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Hon. Xavier Becerra
Secretary
United States Department of Health and Human Services
200 Independence Ave., SW
Washington, D.C., 20201

Attention: Conscience NPRM, RIN 0945-AA18

Dear Secretary Becerra,

We write to comment on several troubling aspects of the NPRM "Safeguarding the Rights of Conscience as Protected by Federal Statutes" (RIN 0945-AA18), pursuant to the notice and comment process outlined in and protected by 5 U.S.C. § 553(c) (2020). While we appreciate the Department's aim in attempting to ensure that statutory protections of conscience rights are upheld, we find several aspects of the proposed rule arbitrary, confusing, or subversive of the rights of conscience. For these reasons, we urge the Department to change course. Our comment follows. We thank you for your time and consideration.

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INTRODUCTION

In its Conscience Rescission NPRM (RIN 0945-AA18), the Department of Health and Human Services proposes several rescissions and modifications without reasonable justification, without reason at all, and/or without an accurate characterization of costs and benefits. The Department's proposed rule is, by its arbitrariness, violation of the standards of administrative law set by statute and by court cases, and failure to produce justification for the cost of the regulation, harmful to the American people and wholly unlawful.

First, the Department engages in several rescissions and modifications to the 2019 Final Rule (the last HHS rulemaking on conscience protections) which are flatly unlawful because they lack true reasoning on the part of the Department. The Department fails throughout the NPRM, in several ways, to engage in reasoned decision-making, depriving the public of the ability to comment intelligently on the proposed rule and producing a quintessentially arbitrary and capricious rule.

Section I of our analysis details this failure on the part of the Department to ground its actions in reasoned decision-making. In Section I.A, we give an overview of the problems with the Department's justification of the rescissions and modifications in general.

In I.A.1, we point out that the Department spuriously cites the court cases which struck down the entirety of the 2019 Final Rule as justification for modification of specific provisions of said Rule. The court cases in question do not cite several of the modified sections as being unlawful. By failing to justify the specific actions it takes, the Department fails to connect its actions to its stated aim, leaving it to the public to do the work of reasoning.

In I.A.2, we address the Department's rescissions. The Department again fails to connect its aims to its actions, this time by simply listing off several options for why it rescinds what it does. Once again the public is left to guess at the reasoning behind the Department's actions.

In I.B and I.C, we examine specific cases where the Department's modifications and rescissions are arbitrary and capricious. The Department does not justify costly actions, attempts to use controversy surrounding the 2019 Final Rule as cover for arbitrary actions, fails to justify decisions that will confuse or weaken the protection of conscience rights, and, in every case, fails to connect its aims to its actions, as described in I.A.

In Section II, we turn to another general theme in the Department's actions, namely, that some of the Department's actions actively work against conscience rights. In particular, the Department proposes an addendum that would override the will of objectors (II.A.1), undermine conscience rights (II.A.2), and cause discrimination against objectors (II.A.3). This provision, like those in Section I, is not justified by reasoned decision-making.

In Section III, we examine the Regulatory Impact Analysis supplied by the NPRM, which greatly mischaracterizes the costs of the proposed rule objectively and relative to the 2019 Final Rule.

In III.A, we show that the RIA used by the Department does not provide reasonable justification for the proposed rule. Section III.A.1 shows that the primary baseline used by the RIA is inconsistent with the Department's claims, because the baseline considers the 2019 Final Rule to be in effect while the rulemaking overall does not. This makes the RIA an unreasonable evaluation of the costs of the proposed rule. The supplied baseline shows a failure to seriously consider cost in the rulemaking process and is logically inconsistent, preventing the public from discerning any reasoning about costs whatsoever.

Section III.A.2 points out that the RIA does not justify the rule under the alternative baseline, leaving the rule without justification by the correct baseline, and leaving the entire cost analysis riddled with arbitrary and unreasonable actions.

In III.B, we show that the Department fails to examine carefully the increased cost and decreased benefits of the proposed rule. III.B.1 points out that, regardless of the baseline chosen, the Department fails to acknowledge familiarization costs, unreasonably claims that no voluntary remedial efforts will be pursued, and assumes without justification that half of covered entities will issue voluntary notices. III.B.2, meanwhile, points out that the proposed rule will not deliver nearly as great a quantity of non-quantifiable benefits as the 2019 Final Rule.

Finally, we show in III.C that the Department fails to provide reasoned analysis of the costs and benefits of the 2019 Final Rule, calling into question its assertion of the superiority of the proposed rule with respect to costs and benefits. In III.C.1, we show that the assumptions of the Department greatly reduce the costs of the 2019 Final Rule. In III.C.2, we show that the Department's portrayal of the 2019 Final Rule misrepresents its effects on healthcare availability.

Ultimately, this rule is not merely a garden variety example of bad rulemaking or questionable analysis. Rather, the Department in several different ways fails to engage in reasoned decision-making at all. The proposed rule is arbitrary and capricious, violates the legal requirements of public notice, fails to evaluate cost in a reasonable way as is demanded by the law, and ultimately does not encapsulate a reasonable rulemaking for the protection of conscience rights. The rule's defects are so extensive that, if the agency proceeds with the rulemaking, it can do so only on the basis of a rationale so substantially different than the proposed rationale that the public will have lacked an adequate opportunity to comment on the new rationale. Accordingly, the agency is barred from finalizing the proposal.

