

Date: March 6, 2023

To: Secretary Javier Becerra
Department of Health and Human Services

In response to: Proposed Rule “Safeguarding the Rights of Conscience as Protected by Federal Statutes”

Reference: RIN 0945-AA18

Dear Secretary Becerra:

This correspondence is submitted in response to the Office for Civil Rights at the Department of Health and Human Services’ request for comment regarding the proposed rule “Safeguarding the Rights of Conscience as Protected by Federal Statutes,” at 88 Fed. Reg 820 (January 5, 2023).

The proposed rule would, among other things, reverse a 2019 rule promulgated by the previous administration “to ensure vigorous enforcement of Federal conscience and anti-discrimination laws applicable to the Department, its programs, and recipients of HHS funds, and to delegate overall enforcement and compliance responsibility to the Department’s Office for Civil Rights (“OCR”).”¹

In contrast, this new proposed rule would gut the 2019 rule’s enforcement provisions, remove critical definitions and explanations of what constitutes discrimination or violations, allow OCR to not respond to complaints at all, allow for informal, non-binding resolutions, and more.

The Heritage Foundation’s support for the objectives of the 2019 rule and opposition the Administration’s attempts to resist the recent Dobbs decision is a matter of public record. Because the Department’s current proposed rule would roll back meaningful, robust protections for Americans civil rights, this comment respectfully writes in opposition to the proposal.

Background on Administrative Enforcement of Conscience Rights

The freedom to live in accordance with one’s conscience is a fundamental principle of American life. Robust conscience protections in the context of health care safeguard the rights of individuals and entities to dissent on morally sensitive issues.

Congress has rightly protected these rights, based on both religious beliefs and moral convictions, for over four decades. These protections allow for the expression of a diversity of

¹ See: U.S. Department of Health and Human Services, “Protecting Statutory Conscience Rights in Health Care; Delegations of Authority,” Final Rule, at 45 CFR Part 88 (May 21, 2018).

values in health care while ensuring that individuals and entities are not compelled to participate in practices that violate their sincere moral, ethical, or religious convictions.

Laws that protect rights of conscience in the context of health care include – but are not limited to – the Church Amendments, the Coats–Snowe Amendment, and the Weldon Amendment.³

Following *Roe v. Wade* in 1973, which effectively legalized abortion on demand nationwide, policymakers recognized the need to protect conscience rights.

Later that year, Senator Frank Church (D–ID) offered four amendments that were included in the Public Health Service Act (PHSA). Known collectively as the Church Amendments, they protect moral and religious objectors in the context of health care.² Those amendments:

- Ensure that entities (such as hospitals) or individuals that receive certain federal funds do not require participation in abortion and sterilization procedures;
- Prohibit employment discrimination on the basis of unwillingness (or willingness) to participate in the performance of abortion or sterilization;
- Provide a general conscience protection for individual performance or assistance in programs or activities funded by the U.S. Department of Health and Human Services (HHS); and
- Prohibit entities receiving federal grants from discriminating against applicants who object to participating in the performance of abortion or sterilizations.

For more than 40 years, the Church Amendments have offered meaningful protection to moral and religious objectors. Their inclusion in the PHSA was bipartisan; in fact, they passed in the Democrat-controlled Senate and the Democrat-controlled House of Representatives.³

In 1996, Congress added another conscience protection to federal law: the Coats–Snowe Amendment to the PHSA.⁴ The amendment, which was included in a fiscal year (FY) 1996 appropriations bill, prohibits local, state, and federal governments from subjecting a health care entity to discrimination if the entity will not train, provide, or refer for abortions. Like the Church Amendments, the Coats–Snowe Amendment received bipartisan support in both houses of Congress.⁵

In 2004, Congress enacted yet another conscience protection. The Weldon Amendment, a provision first included in the FY 2005 appropriations bill, stipulates that no funds appropriated under the appropriations bill can go to a federal, state, or local government if it discriminates

² 42 U.S.C. §300a-7(b)–(e)

³ Public Health Service Act Extension, Public Law 93–45 (1973), <https://www.congress.gov/bill/93rd-congress/senate-bill/1136?q=%7B%22search%22%3A%5B%22S.+1136%22%5D%7D&r=1>

⁴ 42 U.S.C. §238n

⁵ Omnibus Consolidated Rescissions and Appropriations Act of 1996, Public Law 104–134, <https://www.congress.gov/bill/104th-congress/house-bill/3019?q=%7B%22search%22%3A%5B%22H.R.+3019%22%5D%7D&r=1>

against a health care entity that will not perform, cover, refer, or pay for abortion. The amendment protects a wide range of entities, including physicians, medical specialists, nurses, hospitals, and health insurance plans.

