



February 2, 2012

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Department of Health and Human Services  
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ROBERT REMAR  
TREASURER

Dear Acting Administrator Tavenner:

Re: Exclusion of men diagnosed with breast cancer from Medicaid coverage under the Breast and Cervical Cancer Prevention and Treatment Act of 2000

We write today regarding the exclusion of men from access to Medicaid benefits under the Breast and Cervical Cancer Prevention and Treatment Act of 2000, P.L. 106-354. Because the denial of benefits based on gender violates the equal protection guarantee of the U.S. Constitution and the anti-discrimination provision of the Patient Protection and Affordable Care Act of 2010, we call on the Centers for Medicare and Medicaid Services (“CMS”) to change its current policy and issue guidance to state Medicaid agencies providing for coverage of men who are diagnosed with breast cancer, and otherwise meet Medicaid criteria.

The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members, countless additional activists and supporters, and 53 affiliates nationwide, dedicated to the principles of liberty and equality embodied in the Constitution and this nation’s civil rights laws. Through its Women’s Rights Project, founded in 1972 by Ruth Bader Ginsburg, the ACLU has taken a leading role in advocating for gender equality and challenging gender-based laws and policies, including on behalf of men.

Tragically, breast cancer affects both women and men. The American Cancer Society estimates that in 2011, approximately 2,140 new cases of invasive breast cancer will be diagnosed in men, and about 450 men will die of the disease.<sup>1</sup> The government, as a matter of law, cannot deny life-saving treatment to male breast cancer patients based only on their sex.

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<sup>1</sup> *Breast Cancer in Men*, AMERICAN CANCER SOCIETY,  
<http://www.cancer.org/Cancer/BreastCancerinMen/DetailedGuide/breast-cancer-in-men-key-statistics>.

## Background

The Breast and Cervical Cancer Prevention and Treatment Act of 2000 (“Treatment Act of 2000”) allows states to provide Medicaid benefits to individuals diagnosed with breast and cervical cancer, who otherwise would not qualify for Medicaid, if specific requirements are satisfied.<sup>2</sup> The individual must be uninsured, under the age of 65, and must

...have been screened for breast and cervical cancer under the Centers for Disease Control and Prevention breast and cervical cancer early detection program established under title XV of the Public Health Service Act (42 U.S.C. 300k et seq.) in accordance with the requirements of section 1504 of that Act (42 U.S.C. 300n) and need treatment for breast or cervical cancer.<sup>3</sup>

Title XV of the Public Service Act, referred to in the Treatment Act of 2000, funds state screening programs for the prevention and control of breast and cervical cancer, and explicitly restricts screening to women:

The Secretary, acting through the Director of the Centers for Disease Control, may make grants to States on the basis of an established competitive review process for the purpose of carrying out programs --

"(1) to screen *women* for breast and cervical cancer as a preventive health measure;

"(2) to provide appropriate referrals for medical treatment of *women* screened pursuant to paragraph (1) and to ensure, to the extent practicable, the provision of appropriate follow-up services . . . .<sup>4</sup>

This screening program was established pursuant to a 1990 law, the Breast and Cervical Cancer Mortality Prevention Act of 1990 (“Prevention Act of 1990”).

The Prevention Act of 1990 and Treatment Act of 2000 together provide for the following: 1) routine breast and cervical cancer screening offered through the National Breast and Cervical Cancer Early Detection Program (“the Program”) of the Centers for Disease Control and Prevention (CDC), limited to women only; and 2) Medicaid benefits to those under 65, who are underinsured, need treatment for breast or cervical cancer, and who are diagnosed through the Program.<sup>5</sup> Because only women are screened through the Program, CMS has instructed state Medicaid agencies that men are categorically excluded from coverage under the Treatment Act of 2000, even if they meet all other criteria.<sup>6</sup>

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<sup>2</sup> Pub. L. No. 106-354, 114 Stat. 1381.

<sup>3</sup> *Id.* at § 2.

<sup>4</sup> Pub. L. No. 101-354, § 2, 104 Stat. 409 (emphasis added).

<sup>5</sup> Today, NBCCEDP funds breast and cervical cancer screening services to uninsured and underinsured women in all fifty states. See National Breast and Cervical Cancer Early Detection Program, CENTERS FOR DISEASE CONTROL AND PREVENTION, [www.cdc.gov/cancer/nbccedp/about.htm](http://www.cdc.gov/cancer/nbccedp/about.htm).