BACKGROUND

The proposed rule consists of two actions: rescissions of parts of the 2019 Final Rule and modifications of parts of the 2019 Final Rule otherwise preserved. The proposed rule rescinds parts of the 2019 Final Rule:

> "because those portions are redundant, unlawful, confusing or undermine the balance Congress struck between safeguarding conscience rights and protecting access to health care, or because significant questions have been raised as to their legal authorization. […] Those portions of the 2019 Rule were either: (1) redundant and unnecessary, because they simply repeated the language of the underlying statute; (2) have been deemed unlawful in district court decisions that raise significant questions as to whether they exceed the scope of the Department's housekeeping authority; or (3) created confusion or harm by undermining the balance struck by Congress in the statutes themselves."[1]

Second, it preserves certain parts of the 2019 Final Rule, justifying modification of these parts as ways:

> "to address concerns raised by many of the commenters—and echoed in federal district court decisions—about the Department's underlying rulemaking authority. The new proposed rule relies on the Department's housekeeping authority under 5 U.S.C. 301, which permits the Department to issue regulations concerning its own internal procedures and operations, and therefore allows for the modifications in this proposed rule."[2]

The proposed rule does not specify which actions are done for which reasons or under which justificatory scheme. The parts of the rule rescinded include:

> "the purpose provision at § 88.1, the definitions that appeared at § 88.2, the applicable requirements and prohibitions that appeared at § 88.3, the assurance and certification requirements at § 88.4, compliance requirements at § 88.6, the relationship to other laws provision at § 88.8, and the rule of construction and severability provisions at § 88.9 and § 88.10."[3]

The NPRM does not include any other explanation of these actions. Although other concerns and comments (especially regarding health care access) are mentioned, nowhere are they connected to the actions of the Department.

[1] 88 FR 825-826.
[2] 88 FR 825.
[3] Ibid.

ANALYSIS

I. The Department fails to engage in reasoned decision-making

A. Introduction: Justification for Modifications and Rescissions

The Department's proposed rule rescinds large portions of the 2019 Final Rule and preserves certain parts with modifications that it deemed necessary or appropriate. However, the Department fails to justify its modifications and rescissions. Its modifications to the 2019 Final Rule rely on the court cases reviewing the 2019 Final Rule, but the agency's proposed modifications are not demanded by any of the court cases; the Department simply gestures at the cases and the controversy surrounding the 2019 Final rule as a blanket justification for any and all modifications. This is not good enough: to offer a rational explanation, the Department must give a reason for each change it makes.

The court cases are cited, along with dubious claims of redundancy and statutory confusion, to justify a wide array of rescissions, many of which are clearly not necessary according to the Department's stated reasoning. Thus the public cannot even comment intelligently on the proposed rule, since the Department's actions are in no way obviously connected to its stated reasons. By depriving the public of the ability to comment intelligently on the proposed rule, the Department adds another layer of arbitrariness to its decision-making: first, because there is no way to know the Department's reasoning, and second, because all possible reasons it lists fail to justify its rulemaking.

1: Modifications are justified only by broad gesture to court cases, not to specific legal concerns or accusations of unlawfulness

The Department offers the following reason for its modifications to the parts of the 2019 Final Rule that it seeks to preserve:

> "The provisions proposed to be retained have been modified to address concerns raised by many of the commenters—and echoed in federal district court decisions—about the Department's underlying rulemaking authority."[4]

Seeing that *Washington v. Azar* merely grants a summary judgement based on *New York v. HHS*, our discussion of the relevant cases will focus on *New York* and *San Francisco*.

The *New York* case takes issue first and foremost with the 2019 rule's interpretation of definitions of various terms found in the statutory protections of conscience rights for health care funding recipients and sub-recipients. These include the definitions of the terms "[to] assist in the performance of," "referral," "discrimination," and "health care entity." In addition, the *New York* case cites the enforcement provisions and the broader difference from the Title VII

[4] 88 FR 825.

framework, the latter of which is essentially a comment on the definition of "discrimination."[5] Therefore the only actual provisions which concerned the *New York* case were the definitions at §88.2 and the enforcement provisions at §88.7. Judge Engelmeyer's order to vacate the rule, as opposed to sever the provisions which are alleged to exceed the scope of the Department's "underlying rulemaking authority," was based on his holding that "the rulemaking exercise here was sufficiently shot through with glaring legal defects as to not justify a search for survivors."[6] In other words, the judge vacated the rule only because the definitions and enforcement were, in his conception, too bound up with the other parts of the rule to allow the balance of the rule to stand by itself.

The *San Francisco* case, meanwhile, primarily argues against the definitions offered by HHS.[7] It also takes issue with the use of the Housekeeping Authority and Uniform Administrative Requirements to justify the rule, claiming that the "expansive definitions in the rule" along with "the addition of the termination of all HHS funding as a consequence of noncompliance"—as opposed to the termination of non-Medicare-and-Medicaid funding, which with the court seems to find no fault—cause the rule to exceed these sources of authority.[8]

Thus, the court cases held that the entire rule was to be vacated not because each part of the 2019 Final Rule was unlawful, but instead because the two components the courts held to be unlawful—the definitions and the enforcement provisions—seemed to be inextricably bound up with the rest of the rule. The judicial rulings, therefore, offer no basis for departing from any parts of the 2019 Rule except (at best) the definitions and enforcement provisions and the citations of them in other provisions. The proposed rule therefore cannot justify modifications of the preserved parts of the 2019 Final Rule except insofar as the modifications attempt to extricate the core of the preserved parts from their previously alleged entanglement with the definitions and enforcement provisions.

Owing to this fact, the proposed rule cannot simply justify its modifications to the 2019 Final Rule by citing "concerns raised" about the authority of the Department. There were specific and identifiable provisions which the courts alleged to be unlawful; there were other provisions, notably, which commenters alleged to be unlawful, but which were not declared so by the courts. These include comments alleging constitutional violations. The NPRM does not actually cite specific comments, or even general arguments made by comments, about the rulemaking authority of the Department with respect to the conscience provisions; the public is left to wonder what comments and what arguments the Department might have found persuasive.

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[5] "First, the Rule defines 'discrimination' so as not to contain the defense that the accommodation sought by the employee would present an 'undue hardship' to the employer," and "Second, the 2019 Rule departs from the Title VII framework insofar as the Rule does not protect an employer who offers the objecting employee a 'reasonable accommodation.'" *New York v. U.S. Department of Health & Human Services*, 414 F. Supp. 3d 475, 513, 514 (S.D.N.Y. 2019).

[6] *New York v. HHS*, 577.

[7] See *City & County of San Francisco v. Azar*, 411 F. Supp. 3d 1001, 1012-1018 (N.D. Cal. 2019).