Unlike the Coats–Snowe and Church Amendments, the Weldon Amendment does not amend the PHSA and is not codified in federal law. Rather, it is a provision that was first included in the FY 2005 Labor–HHS appropriations bill and has been included or referenced annually in subsequent appropriations bills.⁶

The mere existence of conscience protection statutes does not mean that violations don't occur. Regrettably, administrations have lacked the adequate enforcement tools to address complaints of discrimination.

In the waning weeks of President George W. Bush's second term, the Administration issued a conscience protection regulation. It protected the conscience rights of health care providers by ensuring that HHS funds did not support morally coercive or discriminatory practices or policies in violation of federal law, pursuant to the Church Amendments, the Coats–Snow Amendment, and the Weldon Amendment.⁷ In order to ensure that recipients of HHS funds knew about their legal obligations under these federal health care conscience protection laws, the HHS required written certification that recipients would comply with the terms of the Church, Coats–Snowe, and Weldon Amendments. The rule also defined certain key terms and assigned responsibility for complaint handling and investigation to the HHS's Office for Civil Rights and program offices.

Just months later, in March 2009 the Obama Administration announced plans to roll back these conscience protections, in part to ensure the HHS's "consistency with current Administration policy."⁸ In February 2011, the Obama Administration issued a final rule that rescinded much of the 2008 rule, including clarifications that would have helped in interpreting and enforcing long-standing federal statutes protecting the conscience rights of health care providers and the requirement that recipients of federal funds certify compliance with those statutes.⁹

Without clear and specific ways for HHS to enforce conscience protection policies, someone's only recourse was to file a complaint with the HHS Office for Civil Rights if they felt they'd been

⁶ Consolidated Appropriations Act of 2005, Public Law No. 108–447, <https://www.congress.gov/bill/108th-congress/house-bill/4818>

⁷ U.S. Department of Health and Human Services, Office of the Secretary, "Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law," December 2008, pp. 78071–78101, <https://www.gpo.gov/fdsys/pkg/FR-2008-12-19/html/E8-30134.htm>

⁸ U.S. Department of Health and Human Services, Office of the Secretary, *Rescission of the Regulation Entitled "Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law"*, March 2009, pp. 10207–10211, <https://www.federalregister.gov/documents/2009/03/10/E9-5067/rescission-of-the-regulation-entitled-ensuring-that-department-of-health-and-human-services-funds-do>.

⁹ U.S. Department of Health and Human Services, Office of the Secretary, "Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws," February 2011, pp. 9968–9977, <https://www.gpo.gov/fdsys/pkg/FR-2011-02-23/pdf/2011-3993.pdf>

discriminated against. Unfortunately, OCR had a poor track record of moving quickly – if at all – on such complaints.¹⁰

That status quo was unacceptable. In 2018, the Trump administration established a Conscience and Religious Freedom Division within OCR dedicated to protecting these important rights.¹¹ It also finalized a regulation providing the new division with additional enforcement tools in 2019.¹² These ensured that those who receive HHS funding fully comply with all federal conscience statutes. It also ensured that violations could be swiftly investigated and fixed. The 2019 rule was a significant improvement and demonstrated the previous administration's commitment to protect Americans' civil rights.

Now, HHS proposes to roll back the conscience regulation. The new one would gut enforcement provisions, remove critical definitions and explanations of what counts as discrimination or violations, allow OCR to not respond to complaints at all, allow for informal, non-binding resolutions, and more.

Conscience rights in the context of health care should not be treated as “less-than.” HHS is effectively proposing to turn back the clock. Once again, Americans would have to rely on a (potentially hostile) government bureaucrat to investigate, much less act on, a complaint that their civil rights have been violated.