<sup>6</sup> CMS, TECHNICAL POLICY QUESTIONS AND GUIDANCE, Question 59, available at <https://www.cms.gov/MedicaidSpecialCovCond/downloads/TechnicalPolicyQuestionsandGuidance.pdf>.

Recent media coverage highlights the devastating impact of the current policy. Raymond Johnson, a 26 year-old-man living in South Carolina, was diagnosed this summer with breast cancer.<sup>7</sup> Uninsured, he applied for Medicaid pursuant to the Treatment Act of 2000, but was denied because he was not screened (nor could he have been as a man) through the Program. The South Carolina Department of Health and Human Services urged CMS to extend benefits to him, but according to press accounts, CMS refused to do so. The state agency has chosen to proceed with granting coverage to Mr. Johnson. At least one other male breast cancer patient reportedly has been denied access to Medicaid in South Carolina due to his sex.<sup>8</sup>

### Denying Medicaid Benefits to Male Breast Cancer Patients Violates the Law.

CMS, as an agency within the executive branch of government, has the duty to refuse to enforce unconstitutional statutes.<sup>9</sup> This duty is heightened where the law is not only unconstitutional but also conflicts with other statutory obligations. Here, the Treatment Act of 2000 violates both the equal protection guarantee of the Fifth Amendment of the U.S. Constitution and the antidiscrimination provision of the Patient Protection and Affordable Care Act of 2010 (“ACA”). Interpreting the Treatment Act of 2000 to allow for coverage of men diagnosed with breast cancer, and who otherwise meet the Treatment Act’s insurance and age criteria, best reconciles the Treatment Act with CMS’ obligations under the U.S. Constitution and the ACA.

The exclusion of male breast cancer patients from coverage under the Treatment Act of 2000 violates the equal protection guarantee of the U.S. Constitution. Gender-based distinctions in federal law can only survive constitutional scrutiny when supported by an “exceedingly persuasive justification.”<sup>10</sup> The Supreme Court has explained that for gender-based classifications, the “State must show at least that the [challenged] classification serves ‘important governmental objectives and that the discriminatory means employed’ are ‘substantially related to the achievement of those objectives.’”<sup>11</sup> The differential treatment of men and women who have been diagnosed with breast cancer clearly does not meet this standard. While we recognize that, in some circumstances, women and men have health concerns specific to their sex (e.g.,

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<sup>7</sup> See Renee Dudley, *Graham, Scott, ACLU, on cancer patient’s side*, POST AND COURIER, Aug. 9, 2011, available at <http://www.postandcourier.com/news/2011/aug/09/graham-scott-aclu-on-cancer-patients-side/>; *Make Medicaid gender neutral*, POST AND COURIER, Aug. 12, 2011, available at <http://www.postandcourier.com/news/2011/aug/12/make-medicaid-gender-neutral/>; Renee Dudley, *State to cover man’s breast cancer care*, POST AND COURIER, Aug. 19, 2011, available at <http://www.postandcourier.com/news/2011/aug/19/state-to-cover-mans-breast-cancer-care/>.

<sup>8</sup> See *Second man who battled breast cancer was denied coverage*, ABC NEWS CHARLESTON, SC, Aug. 10, 2011, <http://www.abcnews4.com/story/15239952/another-man-denied-federally-funded-breast-cancer-medicaid-because-of-his-gender>.

<sup>9</sup> *Myers v. United States*, 272 U.S. 52 (1926); *The Attorney General’s Duty to Defend and Enforce Constitutionally Objectionable Legislation*, 4A Op. O.L.C. 55 (1980) (Opinion from Attorney General Civiletti states that “Myers holds that the President’s constitutional duty does not require him to execute unconstitutional statutes”); Memorandum from Walter Dellinger, Assistant Attorney General, Presidential Authority to Decline to Execute Unconstitutional Statutes (Nov. 2, 1994) available at <http://www.justice.gov/olc/nonexecut.htm>; Saikrishna Bangalore Prakash, *The Executive’s Duty To Disregard Unconstitutional Laws*, 96 GEORGETOWN L.J. 1613 (2008).

<sup>10</sup> *United States v. Virginia*, 518 U.S. 515, 531 (1996).

<sup>11</sup> *Id.* at 533.

pregnancy, prostate cancer), this is certainly not the case here, where the government is granting benefits to women and denying the same benefits to similarly situated men.<sup>12</sup> Though both groups have been diagnosed with the covered disease – breast cancer – only men are excluded from benefits for treatment.