[8] *City & Cnty. of S.F. v. Azar*, 1023.

Thus, the only reasoning about the rulemaking authority of the Department that the public can deduce from the NPRM comes from the court cases. The Department cannot simply gesture towards comments on the 2019 Final Rule as a blanket justification for modification. The public has not been supplied with any "substantive information" on the comments upon which modifications are made; therefore, it is deprived of the ability to comment intelligently on the Department's supposed recourse to public comments.[9]

2: Rescissions are not justified at all

Meanwhile, the justification offered for rescissions of parts of the 2019 Final Rule is as follows:

> "because those portions are redundant, unlawful, confusing or undermine the balance Congress struck between safeguarding conscience rights and protecting access to health care, or because significant questions have been raised as to their legal authorization."[10]

The Department later explains that the rescinded portions were either:

> "(1) redundant and unnecessary, because they simply repeated the language of the underlying statute; (2) have been deemed unlawful in district court decisions that raise significant questions as to whether they exceed the scope of the Department's housekeeping authority; or (3) created confusion or harm by undermining the balance struck by Congress in the statutes themselves."[11]

Notably, this section seemingly combines the reason that provisions rescinded were "unlawful" with the reason that "significant questions have been raised as to their legal authorization."

In order to satisfy the APA's rationality requirements, an agency must "explain the evidence which is available, and […] offer a 'rational connection between the facts found and the choice made.'"[12] The choices made by the Department, however, are multiple, not singular. The agency implicitly acknowledges this in noting that rescissions were made because provisions were *either* "redundant, unlawful, confusing or undermin[ing of] the balance Congress struck […] or because significant questions have been raised as to their legal authorization." The Department, however, does not attempt to justify each of its rescissions individually. Far from demonstrating the kind of transparent and thorough reasoned decision-making demanded of the Department under the APA, the Department does not even engage in reasoned decision-making at all. Instead, it merely lists these three or four reasons for rescissions and then lists, without any form of assignment, the rescissions. There is no articulation of the relationship between the facts found and the choices made; instead, the public is given a list of possible reasons on the one

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[9] *Ohio Valley Environmental Coalition v. U.S. Army Corps of Engineering*, 674 F. Supp. 2d 783, 804 (E.D. Va. 2009).
[10] 88 FR 825.
[11] 88 FR 825-826.
[12] *Motor Vehicle Manufacturers Association of the United States, Inc. v. State Farm Mutual Automotive Insurance Company*, 463 U.S. 29, 52 (1983).

hand and a list of choices on the other and left to guess at the rational connections between choices and potential reasons. Reasoned decision-making cannot be a matter of letting the public choose reasons at will from a bank of potential options. A list of inputs and a list of outputs does not make a function, or even a set of data points; the agency must do the work of assigning inputs to outputs in order to justify its actions.

The failure to connect reasons to decisions alone constitutes a failure to engage in reasoned decision-making. However, the Department has also, in this action, made it impossible for the public to comment. An NPRM, we note, must "provide information sufficient to enable an interested or affected party to comment intelligently" on a rulemaking.[13] The public must be supplied with sufficient "substantive information" for a "clear understanding of the nature and magnitude of the activity to generate meaningful comment" in order for them to be considered able to "comment intelligently."[14] An NPRM which simply lists off possible reasons for rescissions does not provide sufficient substantive information for the public to intelligently comment on it, because the public must guess at the connection between the Department's actions and the possible reasons given.

In many cases, however, as we explain below, the Department fails to justify its decisions on any of the reasons listed; that is, many of the Department's decisions cannot be explained by *any* of the listed reasons. Many of the proposed rescissions are thus triply arbitrary: first, in failing to connect the reasoning for rescissions in general to specific rescinded provisions; second, by this same failure, in preventing the public from commenting intelligently on the rulemaking; and third, in failing to provide among its listed reasons any reasonable explanation for many of its rescissions.

B. Department provides no rationale for virtually all modifications to 2019 Final Rule provisions, and many of its modifications significantly change the 2019 Final Rule and/or are poised to have a great impact

1: Proposed Rule implies lack of recourse to the Department of Justice without cause

The proposed rule removes from the 2019 Final Rule's enforcement authority provisions the sixth item, which stated that the OCR has been delegated the authority to:

> "In coordination with the relevant component or components of the Department and the Office of the General Counsel, make enforcement referrals to the Department of Justice."[15]

It also removes the entirety of § 88.7g of the 2019 Final Rule:

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[13] *Washington Trollers Association v. Kreps*, 645 F.2d 684, 686 (9th Cir. 1981).
[14] *Ohio Valley Env. Coal. v. U.S. Army Corps of E.*, 804.
[15] 84 FR 23271, § 88.7a.6

> "If as a result of an investigation, compliance review, or other enforcement activity, OCR determines that a recipient or sub-recipient is not in compliance with the Federal conscience and anti-discrimination laws or this part, OCR may, in coordination with the relevant Department component and the Office of the General Counsel, make referrals to the Department of Justice, for further enforcement in Federal court or otherwise. OCR may also make referrals to the Department of Justice, in coordination with the Office of the General Counsel, concerning potential violations of 18 U.S.C. 1001 or 42 U.S.C. 300a-8 for enforcement or other appropriate action."[16]

This modification lacks sufficient rationale. First, since the proposed rule considers this to be a modification of § 88.7, we note that nowhere in the NPRM is § 88.7 addressed specifically. Thus there is no specific connection made between this modification and the stated reason for all modifications in general, that is, "to address concerns raised […] about the Department's underlying rulemaking authority."[17] It is wholly unclear in what sense this modification even addresses some particular concern, let alone which concern is being addressed. Indeed, it is clear that this rescission is not related to the judgements of the various cases against the 2019 Final Rule, as they do not cite this provision or the utilization of the DOJ as part of their argument against the rule. No comment mentioning concerns about DOJ referral is cited.

