

March 6, 2023

To:

Attention: Conscience NPRM, RIN 0945-AA18  
U.S. Department of Health and Human Services, Office for Civil Rights  
Hubert H. Humphrey Building, Room 509F  
200 Independence Avenue SW  
Washington, DC 20201

**Subject: Conscience — Comment on RIN 0945-AA18, “Safeguarding the Rights of Conscience as Protected by Federal Statutes”**

On January 5, 2023, a proposed rule titled “Safeguarding the Rights of Conscience as Protected by Federal Statutes” (RIN 0945-AA18) (hereinafter “proposed rule”) from the Office for Civil Rights (hereinafter “OCR”) within the Office of the Secretary at the U.S. Department of Health and Human Services (hereinafter “Department”) was published in the Federal Register as a notice of proposed rulemaking (88 Fed. Reg. 820-830). The proposed rule proposed to revise and amend Part 88 under Title 45 of the Code of Federal Regulations (45 CFR Part 88) concerning the Department’s rules for ensuring compliance with conscience protection statutes<sup>1</sup> that pertain to certain federal appropriations handled by the Department in making awards, providing reimbursements, or otherwise handled.

The current text of 45 CFR Part 88 (hereinafter “current rule”) was codified from the Department’s final rule “Protecting Statutory Conscience Rights in Health Care; Delegations of Authority” (RIN 0945-AA10) issued on May 21, 2018.<sup>2</sup> The Department is claiming that it has never enforced this rule, however, as the rule was impeded by federal courts before the rule could be implemented.<sup>3</sup> As a result, the Department has continually and to the present day implemented regulations governing the applicability and enforcement of conscience protection statutes according to a final rule “Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws” issued on February 23, 2011 (hereinafter “presently implemented rule”), although with differing standards of interpretation as

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<sup>1</sup> Church Amendments, 42 U.S.C. § 300a-7; Coats-Snowe Amendment (Section 245 of the Public Health Service Act), 42 U.S.C. § 238n; Weldon Amendment, Consolidated Appropriations Act, 2022, Pub. L. 117–103, div. H, title V General Provisions, § 507(d)(1), 136 Stat. 49, 496; Consolidated Appropriations Act, 2022, Pub. L. 117–103, div. H, title V General Provisions, § 209, 136 Stat. 49, 467; Consolidated Appropriations Act, 2022, Pub. L. 117–103, div. K, title VII General Provisions, § 7018, 136 Stat. 49, 604-5; 42 U.S.C. §§ 18023, 18081, and 18113; 42 U.S.C. §§ 1320a-1(h), 1320c-11, 1395i-5, 1395w-22(j)(3)(A)–(B), 1395x(e), 1395x(y)(1), 1395cc(f), 1396a(a), 1396a(w)(3), 1396u-2(b)(3)(A)–(B), 1397j-1(b), and 14406; 22 U.S.C. § 7631(d); 22 U.S.C. § 2151b(f); 42 U.S.C. §§ 280g-1(d), 290bb-36(f), 1396f, 1396s(c)(2)(B)(ii); 42 U.S.C. § 5106i(a); and 29 U.S.C. § 669(a)(5).

<sup>2</sup> Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23170 (codified at 45 C.F.R. pt. 88).

<sup>3</sup> *New York v. U.S. Dep’t of Health & Human Servs.*, 414 F. Supp. 3d 475 (S.D.N.Y. 2019); *City & Cnty. of San Francisco v. Azar*, 411 F. Supp. 3d 1001 (N.D. Cal. 2019); *Washington v. Azar*, 426 F. Supp. 3d 704 (E.D. Wash. 2019).

will be made clear later in this comment.<sup>4</sup> It is this later rule that the Department presently implements despite the fact that it is no longer codified at 45 CFR Part 88.

In this proposed rule, the Department is proposing to eliminate several provisions from 45 CFR Part 88 because the Department claims these provisions are “redundant or confusing” or that “they undermine the balance Congress struck between safeguarding conscience rights and protecting access to health care access” or “because significant questions have been raised as to their legal authorization.” These claims, however, are contrary to fact. Indeed, much of the Department’s proposed rule as well as much of the Department’s reasoning for its proposed changes to 45 CFR Part 88 are illogical, contradictory, arbitrary, or contrary to fact.

### **The Department’s Claim that Certain Provisions of the Current Rule are “redundant or confusing”**

The Department claims that certain provisions from 45 CFR Part 88 are “redundant or confusing,” but the Department never specifies which provisions they believe to be “redundant or confusing.” The proposed rule, if adopted, would eliminate §§88.1, 88.2, 88.3, 88.4, 88.6, 88.8, and 88.9 and would make revisions to all other sections.

One of the sections the Department is proposing to eliminate, §88.2, provides a list of definitions for key terms in the conscience protection statutes. These definitions make very clear how the Department would handle a civil rights complaint alleging discrimination against conscience per the conscience protection statutes. 45 CFR §88.2 makes abundantly clear what entities and individuals the Department, in its compliance with the conscience protection statutes, would apply the conscience protection statutes to as well as to what the Department would or would not treat as a potential violation of federally protected conscience rights. Far from being confusing, this section makes the Department’s application of the conscience protection statutes clear and makes transparent the Department’s processes for responding to civil rights complaints on conscience.

Section 88.2 of the current rule is much more clear and far less confusing than the Department’s proposed rule. The proposed rule does not provide any rules or guidelines for how the Department would apply the conscience protection statutes generally. Seeing as the Department erroneously argues that Congress struck a “careful balance” between protecting conscience rights of healthcare workers and patients’ access to medical services and seeing that the Department erroneously sees its role in applying the conscience protection statutes as “respect[ing] that balance”<sup>5</sup> (see “There is No Legislative Intent to Balance Protecting Conscience Rights and Access to Medical Services” later), the Department’s concomitant proposed elimination of § 88.2 in fact makes the proposed rule quite “confusing.” The Department’s stated intent to balance the conscience protection rights of healthcare workers against patient’s access to medical care, without any rules to clearly layout the process of how such balancing is achieved, is easily subject to the judgement or whims of OCR or some subset of employee(s) working within OCR. In short, it is profoundly unclear what the Department means by “balance” and what this would mean for healthcare entities who file civil rights complaints on the basis of conscience. Since there are no rules governing what this “balance” means in application, complainants can have no surety or confidence that

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<sup>4</sup> Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws, 76 Fed. Reg. 9968 (codified at 45 C.F.R. 88).