The administration's attempts to resist the *Dobbs* decision and prioritize its policy goal of abortion on-demand for any reason, paid for by taxpayers, simply does not – and cannot – override conscience civil rights statutes.

Proposed Rule Lacks Adequate Enforcement Mechanisms

Under the 2019 Conscience Rule, HHS is required to investigate complaints. For example, if the Office of Civil Rights (OCR) found a violation, they are required to take appropriate action. Notably, this was not an optional, permissive framing that HHS could engage in. Instead, the rule required appropriate action on the part of HHS in response to complaints. The rule outlined complaint remedies in detail and included possible penalties.

¹⁰ Leah Jessen, Obama Administration Refuses to Enforce 'Right of Conscience,' Legal Group Says, The Daily Signal, July 1, 2016, <https://www.dailysignal.com/2016/07/01/obama-administration-refuses-to-enforce-right-of-conscience-legal-group-says/>

¹¹ Press Release, “HHS Announced New Conscience and Religious Freedom Division, Office for Civil Rights, January 18, 2018, <https://public3.pagefreeser.com/browse/HHS.gov/31-12-2020T08:51/https://www.hhs.gov/about/news/2018/01/18/hhs-ocr-announces-new-conscience-and-religious-freedom-division.html>

¹² Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 FR 23170, May 21, 2019, <https://www.federalregister.gov/documents/2019/05/21/2019-09667/protecting-statutory-conscience-rights-in-health-care-delegations-of-authority>

We applaud the proposed rules' inclusion of the conscience regulations identified in the 2019 rule and their possible enforcement by OCR. This is an improvement from the 2011 proposed rule and ensures that the OCR has the authority to investigate violations. Still, the 2023 proposed rule limits OCR's authority to enforce conscience and religious freedom protections, rendering it insufficient.

Without strong enforcement mechanisms, the 2023 proposed rule will ultimately return to a "may enforce" regime, rather than a "shall enforce" regime. This occurs through several changes in the 2023 proposed rule. First, the rule removes the requirement for detailed explanations in complaint reporting. Second, it removes the complaint referral to the Department of Justice. Third, the department does not provide an assurance of compliance. Fourth, the proposed rule does not include a penalty or enforcement mechanism for those who fail to respond to a complaint.

To improve the 2023 proposed Rule and ensure it can uphold the values and regulations that it purports to do, the department must include stronger enforcement mechanisms, in line with those outlined in the 2019 Rule.

Rule Needs Formal Means of Resolution, not Informal

As discussed above, the Church Amendments, the Coats–Snowe Amendment to the PHSA (section 245), the Weldon Amendment, and the Affordable Care Act require, among other things, that the Department and recipients of Department funds (including State and local governments) refrain from discriminating against institutional and individual health care entities for their participation in, abstention from, or objection to certain medical procedures or services, including certain health services, or research activities funded in whole or in part by the federal government. No statutory provision, however, requires promulgation of regulations for their interpretation or implementation.

The 2019 rule included both a formal and informal resolution to ensure that non-compliant entities or individuals were held accountable. The 2019 rule ensured that strong enforcement mechanisms were in place to rectify or enforce compliance from entities or individuals that violated such conscience protections.

The 2019 rule states in "Enforcement Authority (§ 88.7),"

This section also proposed to specify that OCR's enforcement authority would include the authority to handle complaints, perform compliance reviews, investigate, and seek appropriate action (in coordination with the leadership of any relevant HHS component) that the Director deems necessary to remedy the violation of Federal conscience and anti-discrimination laws and the proposed regulation, as allowed by law. The proposed text of § 88.7 of this part would provide OCR discretion in choosing the means of enforcement,

from informal resolution to more rigorous enforcement leading to, for example, funding termination, as appropriate to the particular facts, law, and availability of resources.¹³

It further states,

The Department also proposed to explicitly establish its authority to investigate and handle (a) alleged violations and conduct compliance reviews whether or not a formal complaint has been filed, and (b) “whistleblower” complaints, or complaints made on behalf of others, whether or not the particular complainant is a person or entity protected by Federal conscience and anti-discrimination laws.¹⁴

Examples of formal resolution enforcement mechanisms in the 2019 rule include, but are not limited to, a withdrawal of funds (as in the case of OCR removing \$200 million of California’s Medicaid funds) and an entity or individual’s referral to the Department of Justice.