Even if, however, we consider this modification a rescission, we see that it still does not stand based on the rationale the Department has given for its rescissions. Rescissions are justified by the Department when a provision of the 2019 Final Rule was "redundant" or "confusing," or because it "undermine[d] the balance Congress struck between safeguarding conscience rights and protecting access to health care." It is not clear which of these this rescission could possibly fall under, as it seems in no way to possibly rely upon an accusation of redundancy, confusion, or imbalance.[18]

As both the proposed rule and the 2019 Final Rule note, several of the statutes protecting conscience rights are not currently implemented in a formal way by the Department. The 2019 rule did valuable work in clarifying that recourse to DOJ is available; that clarification is not redundant of previously existing requirements. Nor is the claim that this provision causes confusion reasonable. There is nothing in the provision that could be called confusing, nor does recourse to the DOJ confuse any part of conscience rights or the duties of recipients to provide care. And it is not clear how articulating the availability of DOJ participation could upset the balance struck by Congress.

Ultimately, while it is important to note that none of the stated reasons for rescission could possibly justify the modification cited above, the Department's first and most glaring error was failing to justify the modification as such.

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[16] 84 FR 23271, § 88.7g
[17] 88 FR 825.
[18] Ibid.

2: The proposed rule fails to clarify which, if any, complaints are accepted, and fails to clarify how complaints are to be handled by the OCR

The 2019 Final Rule states that the OCR has enforcement authority over complaints. In particular, with regard to which parties are able to file complaints, the 2019 Final Rule explains that:

> "Any entity, whether individually, as a member of a class, on behalf of others, or on behalf of an entity, may file a complaint with OCR alleging any potential violation of Federal conscience and anti-discrimination laws or this part. OCR shall coordinate handling of complaints with the relevant Department component(s). The complaint filer is not required to be the entity whose rights under the Federal conscience and anti-discrimination laws or this part have been potentially violated."[19]

The proposed rule omits this clarification despite the fact that the scope of the origin of complaints is nowhere cited by the *New York* case or the cases citing it. Thus, there is nothing in the justification for modifications which can explain the removal of this section, since the court cases are mum on the issue and the Department cites no comments. This alone makes the removal arbitrary, since the removal has no basis in the reasoning provided to justify all modifications.

By removing the provision explaining the role of the OCR in handling complaints, the proposed rule is liable to confuse providers attempting to make a complaint, making it uncertain who is allowed to file a complaint. This *adds* confusion to the rule, against one of the stated aims of the rulemaking, without justification for the additional confusion by any other stated aim or benefit.

Likewise, this rescission does not remove a "redundant" provision, especially because it is not obvious by the law alone that complaints may be filed on behalf of another, and it does not "undermine the balance Congress struck between safeguarding conscience rights and protecting access to health care," because it in no way manufactures some new ability or right of conscience to the detriment of access. The clarification of a statutorily authorized ability, even if it could conceivably expand knowledge and awareness of said ability, can in no way be construed as undermining the "balance" of the very statutes it clarifies or makes known. Meanwhile, there are no conceivable benefits to removing an outline of the processes of the Department with respect to complaints.[20]

Ultimately, there is no possible way to justify this modification. This rescission increases confusion without any possible benefit whatsoever: it is another quintessentially arbitrary and capricious rulemaking.

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[19] 84 FR 23271, § 88.7b
[20] 88 FR 825.

3: Proposed rule provides no guarantee of appropriate investigation, leaving room for arbitrary and capricious decision-making on the part of the Department

The 2019 Final Rule states that:

> "**OCR shall make a prompt investigation, whenever a compliance review, report, complaint, or any other information found by OCR indicates a threatened, potential, or actual failure to comply with Federal conscience and anti-discrimination laws or this part**. The investigation **should** include, **where appropriate**, a review of the pertinent practices, policies, communications, documents, compliance history, circumstances under which the possible noncompliance occurred, and other factors relevant to determining whether the Department, Department component, recipient, or sub-recipient has failed to comply. OCR **shall** use fact-finding methods including site visits; interviews with the complainants, Department component, recipients, sub-recipients, or third-parties; and written data or discovery requests" (emphasis added).[21]

The proposed rule omits the first sentence entirely, and modifies the remaining section as follows:

> "**An OCR investigation of a complaint alleging failure to comply with the Federal health care provider conscience protection statutes may include** a review of the pertinent practices, policies, communications, documents, compliance history, circumstances under which the possible noncompliance occurred, and other factors relevant to determining whether the Department, Department component, recipient, or sub-recipient has failed to comply. OCR **may** use fact-finding methods including site visits; interviews with the complainants, Department component, recipients, sub-recipients, or third-parties; and written data or discovery requests. OCR may seek the assistance of any State agency" (emphasis added).[22]

Because of these modifications, the proposed rule:

> 1) Gives no assurance of a prompt investigation of complaints;
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> 2) Fails to confirm that investigation may be merited by threatened or potential failure to comply with conscience and anti-discrimination laws, leaving it ambiguous as to whether complaints involving future violations will be accepted at all;
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> 3) Replaces the assurance that investigations "should" use the various investigatory practices listed "where appropriate" with the ambiguous statement that such practices simply "may" be used; and
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> 4) Replaces the assurance that the various listed fact-finding methods "shall" be used with the ambiguous statement that such practices simply "may" be used.

These modifications severely weaken the complaint handling process, failing to provide any assurance to the public of the prompt, transparent, thorough, and reasonable handling of

[21] 84 FR 23271, § 88.7d.
[22] 88 FR 829-830, § 88.2b.

complaints. None of these changes were demanded by the aforementioned court cases. The removal of such provisions, therefore, cannot be attributed to the specific qualms of pending court cases; nothing in the 2019 Final Rule's investigatory framework, which was clearly justified under the Housekeeping Authority (as it is totally and completely internal to the Department) could be said to create a new substantive obligation, which was a defect for which the courts held that the 2019 Final Rule exceeded the Housekeeping Authority. Thus the Department weakens its handling of complaints in favor of a process ripe for abuse, with no reason or reasonable aim given or possible.