<sup>5</sup> Safeguarding the Rights of Conscience as Protected by Federal Statutes, 88 Fed. Reg. 826 (proposed Jan. 5, 2023) (to be codified at 45 C.F.R. pt. 88).

their rights would be protected by the Department, even in cases where such complaints are valid and verifiable. Under the Department's line of thinking, it would be up to the Department's judgment whether or not to pursue a civil rights claim based on whether the Department's judgment, honoring such a claim would not adversely affect access to care.

The lack of rules of procedure or definition of terms in the proposed rule to provide any clarity on what constitutes a civil rights violation on the basis of conscience along with the Department's stated intent to engage in interpretation of the law contrary to the plain language of the conscience protection statutes is "confusing." Under the proposed rule, no citizen could possibly know how the Department would handle any given civil right complaint on the basis of conscience. This leaves ample space for the Department to arbitrarily issue whatever judgement it wants to pursue or dismiss any civil rights complaint on the basis of conscience. Because the Department does not make clear how it will apply the law to civil rights complaints cases along with its stated intent to actively deny civil rights claims in cases where such claims disturb the "careful balance" between conscience rights and medical access, makes the Department's enforcement of the conscience protection statutes utterly arbitrary and capricious. In fact, with the proposed rule along with the Department's intent to balance rights, the Department could choose to deny every civil rights complaint on the basis of conscience on the justification that these complaints disturbed the balance between conscience rights and access to medical care.

To allege that §88.2 in the current rule somehow makes application of the conscience protection statutes "confusing" or that they make the Department's application of these statutes less clear than the proposed rule is utterly illogical. The definitions in §88.2 make the Department's rule more clear, not less clear and they make the rule less confusing, not more. Any suggestion to the contrary is simply false. Therefore, in order to achieve the Department's objective to make the rule less "confusing," the Department should retain the entirety of 45 CFR § 88.2 as it currently appears in the Code of Federal Regulations. The only change to the definitions section the Department should make with respect to 45 CFR § 88.2 is that the definition of "health care entity" for purposes of the Coats-Snowe Amendment (42 U.S.C. § 238n) should be changed to read: "individual physician, a postgraduate physician training program (including a residency training program), and a participant in a program of training in the health professions." This language is supported by the text of 42 U.S.C. § 238n whereas the definition of "health care entity" applicable to this statute in the current rule is not. But all of the other definitions in 45 CFR § 88.2 are supported by the plain language meaning and intent of the conscience protection statutes and should be left as is.

45 CFR § 88.3 enumerates the applicable requirements and prohibitions per each of the conscience protection statutes. This section makes abundantly clear what each of the conscience protection statutes apply to and the prohibitions pertaining to each statute. This section merely provides a faithful restatement of the current conscience protection statutes and provides no novel interpretation or legislating. They simply make clear what the law is and how it is applicable to the Department. According to the United States District Court, Northern District of California in *City & Cnty. of San Francisco v. Azar*, 411 F. Supp. 3d 1001 (N.D. Cal. 2019), these restatements of the conscience protection statutes "remain largely true to the words used by Congress."<sup>6</sup> As 45 CFR § 88.3 simply and accurately restates the applicability, requirements, and prohibitions of federal statutes, certainly the Department is not alleging that this section is "confusing." Perhaps the Department considers this section to be "redundant." However, as will be demonstrated in the section of this comment titled "Is the Proposed Rule Sufficient for Securing Federally Protected Conscience Rights?" later, 45 CFR § 88.3 is necessary for ensuring that the federally protected conscience rights of health care entities are adequately protected.

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<sup>6</sup> *City & Cnty. of S.F. v. Azar*, 411 F. Supp. 3d 1001 (N.D. Cal. 2019).

## **There is No Legislative Intent to Balance Protecting Conscience Rights and Access to Services**

The Department makes a curious and erroneous claim that “Federal health conscience protection and nondiscrimination statutes represent Congress’ attempt to strike a careful balance” “between safeguarding conscience rights and protecting access to health care.”<sup>7</sup> In making this statement, the Department is perhaps drawing upon the district court’s opinion in *City & Cnty. of San Francisco v. Azar* to justify the Department in making this claim. In *City & Cnty. of San Francisco v. Azar*, the United States District Court for the Northern District of California says, “the Court sees that Congress tried to strike a balance between two competing considerations,” but provides no supporting court case, legislative text, Congressional record, or reasoning to support this peculiar claim. The reason for this of course is because no such supporting court precedent, legislative text, Congressional record, or valid legal reasoning exists to justify this claim.

When interpreting federal statutes, it is necessary to interpret the law first according to the plain meaning of the text within the context in which the statute is framed. Definitions of terms in the statute must first resort to how those terms are defined in the statute itself (if such definitions are provided) and then to the plain meaning of the language of the text. When the plain meaning of the language of the text or the clear legislative intent is unclear, one may resort to the Congressional record of when the law was being crafted to glean legislative intent.

The language used in each of the conscience protection statutes are clear. For instance, the Church Amendments at 42 U.S.C. § 300a–7(c) state that:

“No entity which receives a grant, contract, loan, or loan guarantee the Public Health Service Act [42 U.S.C. 201 et seq.], the Community Mental Health Centers Act [42 U.S.C. 2689 et seq.], or the Developmental Disabilities Services and Facilities Construction Act [42 U.S.C. 6000 et seq.] after June 18, 1973, may discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel, or discriminate in the extension of staff or other privileges to any physician or other health care personnel, because he performed or assisted in the performance of a lawful sterilization procedure or abortion, because he refused to perform or assist in the performance of such a procedure or abortion on the grounds that his performance or assistance in the performance of the procedure or abortion would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting sterilization procedures or abortions.”

