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March 22, 2022

The Honorable Shane Pendergrass
House Health and Government Operations Committee
Room 241
House Office Building
Annapolis, Maryland 21401

Testimony of FreeState Justice

IN SUPPORT OF

SB0682: Maryland Medical Assistance Program - Gender-Affirming Treatment (Trans Health Equity Act of 2022)

To the Honorable Chair Shane Pendergrass, Vice Chair Joseline Pena-Melnyk, and esteemed members of the Health and Government Operations Committee:

FreeState Justice is Maryland's lesbian, gay, bisexual, transgender, and queer (LGBTQ) civil rights advocacy organization. Each year, we provide free legal services to dozens, if not hundreds, of LGBTQ+ Marylanders who could not otherwise be able to afford an attorney, as well as advocate more broadly on behalf of the LGBTQ+ community.

We write today in support of Senate Bill 682, because it will end the discriminatory treatment of transgender patients under Maryland's Medicaid system, which currently includes a number of blanket prohibitions of transition-related care, in violation of both Maryland and federal law.

In 2020, Maryland adopted Insurance § 15-1A-22(d), which provides that health insurance carriers

may not refuse, withhold, or deny any individual coverage under a health benefit plan offered by the carrier or otherwise

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FreeState Justice, Inc. (formerly FreeState Legal Project, Inc., merging with Equality Maryland) is a social justice organization that works through direct legal services, legislative and policy advocacy, and community engagement to enable Marylanders across the spectrum of lesbian, gay, bisexual, transgender, and queer identities to be free to live authentically, with safety and dignity, in all communities throughout our state.

discriminate against any individual because of the individual's race, sex, creed, color, national origin, marital status, sexual orientation, age, gender identity, or disability.

This legislation, which was heard by this very Committee, built upon existing federal protections under Section 1557 of the Affordable Care Act, codified at 42 USC § 18116(a), which prohibit insurance and healthcare providers receiving federal healthcare funding from discriminating on a number of protected grounds, including sex. Under both the United States Supreme Court's decision in *Bostock v. Clayton County, Georgia*, 590 U.S. __ (2020), available at https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf, and guidance from the Department of Health and Human Services' Office for Civil Rights, "sex" includes both sexual orientation and gender identity. See "HHS Announces Prohibition on Sex Discrimination Includes Discrimination on the Basis of Sexual Orientation and Gender Identity" (May 10, 2021), available at <https://www.hhs.gov/about/news/2021/05/10/hhs-announces-prohibition-sex-discrimination-includes-discrimination-basis-sexual-orientation-gender-identity.html>.

Maryland's current prohibition on certain transition-related care dates to a 2016 transmittal from the Maryland Department of Health and Mental Hygiene to Medicaid Managed Care Organizations. Under this transmittal, 31 different types of transition-related care are expressly excluded from coverage, regardless of medical necessity. See Susan J. Tucker, "Maryland Medical Assistance Program Managed Care Organizations Transmittal No. 110" (March 10, 2016), available at https://health.maryland.gov/mmcp/mcoupsdates/documents/pt_37_16.pdf. Despite more recent legislation at both the state and federal level clarifying that discrimination on the basis of gender identity is prohibited, as well as court decisions that state Medicaid programs must make individualized determinations of medical necessity based on the circumstances of the individual, the Maryland Department of Health and Mental Hygiene has declined to reconsider or update its 2016 transmittal, making legislative action necessary.

In a recent case, *Burns v. Maryland Department of Health*, OAH No. MDH-MCP-012-21-17696, attorneys from FreeState Justice challenged the legality of Maryland's blanket exclusions under both Maryland and federal law. But while the administrative law judge in that case found these arguments compelling, he ultimately held that he lacked authority to rule on them.

At the hearing, the Appellant argued I should reverse Amerigroup's decision because the policy upon which Amerigroup based the decision discriminates against transgender individuals. Based upon the literature and evidence the Appellant presented, I find that point well taken as it relates to Transmittal

100. However, I find no authority for me, in this proceeding, to reverse Amerigroup's decision on those grounds. I find such arguments better directed to causes of action in other tribunals against entities other than Amerigroup.

Burns v. Maryland Department of Health at 12 n 11.

Unlike that administrative law judge, this committee has the power to remedy the injustice of Transmittal 110 and Maryland's current blanket exclusion of many types of transition-related care. Please do so.

For these reasons, FreeState Justice urges a favorable report on Senate Bill 682.