C. The proposed rule unnecessarily rescinds compliance requirements, making policies indeterminate and increasing costs

The 2019 Final Rule includes provisions to ensure recipient compliance with federal law, which are rescinded from the proposed rule.[23] The removal of the compliance requirements will raise the cost of compliance for both recipients and the Department. Guidelines for record-keeping provide an invaluable resource to recipients by providing a minimum standard for assuring compliance with the law. Without this rule, some recipients are liable to do too little and incur great costs down the line should a suit emerge, while others are liable to exceed the strictures laid out in the 2019 Final Rule and over-record or keep records for too long. Likewise, without guaranteed access to certain information in a prompt manner, the enforcement role of the Department might be severely reduced. The costs associated with both of these are difficult to quantify, but they are likely to be associated with long, laborious administrative costs and enormous legal fees.

The Department has not shown that the benefits of this rescission justify the costs; far from it, in fact, the Department has not shown that any benefit whatsoever will arise from this particular rescission.

While the compliance requirements were mentioned in the *New York* case, it is important to recognize that the only argument against the compliance requirements of the 2019 Final Rule stemmed from the rule's definition of "discrimination," which the court held "denies an employer the ability to make two showings available under Title VII to avoid liability: that accommodating the objection would work an 'undue hardship' on the employer and that the employer has offered the employee a 'reasonable accommodation.'"[24] The judicial decision may provide a good reason to change the definition, but not to rescind the compliance requirements *in toto*. That is especially true in light of the substantial costs such rescission will generate, as detailed above.

[23] 84 FR 23270-23271, §88.6 b-d.
[24] *New York v. HHS*, 536.

II. The Department takes unnecessary and harmful actions for no discernible reason

A. Proposed rule would result in discrimination against objectors

The proposed rule adds to the provision concerning posting notice of conscience rights (which in the proposed rule is voluntary rather than required) that:

> "Where possible, and where the recipient does not have a conscience-based objection to doing so, the notice should include information about alternative providers that may offer patients services the recipient does not provide for reasons of conscience."[25]

This provision, we will show, effectively undermines the vast majority of conscience-based objections.

1: The addendum would be posted against the will of objectors, and, in most cases, be mandatory

First, it is important to note that this provision will be essentially mandatory in most relevant cases. The provision states that the addendum "should" be posted "where possible" and "where the recipient does not have a conscience-based objection to doing so." Such recipients would be compelled to post the addendum by the proposed rule. The direction of the Department is not simply neutral advice which can be ignored without second thought. The fact that the Department declares that the addendum "should" be posted, in combination with the norm-setting power and investigatory authority of the Department, clearly indicates that the expectation is that this addendum will be posted by all recipients who do not object. It is clear to any recipient reading the provisions of the proposed rule that the Department expects recipients to post the addendum, all else being equal; the Department, here, orders that the addendum must be posted by every non-objecting recipient.

It is notable that non-objecting recipients are obliged to post it, without, it seems, factoring in the objections of any sub-recipients. The proposed addendum does not acknowledge the objections of sub-recipients at all; a doctor could be made to have the addendum posted in his or her waiting room or even in examination rooms and offices, against his or her own objections. For example, a doctor who objects to abortion could be made to have a posting up in her office and examination rooms informing her patients 1) that she objects to abortion, and 2) where her patients can conveniently obtain one. The placement of addenda in places particular to a given objector, where the statement is clearly identifiable as applying to a given objector, undermines his or her objection entirely. Additionally, by compelling all objecting sub-recipients to inform their patients of such information—against their wills and contrary to the private nature of the doctor-patient relationship—the Department gives license to discrimination against objecting sub-recipients.

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[25] 88 FR 830, § 88.3d.

2: The addendum undermines conscience protections by requiring patient referrals for procedures to which providers object

The addendum will, ultimately, undermine the conscience rights of objecting sub-recipients. The Department proposes to add "information about alternative providers that may offer patients" the services to which some sub-recipients object. That is, information identifying one or more specific providers, e.g., hospitals and doctors, will be provided to patients. This kind of "provision of information" about topics like abortion is, according to *Rust v. Sullivan*, equivalent to "counseling" or "referral" for the purposes of the law's bearing on the doctor-patient relationship.[26] Combined, then, with the fact that the addendum is *de facto* required of all non-objecting recipients, the proposed rule essentially requires every provider to refer patients to all the services to which the provider objects.

The addendum, in doing so, violates the Coates-Snowe Amendment's prohibition on government discrimination against health care entities for refusing to provide "referrals for such training [in the performance of induced abortions] or such abortions," and likewise the Weldon Amendment's protection against federal funds being given to organizations or governments that discriminate against health care entities that do not "refer for abortion."[27]

The purpose of a conscience protection notice is to provide information about the conscience rights of relevant parties; it is not meant to undermine conscience rights by directing patients to the very programs to which recipients or sub-recipients object. Patients, meanwhile, are no less free to access these services in the absence of such notices. The Department's addendum would serve to undermine conscience rights by requesting that providers, in effect, require those with conscience objections to have their patients referred away.

3: The addendum would result in discrimination, including financial penalty, against those with objections

This addendum will also lead to discrimination and financial penalty against providers who exercise conscience rights. First, it is important to note that the addendum's presence is not limited to circumstances in which a provider actually exercises conscience rights. The addendum would, being posted by a recipient against the wishes of a sub-recipient, inform all patients of the sub-recipient's objection regardless of relevance to the particular healthcare needs or options of any given patient.

For example, if a patient suspects that some procedure X is the right course of action for his or her healthcare, he or she might leave a practice displaying an addendum that indicates his or her doctor objects to procedure X, before even meeting with the doctor and without knowing

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[26] *Rust v. Sullivan*, 500 U.S. 173, 193 (1991).
[27] 88 FR 821-22, "Public Health Service Act Sec. 245 [42 U.S.C. 238n] (Coats-Snowe Amendment)" and "Weldon Amendment."

whether that procedure is actually a viable or healthful course of action. This is clearly inappropriate and undermines the relationship between doctor and patient.

Further, it is wholly inappropriate for a recipient to call attention to a sub-recipient's objection by the posting of the addendum. The only time the addendum would provide information for a different provider is if the recipient's provider objects; therefore, the addendum acts as a *de facto* signal of a provider's objection, which violates the privacy interests of providers and may lead to discrimination and financial penalties against them.