The language of 42 U.S.C. § 300a–7(c) is unqualified in its guarantee that conscience rights must be protected for healthcare workers who are employed by or enjoy privileges with any entity that receives a federal award per the specified acts. There is no limit, neither explicit nor implied, evident in the Church Amendments on an applicable healthcare worker’s conscience rights under federal awards authorized by these acts. There is no consideration or even mention of any intent on the part of Congress to balance conscience rights against access to medical care. Neither is there any statute in the entire U.S. Code that limits conscience rights of healthcare workers working for or with the federal government or a recipient of a federal award. In fact, in any way limiting conscience rights of healthcare workers would be constitutionally suspect.

Similarly, the Weldon Amendment, in its most current language, states:

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<sup>7</sup> Safeguarding the Rights of Conscience as Protected by Federal Statutes, 88 Fed. Reg. 826 and 825 (proposed Jan. 5, 2023) (to be codified at 45 C.F.R. pt. 88).

“None of the funds made available in this Act may be made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.”<sup>8</sup>

Again, the language of the Weldon Amendment is absolute in its guarantee that health care entities not to be subject to discrimination from the government on account of its unwillingness to provide, pay for, provide coverage for, or refer for abortions. There is no conditioning language of any kind found in the statute, no exemption, exception, or countervailing considerations to take into account. According to the law, these rights are to be guaranteed absolutely, unconditionally, and without regard to any other considerations. Nowhere else in the Consolidated Appropriations Act, 2022 nor anywhere in the entire U.S. Code are these rights superseded or otherwise limited except in rare cases where no exemptions are possible within the context of a medical emergency. Even then, hospitals receiving federal funding are required to maintain adequate accommodations for conscientious objectors in all potentially foreseeable circumstances (including medical emergencies) when drawing their protocols such that any conflict between safeguarding conscience rights and providing access to stabilizing emergency care is exceedingly rare to nonexistent.

This is not only the clear plain meaning of the text of the Weldon Amendment, but also the clear legislative intent. When the Weldon Amendment was first passed by Congress in 2004 as a provision within the Consolidated Appropriation Act, 2005, the Congressional record for the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act, 2005 shows that Rep. Lowey (D-NY) and Rep. Jackson-Lee (D-TX) both raised concerns that the Weldon Amendment would adversely impact access to medical services. Rep. Jackson-Lee, in remarks concerning the Weldon Amendment, said:

“Doctors and health care providers have a duty to ensure that women receive accurate information and appropriate care. Failure to provide this care--even for religious, political or ideological reasons--jeopardizes women's health and violates bedrock principles of medical ethics.”<sup>9</sup>

Rep. Jackson-Lee’s concern echoes the concerns raised by the U.S. District Court for the Northern District of California with the current rule in *City & Cnty. of San Francisco v. Azar* as well as the United States District Court for the Southern District of New York in *New York v. U.S. Dep’t of Health & Human Servs.*, 414 F. Supp. 3d 475 (S.D.N.Y. 2019). But in spite of these objections to the Weldon Amendment raised by two Congressmen, the Consolidated Appropriations Act, 2005 passed the House of Representatives (344-51-1) and in the Senate (65-30) with no change at all to the language of the Weldon Amendment. The Weldon Amendment has been included unchanged in every omnibus appropriations bill passed by Congress since. If Congress had intended to “balance” the safeguarding of conscience protection rights of health care entities against access to medical services, Congress would have put language in the Weldon Amendment stipulating that or at least they would have changed the language of the Weldon Amendment to accommodate these concerns. Rep. Weldon (R-FL) himself made no acknowledgement of Rep. Lowey’s or Rep. Jackson-Lee comments on his amendment nor towards their concerns, but rather made statements reinforcing why he believed the Weldon Amendment was necessary to protect conscience rights of healthcare providers from being forced to participate in providing,

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<sup>8</sup> Weldon Amendment, Consolidated Appropriations Act, 2022, Pub. L. 117–103, div. H, title V General Provisions, § 507(d)(1), 136 Stat. 49, 496.

<sup>9</sup> 150 CONG. REC. H6816-H6817, 105 (daily ed. Sept. 8, 2004) (statement of Rep. Jackson-Lee).

referring for, or paying for elective abortions.<sup>10</sup> There is absolutely nothing in the Congressional record to suggest that Congress intended for the Weldon Amendment to be balanced against patients' access to medical services except in the rare cases of a medical emergency. In fact, the Congressional record shows the opposite: that Congress clearly intended for the Weldon Amendment to protect the conscience rights of health care entities with respect to abortion from any government entity receiving federal funding from the Department of Health and Human Services in spite of concerns of diminished access to medical services from a small minority of Congressmen. Congress did not limit or intend to limit conscience rights. Rather Congress passed the Weldon Amendment unchanged notwithstanding concerns that the amendment could limit patients' access to medical services.

Similar things can be said for all of the conscience protection statutes. None of the conscience protection statutes were intended by Congress to be balanced against any sort of concern for access to medical services. And nothing in federal law contradicts, limits, or circumscribes the full exercise of conscience rights guaranteed by the conscience protection statutes except in rare cases of a medical emergency.

It is also worth noting that few if any of the so-called medical services to which a health care entity could possibly have a religious or moral objection to are in fact necessary, life-preserving, or lifesaving. Many healthcare workers have moral or religious objection to providing, referring for, providing training for, assisting in, or dispensing of drugs for assisted suicide, euthanasia, or medical aid in dying (MAiD). But assisted suicide, euthanasia, and MAiD are never medically necessary and in fact are not even medical services because their end is effect death, not to save a life. There is nothing necessary or even worthy in providing anyone access to assisted suicide, euthanasia, or MAiD so certainly there should be no issue with permitting healthcare entities to refuse to perform such services for moral or religious reasons, even if so many healthcare entities were to refuse as to make access to assisted suicide, euthanasia, or MAiD practically impossible.