The 2019 rule utilized both formal and informal resolutions to ensure the department’s priorities were enforced. Regarding informal resolution, the 2019 rule states that,

If an investigation or compliance review indicates a failure to comply with Federal conscience and anti-discrimination laws or this part, OCR will so inform the relevant parties and the matter will be resolved by informal means whenever possible. Attempts to resolve matters informally shall not preclude OCR from simultaneously pursuing any action described in paragraphs (a)(5) through (7) of this section.¹⁵

The 2019 rule makes clear that OCR’s goal is treat non-compliant entities and individuals in good faith by attempting to resolve a violation of conscience protections first through informal means. Nonetheless, the rule is firm in its right and intention to pursue formal means of resolution if the non-compliant entity or organization does not rectify its error. This ensures that conscience protections are protected, enforced, and encouraged by the department.

In the department’s NPRM 2023, however, the department drops the clear enforcement mechanism for a formal resolution and instead only provides for an informal means of resolution. Instead of outlining the steps a department will take in a formal resolution, the 2023 rule only addresses informal means of resolution. This weakens the means of enforcement for non-compliant entities. As we noted above, we support the inclusion of the informal resolution as it is better than the department’s 2011 rule, however, the lack of formal resolution in the NPRM 2023 is of great concern.

The 2023 NPRM states in “Complaint handling and investigating (§88.2),”

(1) If an investigation reveals that no action is warranted, OCR will in writing so inform any party who has been notified by OCR of the existence of the investigation. (2) If an investigation indicates a failure to comply

¹³ Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 FR 23170, May 21, 2019, <https://www.federalregister.gov/documents/2019/05/21/2019-09667/protecting-statutory-conscience-rights-in-health-care-delegations-of-authority>

¹⁴ Ibid., Enforcement Authority (§ 88.7).

¹⁵ Ibid., Enforcement Authority (§ 88.7).

with the Federal health care provider conscience protection statutes, OCR will so inform the relevant parties and the matter will be resolved by informal means whenever possible.¹⁶

The NPRM 2023 lacks a formal resolution or enforcement mechanism with non-compliant parties. The impact of this is a weak, insufficient enforcement mechanism. Without strong, clear enforcement through a formal resolution, it is effectively up to the individual entity or individual to decide if they want to comply with the department's informal resolution or not. This is a sign of bad faith on the part of the department regarding its intention to protect conscience rights; it signals a lack of desire or effort to enforce the conscience protection laws it is charged with protecting.

A formal resolution is binding and authoritative when it comes to rectifying the behavior of non-compliant entities. It ensures that the department can withdraw funding or refer the case to the Department of Justice. In the department's 2023 rule, however, only an informal means of resolution is available. In short, this relies solely on the parties coming to an informal agreement when a violation has occurred. In short, a non-compliant entity is, in effect, only required to 'promise not to do it again.' The rule cedes all enforcement provisions and rectification of error to the non-compliant party. It trusts that they will reform their behavior, adequately resolve the situation, and not continue to violate conscience protections. Again, this is a laudable first step in seeking resolution. If it is the only step, given the lack of a formal resolution, this is utterly inadequate.

For example, if an entity or individual were charged with discriminating against someone based on their race or sex, the department would not rely on an informal resolution to rectify the problem. Instead, they would ensure that there were strong enforcement mechanisms in place to rectify the issue (as in the loss of funds, a public apology, or a change in their policy). An informal resolution would not be an acceptable sole response. The department would also have a formal resolution in place to ensure that such violations were punished, held accountable, and did not occur again. Why are conscience protections, which address the ability for Americans to flourish with their sincerely held beliefs, treated any differently? Conscience protections protect hospitals, health insurance providers, and medical practitioners from violating their sincerely held moral, religious, or ethical concerns regarding abortion (the taking of an unborn life), gender sterilization surgeries (which are not medically required procedures), or end of life care (a voluntary taking of life, as compared to a natural death). These rights must be protected by the department in the same way the department would protect and enforce violations based on sex or race discrimination.