Consider the example of an OB-GYN who objects to the performance of abortion and a pregnant patient who, though not considering an abortion, is offended by anti-abortion sentiment. The patient might, upon learning that the physician she is seeing objects to abortion, leave the establishment, terminate her business with the physician, and even possibly take her business to the provider listed on the addendum. That is, objectors are forced to disclose their views, regardless of relevance, and at the same time to advertise their competition. Thus, the Department's proposed addendum both undermines the conscience objection itself and may result in discrimination and financial penalty against the objector.

Even worse, the addendum suggested does not detail the nature or extent of the conscience objections being exercised; thus, a patient might think that the provider objects to procedures to which he or she in reality does not, because of the presence of an objecting physician at a hospital or medical office space shared by multiple physicians. Likewise, a patient might eschew care under the charge of one physician because of concerns generated by the exercise of conscience rights of another physician, leading to firm-level discrimination against those who exercise conscience rights. That is, the cost to the provider could be spread to the firm, and lead to discrimination or pressure from peers.

It is important to note that these effects cannot be avoided by requiring or encouraging recipients to list specific objectors and their objections. This would fail to stop individual-level discriminatory effects (i.e., situations like the example of the patient and the obstetrician described above) while deepening the invasion of privacy.

Finally, and importantly, the proposal to add the addendum is arbitrary because it is unrelated to the proposal's reasons for its modifications. As we stated in section I.A.1 of this document, modifications to the preserved parts of the 2019 Final Rule are justified only "to address concerns raised […] about the Department's underlying rulemaking authority."[28] But there is no connection whatsoever between the proposed modification and the concerns about rulemaking authority, making the addendum arbitrary and capricious.

[28] 88 FR 825.

III. The Department does not adequately or accurately consider the cost of its proposed rulemaking

A. The RIA does not show that the proposed rule is justified when evaluated reasonably

1: The Department's use of its primary baseline is irrational and self-contradictory

The Regulatory Impact Analysis provided by the Department does not adequately evaluate the costs of the proposed rule, first and foremost because it rests on contradictory assumptions about the 2019 Final Rule. The Department's "primary baseline scenario" assumes that the 2019 Final Rule would take effect, and therefore that its rescissions result in "saving" money.[29] But Section I of the NPRM states that:

> "Because the 2019 Final Rule never took effect, HHS has been operating under the 2011 Final Rule continuously since it was finalized. It currently accepts, investigates, and processes complaints under the framework created by the 2011 Final Rule. *There are no significant reliance interests stemming from the 2019 Final Rule because the rule was vacated before it became effective. Because the 2019 Final Rule never went into effect, no person or entity could have reasonably relied on its provisions. It is possible that health care providers or individuals have reasonably relied on the 2011 Final Rule because it has remained operational*" (emphasis added).[30]

The Department asserts that the 2019 Final Rule should not be thought of as the current rule, since "no person or entity could have reasonably relied on its provisions." Likewise, then, no cost of the 2019 Final Rule could have applied. Thus, as "health care providers or individuals have reasonably relied on the 2011 Final Rule," the proposed rescissions of the 2019 Final Rule cannot be considered a savings, since said rule was not put into effect.

The rule is rendered arbitrary and capricious on its face by the logical contradiction between the proposed rule's use of the primary baseline assumption in the RIA and the proposed rule's assertion that the 2019 Final Rule should not be considered as in effect. No reasonable interpretation of the NPRM could result in the proposed rule being a "savings" because the Department's entire justification for rulemaking rests on the assumption that the 2019 Final Rule is not in effect, and, consequently, not plausibly the baseline for regulatory costs.

The Department does not engage in reasoned analysis of the costs and benefits of the rescissions and modifications, instead assuming (contradictory to its own assumptions and contrary to reason) that they are cost-free "savings." But even granting that assumption, the Department's RIA would be severely lacking. Nowhere does the Department actually engage in weighing the costs and benefits of the proposed rule; instead, the Department seems to assume, since the rule is entirely a "savings," that the action is automatically justified. This directly violates the holding of *MVMA v. State Farm*, which holds that "an agency changing its course by

[29] 88 FR 827-829, "V. Preliminary Regulatory Impact Analysis."
[30] 88 FR 824.

rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."[31]

2: The Department does not justify its actions under the alternative baseline, which it must do to save the proposal from arbitrariness

The Department correctly identified the 2019 Final Rule as not in effect; its primary baseline, is totally unusable and does not justify the proposed rule, because it presents the 2019 Final Rule as if it were in effect, in contradiction to the plain fact of the matter. The only baseline the Department should use is its "alternative baseline" scenario, which correctly assumes the 2019 Final Rule to be unimplemented. But in the summary of its economic analysis, the Department mentions the alternative baseline only once. Nowhere does the Department claim that the proposed rule is justified under the alternative baseline. Ultimately, the proposed rule clearly relies on the primary baseline alone for justification; the rule fails to be justified under the alternative baseline in any way, let alone in a sufficient way as outlined above.

B. The Proposed Rule greatly underestimates its own costs and fails to consider its reduced benefits compared to the 2019 Final Rule

1: The Department underestimates the impact of the proposed rule

The Department notes in its RIA that it proposes to retain only three aspects of the 2019 Final Rule, namely,

> "(1) the addition to part 88 of statutes including the 2019 Final Rule; (2) several enforcement provisions; and (3) a voluntary notice provision."[32]

Because of this, the Department claims that the costs associated with the rule (under the alternative baseline, which we will use from here on out) are simply the sum of the costs of the preserved portions of the 2019 Final Rule. These are, as listed in the 2019 Final Rule's RIA, the costs of "provisions related to enforcement," estimated at $15 million over five years, and "provisions related to voluntary notices," estimated at $150 million over five years, for a total of $165 million in undiscounted cost.[33] This sum, however, severely underestimates the impact of the proposed rulemaking for three reasons.