Another common example is abortion. But abortion is very rarely (if ever) medically necessary<sup>11</sup> and there are no religious tenants that would forbid a healthcare entity from providing stabilizing care to a pregnant woman at imminent risk of death. There are also no religious tenants that forbid a physician from performing a procedure to remove an ectopic pregnancy. The overwhelming percentage of abortions are carried out by a small subset of physicians. According to one study, 7% of private practice obstetrician-gynecologists in 2015 said they performed abortions.<sup>12</sup> Yet, women seeking abortion are currently not impeded from accessing one for lack of physicians that provide abortion. Removing physicians with moral or religious objections from the pool of physicians available for performing abortion would never adversely affect women's access to abortion. I would challenge the Department to find even one example in which a woman in the United States was unable to find an abortion provider solely because a physician refused to perform an abortion for moral or religious reasons.

Some health care entities have moral or religious objections to providing, assisting in providing, referring for, or providing training for sterilization or contraception. But neither sterilization nor contraception are urgently needed or lifesaving. In fact, they are never medically necessary. The worst any patient would have to do if faced with a situation where his or her doctor or pharmacist refused to provide

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<sup>10</sup> 150 CONG. REC. H6817, 105 (daily ed. Sept. 8, 2004) (statement of Rep. Weldon).

<sup>11</sup> Davenport ML, Is late-term abortion ever necessary? (Issue Brief IF09F01). Family Research Council. Available from: <https://downloads.frc.org/EF/EF09F61.pdf>.

<sup>12</sup> Desai S, Jones RK, Castle K. Estimating abortion provision and abortion referrals among United States obstetrician-gynecologists in private practice. *Contraception*. 2018 Apr 1;97(4):297-302.

contraceptives is that the patient would simply need to find another doctor or pharmacist. There is no justification for weighing a health care entity's right to conscience on sterilization or contraceptives against a patient's access to contraceptives or sterilization. They are not necessary services, and they can be easily obtained from the vast majority of physicians and pharmacists.

Many health care entities have moral or religious objections to performing or assisting in a gender transition surgery or providing puberty blockers or hormones for the purposes of altering a patient's secondary sex characteristics or for the purposes of changing a patient's appearance to align with the opposite sex. These treatments are never medically necessary and are certainly not urgent or lifesaving. Gender transition surgery and gender transition hormonal treatments are quack medicine that do nothing more than mutilate, and in some cases sterilize, the patient. These treatments do not save lives. The medically appropriate way for addressing suicidal ideation, self-harm, and gender dysphoria is through emotional support, psychological therapy, and medication if judged by a physician to be safe and appropriate for the patient to take. There is no evidence that gender transition surgeries or hormonal treatments even reduce the risk for suicide and self-harm. A study using national register including nearly all inpatient psychiatric episodes in Sweden from 1973-2003 found that persons who had received sex reassignment surgery had a 4.9 times greater risk for attempting suicide and a 19.1 times greater risk for committing suicide in any given year than randomly selected controls who had not had sex reassignment surgery.<sup>13</sup> A health care entity can never be compelled to in any way participate in these gender transition treatments, and certainly not when doing so would violate their moral or religious beliefs.

Some health care entities may have moral or religious objections to providing certain vaccines. Vaccines, while medically necessary in many cases and potentially lifesaving, are generally not urgent such that any delay would have serious adverse effects on the patient. There are also ample places to obtain vaccinations such that it would never be necessary to force a health care entity to administer them if such violated their conscience rights.

This about exhausts all possible services health care entities could have a moral or religious objections to providing or assisting in. Any other services that health care entities would have a moral or religious objection to providing would constitute only a small percentage of all healthcare workers and in most cases, would not be urgent and necessary to prevent death or serious physical harm. It is not necessary nor appropriate for the Department to "balance" the safeguarding of conscience rights against patient's access to services. In doing so, the Department would be engaging in making law by reading into the conscience protection statutes a balancing test that does not exist in the statutes and was never intended by Congress.

In a situation where a woman comes to a hospital and the hospital determines that the woman has an emergency medical condition, the statutory requirements with respect to pregnant women of The Emergency Medical Treatment and Labor Act (EMTALA) (42 U.S.C. § 1395dd) are applicable. As clear from the reasoning of the United States District Court for the Southern District of New York in *New York v. U.S. Dep't of Health & Human Servs.*, Congress never intended that the Church Amendments, the Coats-Snowe Amendment, the Weldon Amendment, or the conscience protection provisions in the Patient Protection and Affordable Care Act would leave women in need of immediate lifesaving and stabilizing treatment unable to access the care necessary to save their life or avert or serious physical harm. In *New York v. U.S. Dep't of Health & Human Servs.*, the Department made clear that it was never the Department's intention to ignore or limit the statutory requirements of EMTALA with the current rule. Yet the U.S. District Court wanted the rule to reflect this in writing rather simply relying on

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<sup>13</sup> Dhejne C, Lichtenstein P, Boman M, Johansson AL, Långström N, Landén M. Long-term follow-up of transsexual persons undergoing sex reassignment surgery: cohort study in Sweden. *PLoS one*. 2011 Feb 22;6(2):e16885.

assurances from the Department. Thus, the Department should leave the current rule unchanged as-is (except where otherwise noted in this comment), except the Department should add the following two provisions. This first provision should be added as definitions to the definitions section at 45 CFR § 88.2:

*Emergency hospital* includes a critical access hospital (as defined in 42 U.S.C. § 1395x(mm)(1)) and a rural emergency hospital (as defined in 42 U.S.C. § 1395x(kkk)(2)).

*Emergency medical condition* is a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in placing the health of the individual (or, with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part. With respect to a pregnant woman who is having contractions, an emergency medical condition means that there is inadequate time to effect a safe transfer to another hospital before delivery, or that transfer may pose a threat to the health or safety of the woman or the unborn child.

