the basis of sex. After all, "by definition, a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth."[46] The Eleventh Circuit Court of Appeals, which governs cases coming from Florida, Georgia, and Alabama, agrees, having found in *Glenn v. Brumby* that protections against sex discrimination "are afforded to everyone, [and therefore] cannot be denied to a transgender individual."[47]

In *Bostock*, the Supreme Court held that sex discrimination necessarily includes discrimination on the basis of transgender status. The Court explained that "[s]ex plays a necessary and undisguisable role in the decision" to fire an individual for being transgender, because the employer "fires that person for traits or actions it would not have questioned in members of a different sex."[48] As such, the Court held that "transgender status [is] inextricably bound up with sex."[49] While *Bostock* was decided within the context of employment discrimination under Title VII of the Civil Rights Act rather than Title IX of the Education Amendments Act, courts including the Supreme Court generally construe Title IX's antidiscrimination provision consistently with

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[42] *See supra*.
[43] 42 U.S.C. § 18116.
[44] 20 U.S.C. § 1681.
[45] 140 S. Ct. 1731 at 1737–38, 1743–45, 1753 (2020) (using Title VII's phrase "because of . . . sex" and Title IX's "on the basis of sex" interchangeably).
[46] *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1048 (7th Cir. 2017).
[47] *Glenn v. Brumby*, 663 F.3d 1312, 1319 (11th Cir. 2011).
[48] 140 S. Ct. at 1737.
[49] *Id.* at 1742.

Title VII.[50] Moreover, the Court's reasoning in *Bostock* is applicable to all sex discrimination laws because any discrimination against someone for being transgender turns on the sex assigned at birth of the targeted person. According to the Court, "it is impossible to discriminate against a person for being . . . transgender without discriminating against that individual based on sex."[51]

Section 1557 applies to nearly every medical practitioner licensed by the Boards. The proposed rules thus create a catch-22 situation where practitioners would be prohibited by the Florida Administrative Code from providing gender-affirming care to minors, but could be found in violation of federal Section 1557 for denying access to that very same care.

Further, the rules as written fail to provide equal protection as required by this country's founding legal document. The Fourteenth Amendment to the U.S. Constitution prohibits states from denying "to any person within its jurisdiction the equal protection of the laws."[52] The Equal Protection Clause is "essentially a direction that all persons similarly situated should be treated alike."[53] When considering an equal protection claim, a court must determine (1) "what level of scrutiny applies" and (2) "whether the law or policy at issue survives such scrutiny."[54]

Laws that discriminate based on sex must be supported by an "exceedingly persuasive justification" and only meet this burden if the state can show that the law in question is substantially related to a sufficiently important government interest."[55] Given the Board of Medicine's authority to promulgate rules that become effective as law outside of the legislative process, its rulemaking must comport with the Constitutional principle of Equal Protection barring exceedingly persuasive justification.[56]

The proposed rules establish limitations on healthcare for transgender youth that do not exist for their cisgender peers. Where gonadotropin-releasing hormones are made off-limits for transgender patients, they remain available for cisgender youths who are prescribed them for precocious puberty. Where transgender youth are denied access to hormone replacement therapy, cisgender youth are prescribed those very same medicines for a host of reasons, including care designed to help their bodies better align with their sex assigned at birth. For example, testosterone may be prescribed for cisgender boys to treat hypogonadism or delayed puberty, while anti-estrogens may be prescribed to treat gynocomastia. In cisgender girls, hormone therapies are key components of not only oral contraceptives, but also as treatment for amenorrhea, dysmenorrhea, and even acne, while anti-androgens may be prescribed to treat polycystic ovarian syndrome

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[50] *See, e.g., Doe v. Snyder*, 28 F.4th 103, 113–14 (9th Cir. 2022); *Emeldi v. Univ of Or.*, 698 F.3d 715, 725 (9th Cir. 2012) ("[T]he Supreme Court has often 'looked to its Title VII interpretations of discrimination in illuminating Title IX'" (*quoting Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 616 n.1 (1999) (Thomas, J., dissenting))); *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75 (1992) ("Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe.").
[51] 140 S. Ct. at 1741.
[52] U.S. Const. amend. XIV, § 1.
[53] *Kadel v. Folwell,* No. 1:19CV272, 2022 WL 3226731, at *17 (M.D.N.C. Aug. 10, 2022) (*quoting City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985)).
[54] *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 607 (4th Cir.), *as amended* (Aug. 28, 2020), *cert. denied*, __ U.S. __, 141 S. Ct. 2878, 210 L.Ed.2d 977 (2021).
[55] *United States v. Virginia*, 518 U.S. 515, 531, 533, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996).
[56] 459.015(1)(z) FS.

(PCOS). In each of these cases, transgender and cisgender youth are treated differently when attempting to access the exact same healthcare, often for substantially similar reasons. This is patent discrimination under both Section 1557 and the Equal Protection Clause of the Fourteenth Amendment.