The department has not provided any explanation or analysis as to why they have removed the formal resolution. Additionally, the department has failed to provide an explanation as to why the absence of a formal resolution will effectively protect the conscience rights of Americans. Without an answer to either of these questions, the department is at-risk for proposing an

¹⁶ Safeguarding the Rights of Conscience as Protected by Federal Statutes; Delegations of Authority 45 CFR Part 88, January 5, 2023, <https://www.govinfo.gov/content/pkg/FR-2023-01-05/pdf/2022-28505.pdf>

arbitrary and capricious rule that fails to provide adequate conscience protections. The department must explain their rationale and justify this decision legally.

Proposed Rule Wrongly Drops Definitions, Examples

The department is wrong to drop the definition of key terms from the proposed rule. This is a notable deviation from the 2019 rule that included clear, explicit definitions of the terms and areas where conscience protections applied.

Section 88.2 of the 2019 Rule includes a lengthy section on key definitions, particularly of what it means to “assist in the performance.” It states,

The Department proposed that “assist in the performance” means “to participate in any program or activity with an articulable connection to a procedure, health service, health program, or research activity, so long as the individual involved is a part of the workforce of a department-funded entity.” The definition specified that “[t]his includes but is not limited to counseling, referral, training, and other arrangements for the procedure, health service, health program, or research activity.”

The 2019 rule provides clear guidelines and expectations about what it means for an individual to participate in, or decline to participate in, specific medical-related actions that may violate their sincerely held moral, religious, or ethical beliefs. It provides broad latitude so that individuals who are personally opposed to aiding in an abortion, sex-sterilization surgery, or assisted suicide at any point in the process have a protected right to decline. Because of robust conscience protections, individuals or entities are not required to assist in specific aspects of procedures, including the procedure itself. This is clearly outlined in the 2019 definition above. It makes it clear that a willingness to accommodate sincerely held moral, religious, or ethical concerns is not a form of discrimination against patients or other personnel.

Unfortunately, the 2023 proposed rule removes all such definitions. This introduces greater ambiguity for the medical professionals involved and fewer legal protections to rely on. Beyond the removal of the definition for “assist in the performance,” the 2023 proposed rule also removes definitions for terms including “discriminate or discrimination,” “entity,” “federal financial assistance,” “health care entity,” “health service program,” “recipient,” “referral or refer,” “sub recipient,” and “workforce.”

Biden-Becerra’s HHS seems intent on removing key conscience protections from federal regulations and law. For example, the budget for fiscal year 2022 removed references to “conscience,” “religion,” and the Conscience and Religious Freedom Division altogether. This is contrary to earlier promises by Secretary Becerra that “the work [of the Conscience and Religious Freedom Division] will not change.”¹⁷ Taken in context of HHS’s broader pattern of de-

¹⁷ Secretary Becerra testimony before the Senate Finance Committee, “The President’s FY 2022 HHS Budget,” June 10, 2021, <https://www.youtube.com/watch?v=BsYcj1hQKgQ>

prioritizing conscience rights,¹⁸ gutting the 2019 rule does not reflect a good faith effort on the part of the Secretary to preserve the conscience protections of persons with religious, moral, or ethical concerns regarding abortion, sex-sterilization surgeries, end of life care, and more. Instead, the rule introduces greater ambiguity and fewer protections since HHS will not have clearly defined terms to rely on.

Without clearly outlined definitions, it is impossible to know or evenly judge what discrimination is or isn't in each context. This is insufficient for the task of rulemaking. The department has failed to provide adequate justification for why the removal of all definitions, specifically addressing controversial medical procedures like abortion and sex-sterilization surgeries, improves the application or interpretation of laws regarding conscience protections.

Without an adequate justification or explanation, the department is at fault for an arbitrary and capricious rule. Moreover, this ambiguity opens the door for the department, medical entities, hospitals, insurance companies, or medical professionals like doctors and nurses to abuse or coerce individuals or entities to act in conflict with their sincerely held beliefs.

Given rapid technological developments in chemical abortion pills, sex-sterilizing gender transition procedures, and new forms of birth control, the department should provide stronger definitions than ever before. By removing the definitions altogether, the department fails to adequately provide clear guidelines for protecting conscience rights. For these reasons, the department should retain the definitions from the 2019 rule to ensure the utmost clarity and compliance with the rule regarding conscience protections.