The second provision should be added to 45 CFR § 88.3:

***The Emergency Medical Treatment and Labor Act, 42 U.S.C. § 1395dd –***

*Any recipient or sub-recipient of federal financial assistance that is either an emergency hospital or a pass-through entity for federal financial assistance to an emergency hospital must comply with all the paragraphs in this section. Any emergency hospital which is a recipient or sub-recipient of federal financial assistance under this part must provide effective accommodations for the exercise of protected conduct, religious beliefs, or moral convictions under this part and whether or not the entity took any adverse action against a protected entity on the basis of protected conduct, beliefs, or convictions before the provision of any accommodation.*

*In fulfilling its compliance with the Emergency Medical Treatment and Labor Act (EMTALA) (42 U.S.C. § 1395dd), an emergency hospital which is a recipient or sub-recipient of federal financial assistance under this part must establish protocols for stabilizing treatment that respect the religious and moral beliefs of any employees who would be involved in providing such stabilizing treatment to a pregnant woman with an emergency medical condition.*

*When a pregnant woman comes to an emergency hospital that is a recipient or sub-recipient of an instrument under this part and the emergency hospital determines that the pregnant woman has an emergency medical condition, if a health care entity has a moral or religious objection to providing or assisting in providing a medical service that is necessary for stabilizing treatment, the emergency hospital should find another qualified health care entity working at the same emergency hospital who does not have moral or religious objections to providing the necessary stabilizing treatment to perform such stabilizing treatment. The said emergency hospital must ensure that it has sufficient staff to provide stabilizing treatment per the statutory requirements of EMTALA at any time.*

These new provisions should satisfy the District Court insofar as it had concerns with the current rule conflicting with EMTALA. The addition of these provisions along with retaining the whole of 45 CFR §§ 88.2 and 88.3 will provide assurance to health care entities that their conscience rights will be protected and will provide clarity and transparency in how the Department handles civil rights complaints on the basis of conscience. It will also make clear to federal, state, and local government recipients of federal funds as well as nongovernmental recipients of federal funds that they are required to abide by the statutory requirements of the conscience protection statutes. However, the addition of these two provisions mentioned above are only appropriate if the Department retains the current text in 45 CFR §§



88.2 and 88.3. The Department must not include these two provisions pertaining to EMTALA shown above if 45 CFR §§ 88.2 and 88.3 are excluded from the Department's final rule. Deleting 45 CFR §§ 88.2 and 88.3 from the current rule while adding provisions about applicability to EMTALA would substantially harm health care entities conscience rights as it would signal to recipients of federal funds that the Department is primarily concerned with limiting conscience rights and that the Department has little concern for safeguarding conscience rights. It would further leave recipients and sub-recipients in the dark as to what their conscience rights (or the conscience rights of their employees) are, which in turn would make it more difficult for health care entities to secure their statutorily guaranteed conscience rights.

### **The Proposed Rule Would Reduce Patient Access to Medical Services**

The Department has asked for comments and information about whether or not the current rule would hinder access to information and health care services, particularly sexual and reproductive health care and other preventative services.

The current rule would not hinder access to information or health care services in any way that is contrary to federal law. Federal law stipulates that health care entities are guaranteed protection of conscience rights as specified in the conscience protection statutes. The conscience protection statutes and 45 CFR §§ 88.2 and 88.3 are clear in their guarantee that health care entities, recipients and sub-recipients of certain federal funding, and the workforce of these are to be, without exception, secure in exercising their rights of conscience. Failure to secure conscience rights for health care entities per the conscience protection statutes is against federal law. Thus, the Department cannot for any reason limit health care entities' conscience rights per the conscience protection statutes except insofar as absolutely necessary and unavoidable per the proposed section on EMTALA to be added to 45 CFR § 88.3 shown above. That means that the Department cannot in any way limit conscience rights for health care entities for the purposes of improving access to sexual and reproductive health care services or information or services or information for other preventative services. If the current rule does in fact hinder access to sexual and reproductive health care services or information, the Department cannot use this as a premise to in any way limit the scope of applicability of the conscience protection statutes as doing so would be contrary to federal law.

Even still, the current rule does not hinder access to information or health care services. To the contrary, the current rule codified at 45 CFR Part 88 protects the conscience rights of doctors, nurses, and other health care providers, thereby enabling such health care providers to work in their profession and industry without fear of retribution, reprisal, or discrimination on account of their moral or religious principles.

Surveys of physicians on their views on abortion and their willingness or unwillingness to perform, counsel, or refer for abortion tend to have a high nonresponse rate. But one study of primary care physicians with a 29% response rate found that about 36% of primary care physicians sampled at least sometimes advised their patient against seeking an abortion when the patient was seeking an abortion and 14% said they always or mostly advised patients against abortion.<sup>14</sup> In the same study, approximately 29% of primary care physicians said they would never offer up abortion as an option in situations where a woman is unsure if she wants to continue her pregnancy.<sup>15</sup> According to another study of physicians

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<sup>14</sup> Holt K, Janiak E, McCormick MC, Lieberman E, Dehlendorf C, Kajeepeta S, Caglia JM, Langer A. Pregnancy options counseling and abortion referrals among US primary care physicians. *Fam Med.* 2017 Jul;49:527-36.

<sup>15</sup> *Ibid.*

surveyed at one Wisconsin academic medical center (67% response rate), just under two-thirds of physicians said that they were willing to consult in abortion services,<sup>16</sup> which means that there is a significant minority that would not be willing to. Among obstetrician-gynecologists in particular, according to one study with a 65% survey response rate, 12% of obstetrician-gynecologists said that they do not provide abortions or abortion referrals for moral, religious, ethical, or health reasons.<sup>17</sup> On the issue of assisted suicide, only 40% of physicians in Victoria, Australia said they were willing to participate in assisted suicide counseling or referral.<sup>18</sup> On the issue of gender-affirming hormone treatment for transgender patients, a 2018 study of physicians and residents at a large integrated Midwestern health system (51% response rate) found that only half of physicians were willing to continue a gender-affirming hormone treatment for a transgender patient that had been initiated by another physician.<sup>19</sup>