Because gender-affirming care is being denied on the basis of the young person's transgender status, practitioners would be unable to comply with both the proposed rules and with federal law. Moreover, the fact that the Florida Boards have adopted regulations prohibiting the provision of care would not protect Florida practitioners from legal liability. The United States Supreme Court has held that compliance with state law is not a defense to a violation of federal law. In *Arizona v. United States*, the Court held that "state laws are pre-empted . . . where compliance with both federal and state regulations is a physical impossibility."[57] Such is the case here.

Conclusion

The proposed rules are built on and perpetuate discrimination against transgender youths, defy the best practices established by peer-reviewed medical science and endorsed by every major medical association that has reviewed the issue, go far beyond the scope of prior regulations by the Boards of Medicine and Osteopathic Medicine, would undermine the decisions of those Boards in sister states, and fail to comply with federal nondiscrimination requirements. The National Center for Transgender Equality and fellow signatories express our strong opposition to these rules. We strongly encourage the Boards to reject the draft rules before further damage is done.

[57] *Arizona v. United States*, 567 US 387, 399 (2012). *See also Green v. Sch. Bd. of New Kent City*, 391 US 430, 432-33, 35 (1968) (prohibiting school boards from complying with state laws that mandated racial segregation in public schools in conflict with the Fourteenth Amendment).

APPENDIX 1: Florida-Based Signatories

Planned Parenthood of South, East and North Florida

TransSOCIAL, Inc.

Florida Rising

MomsRising

Florida People's Advocacy Center

Southern Poverty Law Center

Contigo Fund

Latina Institute for Reproductive Justice Florida

State Innovation Exchange (SiX)

Emergency Medical Assistance, Inc.

Unique Woman’s Coalition

PRISM

Stand with Trans

Transinclusive Group

ADL Florida

Planned Parenthood of Southwest and Central Florida

APPENDIX 2: National Signatories

Equality California

TransOhio

FORGE, Inc.

Chicago House and Social Service Agency

GLSEN

Desiree Alliance

Minority Veterans of America

American Association of People with Disabilities

Hispanic Federation

American Atheists

Movement Advancement Project

The Fenway Institute

Autistic Self Advocacy Network

Equality Federation

GLMA: Health Professionals Advancing LGBTQ+ Equality

American Humanist Association

Athlete Ally

Oasis Legal Services

Physicians for Reproductive Health

COLAGE

National Council of Jewish Women

Spectrum: The Other Clinic

Kentucky Youth Law Project, Inc.

PFLAG Portland Maine Chapter

Louisiana Trans Advocates

Kamora's Cultural Corner

Lyon-Martin Community Health Services

Transgender Assistance Program Virginia

National Council of Jewish Women Austin Section

4 Ever Caring Evonné

PFLAG Athens Area (Georgia)

Massachusetts Transgender Political Coalition

Makom Shelanu Congregation

St. Louis Queer+ Support Helpline

PROMO Missouri

Inclusive Faith Coalition

Rainbow Health Minnesota

Stonewall Center - Columbus, Ohio

San Diego Black LGBTQ Coalition

Transhealth

Edutechnologic, LLC

Fairness Campaign

LOVEboldly

Transgender Education Network of Texas (TENT)

Trans Youth Equality Foundation

Boston Alliance of LGBTQ Youth (BAGLY)

TransFamily Support Services

TransYouth Liberation

SIECUS: Sex Ed for Social Change

Youth Outlook

Transgender Caucus of the NC Democratic Party

International Association of Providers of AIDS Care

First City Pride Center

Trillium Health

LGBTQ Community Center Fund, DBA "Q Center"

ASPEN (Abuse Support & Prevention Education Network)

MassEquality

Callen-Lorde Community Health Center

Mack Karam Beggs Transathlete/Advocate

National Latina Institute for Reproductive Justice

CenterLink: The Community of LGBT Centers

Sylvia Rivera Law Project

Bridgercare

Rainbow Dublin

Delmarva Gender Expression Movement

Serotiny Counseling

Infinite possibilities counseling

Moxie Mind

Jade Cooley Therapy

SAGE

Metamorphosis Medical Center

National Trans Bar Association

Juxtaposed Center for Transformation Inc.

T-time Transgender Support Inc.

TLDEF

Transgender, Gender-Variant and Intersex Pro Bono Project of Stanford Law School

Equitas Health

Ace and Aro Alliance of Central Ohio

Congregation Makom Shelanu

Transgender Law Center

Fenway Health

Y2Y Network

Gender Spectrum

National LGBT Cancer Network

Lawyers for Good Government

Transgender Emergency Fund Of Massachusetts, Inc

Howard Brown Health

TransVisible Montana

Stanford Law School OutLaw

International Transgender Education Organization.=

Anarres Infoshop & Community Space

Philly Trans March

PFLAG National

Changing the Game

YWCA Boston

Massachusetts LGBT Chamber of Commerce

One Colorado

National Women's Law Center

Keshet

National Black Justice Coalition

The Trevor Project

Michael Tevya Cohen (Rabbi)

The Trans Formations Project