First, this calculation leaves out the familiarization costs included in the 2019 Final Rule's RIA, estimated at $135 million. The proposed rule is a change from both the 2019 Final Rule and the 2011 Final Rule which, in the eyes of the Department, is currently "relied" upon. Therefore, the Department cannot reasonably claim that the burden of familiarization with a new rule has been reduced or eliminated. Thus, per the 2019 Final Rule's analysis, an additional

[31] *MVMA v. State Farm*, 42.
[32] 88 FR 828, "Policy Option 2: The Proposed Rule."
[33] We include this cost calculation only because the Department fails to include an undiscounted accounting of costs.

undiscounted cost of $135 million at minimum must be added to the total cost of the proposed rule, bringing the total undiscounted cost to at least $300 million.[34]

Second, the proposed rule excludes, without explanation, the impact of the rulemaking on voluntary remedial efforts. The 2019 Final Rule's RIA states that the Department "anticipate[d] that some recipients will institute a grievance or similar process to handle internal complaints raised to the recipient's or sub-recipient's attention."[35] There is no reason that the proposed rule will not induce such behavior, especially given the heightened public concern over conscience rights since 2019.[36] Thus, an additional undiscounted 5-year cost of $36 million at minimum must be added to the total cost of the proposed rule, for a total of $336 million.[37]

Third, the Department retains from the 2019 Final Rule "the assumption […] that about half of covered entities would provide notices voluntarily."[38] That assumption, however, is not supported by evidence in the 2019 RIA or in the proposed RIA, and there is no reason to think that this assumption will still hold today. Since there has been no implementation of the 2019 Final Rule, and since the litigation surrounding it may have caused confusion among the public, the proportion of covered entities providing notices may well be far higher. Conscience protections have, as we have said, been brought to the forefront of the health care industry recently, so it is likely that more covered entities will feel compelled to provide notices. A more reasonable estimate might be that 100% of covered entities will feel compelled to provide voluntary notices, making the undiscounted cost of voluntary notices double to $300 million, raising the proposed rule's overall undiscounted cost by $150 million, to a total of $486 million.

Ultimately, the discrepancy between our estimate of $486 million in quantifiable cost and the Department's deficient estimate of $165 million is enough to show that the Department has failed to seriously consider the true costs of the proposed rule, contrary to the demands of *Michigan v. EPA*. Ignoring these significant costs is yet another sign of arbitrary and capricious rulemaking on the part of the Department. The Department has failed to even minimally satisfy the APA's directive to "consider[]… the relevant factors" at stake in a rulemaking.[39] The Department's failure to "pay[] attention to the advantages *and* the disadvantages of agency decisions" means that the Department has ultimately failed to supply that which "reasonable regulation ordinarily requires."[40] The Department, as is clear by the above analysis, "entirely failed to consider an important aspect of the problem" in ignoring the several probable

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[34] 84 FR 23240, "Table 6."
[35] 84 FR 23245, "Voluntary Remedial Efforts"
[36] For example, the Google Trends data for the search term "religious exemption" shows a massive increase in interest in conscience rights and conscience exemptions since the May 2019 promulgation of the NPRM and the July 2019 promulgation of the Final Rule. The average search interest for the term over the past twenty weeks (9/25/2022-3/1/2023) was 230% of the interest from 3/1/2019 to the end of July of that year.
[37] 84 FR 23240, "Table 6."
[38] 88 FR 828, "Policy Option 2: The Proposed Rule."
[39] *Michigan v. Environmental Protection Agency, 576 U.S.* 743, 753 (2015).
[40] *Michigan v. EPA*, 753.

quantifiable costs detailed above; it therefore has promulgated an arbitrary and capricious rulemaking.[41]

2: The non-quantifiable benefits of the proposed rule will be greatly reduced compared to the 2019 Final Rule

The Department does not just underestimate the proposed rule's costs; it also overestimates its benefits, failing in any way to examine the extent to which the rescissions and modifications it pursues would reduce the benefits that it claims to deliver.

The 2019 Final Rule promised to deliver several non-quantifiable benefits that outweighed its costs, namely:

> "Compliance with the law; protection of conscience rights, the free exercise of religion and moral convictions; more diverse and inclusive providers and health care professionals; improved provider-patient relationships that facilitate improved quality of care; equity, fairness, nondiscrimination; increased access to care."[42]

Neither the Department nor the courts take issue with any of these. However, the Department does request public comment on:

> "whether the non-quantified impacts identified in the 2019 Final Rule's RIA would likely be realized, absent any further regulatory action; and […] on the extent to which each of the Policy Options, including the proposed rule, would result in comparable impacts."[43]

The Department is correct to consider comments on this issue. Unfortunately, however, it is clearly the case that the proposed rule does not seriously evaluate its own non-quantifiable benefits with reason, and that, if it did, it would find that the proposed rule will not deliver on many of these to any significant extent, and certainly not to the extent that the 2019 Final Rule would have.

The Department does not explicitly analyze the proposed rule's non-quantifiable benefits anywhere in the NPRM. It is not clear how commenters can comment intelligently on the agency's proposed rule when it does not supply, in its NPRM, any concrete affirmation of its belief in the benefits identified by the 2019 Final Rule. In other words, the Department does not provide any evidence that it believes that the benefits of the rulemaking outweigh the costs, instead relying on commenters to supply its logic for it.

We have already shown that the proposed rule will fail to deliver on several of the non-quantifiable benefits that the 2019 Final Rule would have reaped, due to its several destructive modifications and rescissions that weakened the protections of the 2019 Final Rule. Especially notable is the fact that the proposed rule does not address the fact that its weakened provisions will lead to little increase in healthcare availability. Healthcare availability would have been

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[41] *MVMA v. State Farm*, 43.
[42] 84 FR 23227, "Table 1."
[43] 88 FR 829.

increased in situations where a sub-recipient remains in his or her job rather than exiting the labor force because of fear of being compelled to violate conscience. But the typical objector who will remain in or re-enter the market is exactly the type of person who risks facing discrimination because of the proposed rule's addendum, as we described in Section II, *supra*. Therefore, there is little reason to believe that the proposed rule will increase healthcare availability at all.