Keeping the current rule at 45 CFR part 88 intact without recissions would protect the conscience rights of these physicians who would be unwilling to participate in the performance of, counseling for, or referral for these aforementioned services. The proposed rule, on the other hand, would seek to weigh the federally protected conscience rights of these physicians against whatever “information” the Department is obtaining through this irrelevant inquiry. Due to its lack of specifics or any description of what “balancing” conscience rights against patient’s access to services entails, the Department’s handling of civil rights complaints on the basis of conscience can be none other than arbitrary. The proposed rule as written leaves ample room for the Department to decide that all or most civil rights complaints on the basis of conscience are upsetting to the balance of rights and access. Thus, the proposed rule as written could force out of their profession physicians with moral or religious objections to providing certain services the Department arbitrarily sees as necessary to maintain adequate patient access. The scale at which this could occur depends on how the Department exercises arbitrary discretion to ignore civil rights complaints on the basis of conscience for the sake of maintaining patient access, but at its worst, the proposed rule could reduce the number of practicing physicians in the United States by up to the percentages in the aforementioned papers. The Department’s proposed rule then has the potential to severely reduce the number of physicians working in their profession. This has the potential to reduce patients’ access to noncontroversial and necessary medical care as the physicians who otherwise could have helped them could be forced out of practice due to a lack of adequate safeguards on their moral or religious conscience rights. It is the Department’s proposed rule then, not the current rule codified at 45 CFR Part 88, which threatens to limit patient access to necessary medical services.

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<sup>16</sup> Physician attitudes about abortion at a Midwestern academic medical center. *Health & Medicine Weekly*. 2020 May 29; 3788.

<sup>17</sup> Desai S, Jones RK, Castle K. Estimating abortion provision and abortion referrals among United States obstetrician-gynecologists in private practice. *Contraception*. 2018 Apr;97(4):297-302. doi: 10.1016/j.contraception.2017.11.004. Epub 2017 Nov 21. PMID: 29174883; PMCID: PMC5942890.

<sup>18</sup> Sellars M, Tacey M, McDougall R, Hayes B, Pratt B, Hempton C, Detering K, Aldrich R, Benson M, Kirwan J, Gold M. Support for and willingness to be involved in voluntary assisted dying: a multisite, cross-sectional survey study of clinicians in Victoria, Australia. *Internal medicine journal*. 2021 Oct;51(10):1619-28.

<sup>19</sup> Shires DA, Stroumsa D, Jaffee KD, Woodford MR. Primary care providers’ willingness to continue gender-affirming hormone therapy for transgender patients. *Family practice*. 2018 Oct;35(5):576-81.

### **Should Posting a Nondiscrimination Notice per 45 CFR § 88.5 be Mandatory?**

Yes, recipients, sub-recipients, and other awardees of federal funds to which the conscience protection statutes are applicable to should be required to post the notice text per 45 CFR § 88.5. Mandatory posting of a notice of rights under the conscience protection statutes would significantly improve health care entities' awareness of their rights under federal law and would keep recipients, sub-recipients, and federal, state, and local government involved with such federal awards accountable. The cost and burden of imposing this requirement on recipients and sub-recipients is next to nothing as they are already required by the Department of Labor to post similar notices for other purposes.

It is unclear where the Department gets its idea that the current rule “impl[ies] that covered entities can substantively comply with the underlying statute by simply posting a notice.”<sup>20</sup> The current rule makes no such implication. To the contrary, the current rule states that

“In investigating a complaint or conducting a compliance review, OCR will consider an entity's voluntary posting of a notice of nondiscrimination as non-dispositive evidence of compliance with the applicable substantive provisions of this part.”<sup>21</sup>

Since an entity's posting of a notice of nondiscrimination is considered non-dispositive evidence, by definition, that means that the Department will not consider a covered entity to be in compliance substantively simply by posting a notice of non-discrimination. The Department has clearly erred in its reasoning that removing the mandatory requirement to post the nondiscrimination notice per 45 CFR § 88.5 provides for a more expansive guarantee of rights. To the contrary, the Department's move to eliminate the mandatory requirement to post the nondiscrimination notice per 45 CFR § 88.5 substantially harms health care entities who, as a result of the proposed rule (if adopted), will be less aware of how to exercise their federally protected conscience rights.

Furthermore, the Department should replace the model text in Appendix A to Part 88 “Notice of Rights Under Federal Conscience and Nondiscrimination Laws” in the proposed rule with the model text in Appendix A to Part 88 “Notice of Rights Under Federal Conscience and Anti-Discrimination Laws” in the current rule codified at 45 CFR Part 88. The model text of the current rule is more specific and informative to a non-attorney who is unfamiliar with the U.S. Code citations referencing the conscience protection statutes or with the legal interpretation of the text of these statutes. The model text in the proposed rule greatly diminishes health care entities' awareness of their federally protected conscience rights as it is not at all clear from the model text what these conscience protection statutes pertain to. With the model text in the proposed rule, the Department is asking health care entities to play the role of an attorney by digging up these statutes on their own, figuring out what they mean without assistance, and deciding for themselves whether they are applicable to them. The role of OCR is to make it easier for individuals to secure their rights under federal law, not more difficult. The Department's proposed rule makes it more difficult for individuals to secure their rights under the conscience protection statutes. Moreover, the model text in the proposed rule is unclear as what the conscience protection statutes pertain to and, as a result, we can expect that OCR will receive more extraneous complaints alleging discrimination against conscience not supported by law. This in turn will waste more of OCR's time and resources in dealing with extraneous complaints and will add costs to implementing the proposed rule which the Department has failed to take into account.

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<sup>20</sup> Safeguarding the Rights of Conscience as Protected by Federal Statutes, 88 Fed. Reg. 825 (proposed Jan. 5, 2023).

<sup>21</sup> Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 45 C.F.R. § 88.5 (2023).

By contrast, the model text in Appendix A to Part 88 “Notice of Rights Under Federal Conscience and Anti-Discrimination Laws” in the current rule codified at 45 CFR part 88 very succinctly, very generally, and very accurately describes what discrimination per the conscience protection statutes may potentially constitute. The model text in the current rule mentions examples of services to which the conscience protection statutes apply such as abortion and assisted suicide which are both mentioned explicitly in the law and are likely some of the most common causes for discrimination on the basis of conscience.