It may be that the government will seek to justify the exclusion on the grounds of administrative convenience, cost or a focus on providing a benefit to women. None of these rationales is adequate. Sex-based classifications cannot be used “for denigration of the members of either sex or for artificial constraints on an individual’s opportunity.”<sup>13</sup> It is difficult to contemplate a greater denigration or constraint on opportunity than the denial of life-saving treatment. Furthermore, “any statutory scheme which draws a sharp line between the sexes, solely for the purpose of achieving administrative convenience, necessarily commands ‘dissimilar treatment for men and women who are . . . similarly situated,’” and thus violates the Constitution.<sup>14</sup> The relative prevalence of breast cancer among women cannot serve as a proxy for who needs treatment, particularly when a simple gender-neutral alternative exists: an actual diagnosis of breast cancer. Moreover, the fact that male patients have not been screened through the Program cannot justify their exclusion from Medicaid coverage, because they were completely barred by law from the Program due to their sex.<sup>15</sup> In other contexts involving absolute bars to benefits based on sex, the Supreme Court has found that benefits must be extended to both men and women in order to comply with the equal protection mandate.<sup>16</sup>

Denying men access to Medicaid coverage under the Treatment Act of 2000 also violates the ACA. Section 1557 of the ACA included, for the first time, a federal prohibition on sex discrimination in health care.

In General.--Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 504 of the Rehabilitation Act of 1973

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<sup>12</sup> In the context of routine breast cancer screening, men and women arguably are not similarly situated, given the disparity in cancer risk between the sexes. *Breast Cancer in Men*, AMERICAN CANCER SOCIETY, <http://www.cancer.org/Cancer/BreastCancerinMen/DetailedGuide/breast-cancer-in-men-detection>. Currently, medical guidelines do not recommend routine screening for men because of the rarity of the disease in men, although screening may be recommended for men with risk factors, such as having a strong family history of breast cancers or certain genetic mutations. *Id.*

<sup>13</sup> *Virginia*, 518 U.S. at 533.

<sup>14</sup> *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973). See also *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 152 (1980); *Craig v. Boren*, 429 U.S. 190, 197-98 (1976).

<sup>15</sup> We do not comment here on the legality of denying benefits to women who are diagnosed with breast or cervical cancer outside of the Program. Other advocates have raised concerns about this policy. See Mary Haviland, Esq., Donna Lawrence and Sarah Stumbar, *Through the Wrong Door Ensuring Access to Breast Cancer Services for Low Income Women in New York State*, SUSAN G. KOMEN FOR THE CURE GREATER NEW YORK CITY, available at <http://www.komennyc.org/site/DocServer/ThroughTheWrongDoorFINALDOM.pdf?docID=2641>.

<sup>16</sup> See *Califano v. Westcott*, 443 U.S. 76, 85-93 (1979); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975).

(29 U.S.C. 794), be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section 504, or such Age Discrimination Act shall apply for purposes of violations of this subsection.<sup>17</sup>

The ACA prohibits the denial of benefits on the grounds of sex in any health program or activity that receives federal funds or that is administered by an executive agency.<sup>18</sup> The Medicaid option created by the Treatment Act of 2000, which is funded by federal monies and administered by CMS, clearly falls under the ACA. Accordingly, CMS' implementation of the option must be reconciled with the ACA's protections.

Because the exclusion of men from Medicaid coverage for breast cancer treatment unlawfully discriminates based on gender, we urge CMS to revisit its policy and issue guidance to the state Medicaid agencies, obligating them to extend Medicaid benefits to men who are diagnosed with breast cancer and otherwise meet the age and insurance criteria of the Treatment Act of 2000. Continuing to mandate that states withhold benefits to men in need of treatment violates the U.S. Constitution and the ACA, and coerces states to engage in discriminatory conduct.

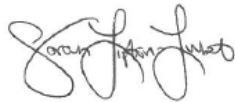
We hope you will take action on this important issue and would be happy to discuss next steps with you. If you have any questions, please contact: Sarah Lipton-Lubet, ACLU Washington Legislative Office; (202) 675-2334 or [slipton-lubet@dcaclu.org](mailto:slipton-lubet@dcaclu.org); or Sandra Park, ACLU Women's Rights Project; (212) 519-7871 or [spark@aclu.org](mailto:spark@aclu.org).



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<sup>17</sup> Pub. L. No. 111-148, § 1557, 124 Stat. 119, 260.

<sup>18</sup> The ACA refers to other civil rights laws in describing the prohibited grounds of discrimination. Sex is one of those grounds, as Title IX, one of the laws incorporated by the ACA, outlaws discrimination based on sex. 20 U.S.C. § 1681 et seq.