Additionally, on provider-patient relationships, the proposed rule seems to drive misunderstanding and distrust between providers and patients. As we laid out in Section II, there are many examples in which the addendum could be posted despite the objections of a provider, causing discrimination and mistrust against providers and fomenting confusion among patients concerning the rights and principles of their providers.

C. The Department fails to reasonably evaluate the 2019 Final Rule

1: The Department's own logic implies that the 2019 Final Rule is far less costly than it claims

The Department seems to believe that the assurance and certification requirements of the 2019 Final Rule were "redundant and unnecessary." But if the provisions of the 2019 Final Rule concerning assurance and certification were "redundant and unnecessary," then, following the unrefuted reasoning of the 2019 Final Rule's RIA, "there would likely not be any costs within the first five years of publication" since "entities were already fully taking steps to be educated on, and comply with, all the laws that are the subject of this rule."[44]

If this is true, then the impact of the 2019 Final Rule should be, according to the Department's logic, reduced by the $255.3 million in assurance and certification impact, to a total undiscounted cost of $769.7 million.[45] This is a far lower number than the Department claims the 2019 Final Rule would cost.

The failure to account for this discrepancy in cost of the 2019 Final Rule points to an overall lack of consideration of cost itself: a failure to reasonably meet the demands of *Michigan v. EPA*.

2: The Department denies many of the benefits of the 2019 Final Rule, underestimating the effects of reversal

The proposed rule claims, among other things, that there were concerns that the 2019 Final Rule would decrease access to healthcare. The proposed rule seems to ignore the fact that

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[44] 84 FR 23241.

[45] 84 FR 23240-41 and Author's Calculations. This number is the sum of the annual self-assessment (since entities are easily in-compliance without the Assurance and Certification provisions) of $46.9 million each year, the year-one $14.8 million remedial efforts, the subsequent years' remedial assurance efforts of $1.5 million, and the voluntary remedial efforts of $36 million over 5 years. This sum is subtracted from the 2019 Final Rule's total 5-year cost of $1,061 million.

the 2019 Final Rule shows that it would increase access to healthcare. The 2019 Final Rule RIA states:

> "This rule is expected to remove barriers to the entry of certain health professionals, and to delay the exit of certain health professionals from the field, by reducing discrimination or coercion that health professionals anticipate or experience."[46]

This claim was supported by empirical data. Thus, comments cited in the proposed rule that claim the 2019 Final Rule would decrease access to health care services make little sense: even when measuring only services like abortion or euthanasia to which many health care providers object, it is impossible that more providers remaining in the market reduces absolute availability of such services. That is, the 2019 Final Rule would have increased overall healthcare availability by preventing the exit of objectors from the market. An objecting health care provider may have felt pressured to retire or otherwise exit the market at the prospect of being forced by a hospital or other entity to perform services to which he or she objects. Indeed, many people might have decided to not even enter the health care profession out of fear of having to violate their own consciences. The 2019 Final Rule would have expanded health care access by retaining such people in or adding such people to the health care industry. Since these persons would not have been in the health care sector at all in the absence of the 2019 Final Rule's enforcement of conscience statutes, the level of availability of services to which they objected would not decrease.

The only possible reduction in such services would be due to health care providers exercising conscience rights that they previously did not know existed or that were, contrary to relevant statutes, violated (as may have been the case in some or all of the numerous cases listed in paragraphs 3-5 of the 2019 Final Rule).[47] Obviously any hypothetical reduction caused by the latter is not merely necessary but demanded by the statutory protections Congress authorized. On the former, the Department cannot claim that this effect is undesirable or even avoidable. That is, there is no rational interpretation of statutory protections of conscience rights which claims that such protections should exist, but should be inscrutable, difficult to exercise, dauntingly expensive to act upon, or otherwise hidden.[48]

The Department may counter that the provisions of the 2019 Final Rule are unnecessary toward the end of the enforcement of the law. However, if this were true, then the provisions of the 2019 Final Rule, if put into effect, should result in no additional exercise of conscience rights whatsoever, since all providers who wish to exercise conscience rights would be doing so were the law already known and enforced. In other words, if the provisions are unnecessary, then it must be that the law is sufficiently known, enforced, and usable, such that there should not be

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[46] 84 FR 23246, "4. Estimated Benefits."
[47] See 84 FR 23175-23179, II.A: "Overview of Reasons for the Final Rule."
[48] See, for example, the *Decretals* of Gratian, Distinctio IV C. III: "Laws are instituted when they are promulgated" ("*Leges instituuntur, cum promulgantur*").

any great increase in the exercise of conscience rights and therefore no decrease in healthcare access. Indeed, this argument is present in the 2019 Final Rule:

> "The Department also observed that it was contradictory to argue, as many commenters did, both that the rule would decrease access to care and that the then-current conscience protections for providers were sufficient: If the Department's new rule would decrease access to care because of an increase in providers' exercise of conscientious objections, it would seem that the statutory protections that existed before the regulation did not result in providers fully exercising their consciences as protected by law."[49]

Thus, the Department cannot use the reduction in health care availability to argue that the 2019 Final Rule was too costly or went too far. The Department's evaluation of the 2019 Final Rule is skewed by its failure to understand that non-quantifiable decreases in health care availability were only expected to possibly occur because of increased knowledge of the law or because policies in violation of statutory protections were brought in line with the law. There is no alternative reason given, so the Department has no grounds on which to act on comments requested regarding:

> "Information, including specific examples where feasible, supporting or refuting allegations that the 2019 Final Rule hindered, or would hinder, access to […] health care services, particularly sexual and reproductive health care and other preventive services."[50]

The Department, thus, cannot act on such comments, since they are totally irrelevant to the evaluation of the 2019 Final Rule (and in fact simply prove its necessity).

Respectfully submitted,

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[49] 84 FR 23180, III.A: "General Comments."
[50] 88 FR 826, IV: "Request for Comment."
[51] Affiliation and title provided for identification purposes only; I submit this comment in my personal capacity only, not as an employee of The Heritage Foundation.