### **Is the Proposed Rule Sufficient for Securing Federally Protected Conscience Rights?**

No. The proposed rule contains numerous loopholes and leaves ample space for arbitrary and capricious enforcement of the conscience protection statutes by the Department. By rescinding the definitions and the applicable requirements and enforcement sections under 45 CFR §§ 88.2 and 88.3, the proposed rule introduces confusion and makes unclear how the Department will enforce the conscience protection statutes. The Department’s further stated aim to “balance” federally protected conscience rights against access to services without any rules of applicability or definitions of terms as found in 45 CFR §§ 88.2 and 88.3 makes the Department’s proposed rule arbitrary and capricious.

The presently implemented rule (the 2011 Rule) is grossly insufficient for safeguarding federally guaranteed conscience rights. On August 28, 2019, the Department issued a Notice of Violation in OCR Transaction No. 306427 against the University of Vermont Medical Center (UVMCMC) for violating the Church Amendments.<sup>22</sup> According to the Department, UVMCMC had violated federal law by forcing a nurse to participate in an abortion against her religious-based objections and had maintained an inadequate "Conflict of Care" policy. The Department had correctly made the determination to issue to issue a Notice of Violation based on the correct premise that the Church Amendments create an unconditional and unqualified right to conscience for health care entities to refuse to participate in any way in a service that violates their moral or religious beliefs. The Department was able to arrive at this conclusion based on the reasoning behind the standard of enforcement it had set forth in the current rule codified at 45 CFR Part 88. This shows how the current rules under 45 CFR Part 88 are effective in ensuring the federal conscience protection statutes are properly enforced and that the current rule adequately ensures health care entities’ federally protected conscience rights are secured.

Yet, on July 30, 2021, the Department announced that it had voluntarily withdrawn its Notice of Violation against UVMCMC, claiming that the Notice of Violation had been issued under a standard of interpretation of the Church Amendments that

“departed from the burden shifting Title VII framework by requiring employers to allow employees to decline to participate in procedures, even if it would constitute an undue hardship to the employer, and even if the employer offered a reasonable religious accommodation.”<sup>23</sup>

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<sup>22</sup> Letter from Roger T. Severino, Director, Office for Civil Rights, U.S. Department of Health and Human Services and Luis E. Perez, Deputy Director, Conscience and Religious Freedom Division, U.S. Department of Health and Human Services to [Redacted], McDermott Will & Emery LLP (Aug. 28, 2019) “Re: OCR Transaction Number 18-306427.”

<sup>23</sup> Letter from Robinsue Frohboese, Acting Director and Principal Deputy, Office for Civil Rights, U.S. Department of Health and Human Services to David Quinn Gacioch, Esq., McDermott Will & Emery LLP (Jul. 30, 2021) “RE: OCR Transaction Number 18-306427.”

The Department points to *New York v. U.S. Dep't of Health & Human Servs.* as the reason for making this claim that the current rule departs from the Title VII framework. However, the District Court in *New York v. U.S. Dep't of Health & Human Servs.* was wrong in its reasoning about the Title VII framework's applicability to the current rule. The current rule at 45 CFR Part 88 imposes no undue hardship on employers under any circumstance. There are no circumstances where the employer of a protected health care entity under the conscience protection statutes would be suffering undue burden as a result of honoring that health care entity's conscience rights under the law. In the worst case scenario, the employer would simply have to find another willing health care entity to provide the service or the employer would simply have to not offer that service. As made clear above (in section titled "There is No Legislative Intent to Balance Protecting Conscience Rights and Access to Medical Services") none of the services to which a health care entity could object to on moral or religious grounds are medically necessary or not easily obtainable at another healthcare facility.

UVMMC's actions with respect to forcing a nurse under its employment to assist in performing an abortion against the employee's religious beliefs is a clear, flagrant, and egregious violation of the Church Amendments. Yet under the rules of interpretation that the Department is presently operating under, even UVMMC's clear and egregious violation of federal conscience protection statutes is inadmissible for remediation or for enforcement mechanisms to take effect. As such, under the rules of interpretation that the Department is presently operating under (including the Department's position on the applicability of Title VII with respect to the conscience protection statutes) there is no conceivable situation in which the Department would provide meaningful remediation or restitution for any health care entity submitting a civil rights complaint per their conscience rights under the conscience protection statutes. In effect, the Department's presently implemented rule secures no conscience rights for health care entities. The message health care entities can take away from the Department's voluntary dismissal of the Notice of Violation against UVMCC is that they have no conscience rights under the current administration. This is a severe dereliction of duty on the part of the Department.

The Department's proposed rule does nothing to alter or diminish the concerns persons of faith and conscience have with the Department's current standard of interpretation of the conscience protection statutes. Nothing in the proposed rule would have produced a different outcome in the UVMMC case. Under the proposed rule, the Department still would have voluntarily withdrawn its Notice of Concern against UVMMC had the proposed rule been in force at the time. The reason for this is because the proposed rule does not in any way define or specify the Department's standard of interpretation of the conscience protection statutes. The current rule under 45 CFR part 88 does, however. If the definitions and applicable requirements and prohibitions sections of the current rule at 45 CFR §§ 88.2 and 88.3 were retained and included in the Department's final rule, the problems with the Department's enforcement of the conscience protection statutes would be solved. As mentioned above, it was the reasoning and standard of interpretation behind the current rule that made it possible in the first place for the Department to issue a Notice of Violation against UVMMC in the first place. As a result, the Department should retain the definitions and applicable requirements and prohibitions sections of the current rule at 45 CFR §§ 88.2 and 88.3 and leave them as they are.

Another example that illustrates how the 2011 Rule and the proposed rule fail to adequately protect the conscience rights of health care entities is the Department's response (under the present standards of interpretation) towards a clear and obvious violation of the Weldon Amendment when the State of California in 2014 mandated all health insurance providers offering health insurance plans within the state to provide coverage for elective abortion. The Weldon Amendment prohibits any funding authorized under the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act to

“be made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.”<sup>24</sup>

The Weldon Amendment defines a health care entity as inclusive of

“an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan.”<sup>25</sup>

On August 22, 2014, the California Department of Managed Health Care (DMHC) sent a letter to the seven health insurance providers operating in California at the time, instructing them to provide coverage for elective abortion in all the health insurance plans they provide in the state as DMHC claimed was required by California state law. In doing so, the State of California subjected multiple insurance plans in the state (the Weldon Amendment defines a health care entity as “a health insurance plan”) to discrimination on the basis that those health insurance plans did not pay for or provide coverage for abortion. Even though the health insurance companies voluntarily complied with DMHC’s letter, the State of California clearly discriminated against these health plans as the State threatened to take adverse action against health plans on the sole basis that they did not provide coverage for abortion. Under the Weldon Amendment, the State of California is ineligible for federal funding under the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act so long as they enforce any state law or policy to prohibit health insurance plans that do not provide coverage for abortion from operating within their state.

On June 21, 2016, the Department erroneously concluded under its 2011 Rule that the State of California was not in violation of the Weldon Amendment despite prohibiting any health plans that do not provide coverage for abortion from operating within their state. The Department falsely claimed that the Weldon Amendment does not apply to the California health insurance plans in question because none of the complainants who filed civil rights complaints with OCR on this situation were “health care entities” under the Weldon Amendment. But nowhere in federal law does it stipulate who or what kinds of entities have a right to notify OCR of a violation against the Weldon Amendment. The consequences of the State of California’s actions to discriminate against health insurance plans that do not provide coverage for abortion clearly adversely affected the complainants, so they have standing to bring a complaint to OCR when such adverse effects are caused by actions which are contrary to federal law. The fact that the complainants were not “health care entities” is immaterial because the State of California engaged in discrimination against health insurance plans in their state on account of them not providing coverage for abortion. A health insurance provider need not object to providing coverage for abortion for a violation of the Weldon Amendment to occur. Discrimination exists even when those discriminated against are willing parties to the act of discrimination. The Weldon Amendment is clear that no state receiving federal funding under the Departments of Labor, Health and Human Services, and Education, and Related Agencies Appropriations Act should discriminate against any health care plan full stop.

The Department also falsely claimed that the Weldon Amendment only protects health care entities that claim a religious or moral objection to abortion. Yet the language of the Weldon Amendment is clearly

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<sup>24</sup> Weldon Amendment, Consolidated Appropriations Act, 2022, Pub. L. 117–103, div. H, title V General Provisions, § 507(d)(1), 136 Stat. 49, 496.

<sup>25</sup> *Ibid.*

unconditional and unqualified in its guarantee of the rights of health care entities not to be subject to discrimination on account of not providing coverage for abortion.

Under the unconditional standard of interpretation of conscience rights encapsulated in the current rule at 45 CFR Part 88, however, the Department changed its position towards the California health insurance plan abortion coverage mandate. On January 24, 2020, the Department found the State of California to be in violation of the Weldon Amendment.<sup>26</sup>

But when the Department adopted its present standard of interpretation after *New York v. U.S. Dep't of Health & Human Servs.*, 414 F. Supp. 3d 475 (S.D.N.Y. 2019), *City & Cnty. of San Francisco v. Azar*, 411 F. Supp. 3d 1001 (N.D. Cal. 2019), and *Washington v. Azar*, 426 F. Supp. 3d 704 (E.D. Wash. 2019), it found that the State of California was not violation of the Weldon Amendment despite no change in policy from the State of California. The Department again falsely claims that the complainants in this case are not “health care entities” despite the fact of the matter that the State of California clearly discriminated against health insurance plans which are “health care entities” under the Weldon Amendment.

The proposed rule as written would not have any effect in rectifying the Department’s erroneous interpretation of the Weldon Amendment with respect to the California health insurance plan abortion coverage mandate. The proposed rule does not make clear or even take the position that conscience rights are unconditional and unqualified under the conscience protection statutes. There are no definitions of terms, enumerated prohibitions, or rules of applicability contained in the proposed rule that would prevent the Department from arriving at erroneous interpretations of federal law as in the case of UVMMC and the California health insurance plan abortion coverage mandate. In contrast, 45 CFR § 88.3(c)(2) of the current rule makes clear that the Weldon Amendment applies to discrimination against “any institutional or individual health care entity” (such as a health insurance plan) “on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for, abortion.”<sup>27</sup>

As is clear, neither the 2011 Rule nor the Department’s proposed rule are adequate for securing health care entities conscience protection rights as unconditionally guaranteed by the conscience protection statutes. On the other hand, the current rule codified at 45 CFR Part 88 does effectively secure health care entities conscience protection rights in compliance with federal law. Therefore, the Department should rescind its proposed rule and instead retain the current rule at 45 CFR Part 88 in full.

## **Cost Considerations**

The Department in its analysis of cost in its preliminary regulatory impact analysis for the proposed rule, the 2011 Rule (the presently implemented rule) and the current rule codified at 45 CFR part 88 has failed to take into account the cost savings the Department would incur under the current rule by cutting funding to entities that violate the conscience protection statutes. In the case where the Department cut funding to the State of California on account of its violation of the Weldon Amendment by discriminating against

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<sup>26</sup> Letter from Roger T. Severino, Director, Office for Civil Rights, U.S. Department of Health and Human Services and Luis E. Perez, Deputy Director, Conscience and Religious Freedom Division, U.S. Department of Health and Human Services to Xavier Becerra, Attorney General of the State of California (Jan. 24, 2020) “Notice of Violation — OCR Transaction Numbers 17-274771 and 17-283890.”

<sup>27</sup> Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 45 C.F.R. § 88.3(c)(2) (2023).

health insurance plans that did not provide coverage for abortion, the Department, per the statutory requirements of the Weldon Amendment, withheld “\$200,000,000 every quarter, for an annual disallowance total of \$800,000,000, until the State complied with the Weldon Amendment.”<sup>28</sup> This is a considerable cost savings that the Department has clearly failed to take into account.

Respectfully Submitted,

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The Heritage Foundation<sup>29</sup>

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<sup>28</sup> Letter from Robinsue Frohboese, Acting Director and Principal Deputy, Office for Civil Rights, U.S. Department of Health and Human Services to Rob Bonta, Attorney General of the State of California (Aug. 13, 2021) “Re: OCR Transaction Numbers 17-274771 and 17-283890.”

<sup>29</sup> Affiliation information provided solely for informational purposes; I submit this comment in my personal capacity.