Absence of Conscience Protections Harms Medical Profession and the American People

Without strong and clearly defined conscience protections, medical professionals and the American people suffer harm by willful coercion or incidental neglect.

Despite the existence of numerous conscience protections in federal statutes, violations happen, and existing conscience protections do not provide a private right of action, which would allow victims to seek legal redress in court. Instead, their only recourse lies in an appeal to the Office for Civil Rights (OCR) at HHS. Regrettably, Obama-era occurrences demonstrate the OCR's poor track record in moving quickly—if at all—on such complaints.

In contrast, what does it look like for HHS to robustly enforce conscience-protection laws? In 2020, the Office for Civil Rights took away \$200 million of California's Medicaid funds.¹⁹ The state had violated federal law by requiring state health care plans to cover abortions—without any limitations—including in plans used by an order of nuns. During the Obama administration,

¹⁸ Rachel N. Morrison, "A Year of Assaults from Biden's HHS," Ethics and Public Policy Center, March 18, 2022, <https://eppc.org/publication/a-year-of-assaults-from-bidens-hhs/>

¹⁹ U.S. Department of Health and Human Services Guidance Portal, HHS Issues Notice of Violation to California for its Abortion Coverage Mandate, January 24, 2020, <https://www.hhs.gov/guidance/document/hhs-issues-notice-violation-california-its-abortion-coverage-mandate>

HHS had dismissed complaints about the mandate after two years of “investigation” by OCR.²⁰ Notably, Secretary Becerra “reassessed” the conscience violations filed against him during the Trump administration and found that there were none. This led to the overruling of this case in the Biden administration.

Health and Human Services also referred a hospital in Vermont to the Department of Justice.²¹ The hospital forced a nurse to assist in an elective abortion despite her objections. The hospital also refused to change its policies to comply with the Church Amendments and prevent its employees from having their conscience rights violated again. Unfortunately, the Biden administration has quietly dismissed the case without any settlement or legal action. Since the federal conscience protection laws do not provide a right of action, she cannot sue on her own. This is a blatant disrespect for conscience protection laws and is a sign of bad faith on the part of the department.

These are just a few of the recent examples of conscience violations. Unfortunately, they aren’t the only instances.

In 2009, Cathy DeCarlo, a nurse at a New York hospital, was forced to take part in a second-trimester abortion, despite her long-standing religious objections, under threat of losing her job and her license.²² She filed a complaint with the HHS OCR alleging that the hospital had violated the Church Amendments’ protection against compelled participation in assisting abortions. She also filed a lawsuit against the hospital that was dismissed because the Church Amendments do not provide for a private right of action.²³ Almost three years passed before OCR completed its investigation, which led to the hospital agreeing to comply with federal conscience laws, revising its human resources policy, and training staff about obligations to comply with statutory conscience protections.²⁴

²⁰ U.S. Department of Health and Human Services, Office for Civil Rights, letter from Jocelyn Samuels, Director, to Catherine W. Short, Life Legal Defense Foundation attorney, June 21, 2016, <https://adflegal.blob.core.windows.net/web-content-dev/docs/default-source/documents/resources/media-resources/cdmhc-investigation-closure-letter.pdf?sfvrsn=4>.

²¹ U.S. Department of Health and Human Services Press Office, HHS to Disallow \$200M in California Medicaid Funds Due to Unlawful Abortion Insurance Mandate; Refers Vermont Medical Center to DOJ for Lawsuit Over Conscience Violations, December 16, 2020, <https://public3.pagefreezer.com/content/HHS.gov/31-12-2020T08:51/https://www.hhs.gov/about/news/2020/12/16/hhs-disallow-200m-california-medicaid-funds-due-unlawful-abortion-insurance-mandate.html#:~:text=media%40hhs.gov-,HHS%20to%20Disallow%20%24200M%20in%20California%20Medicaid%20Funds%20Due,for%20Lawsuit%20Over%20Conscience%20Violations>

²² Alliance Defense Fund (now known as Alliance Defending Freedom), “Report of Discrimination in Violation of 42 U.S.C. § 300a-7,” letter from Matthew S. Bowman to Michael Carter, Regional Manager, Office for Civil Rights, U.S. Department of Health and Human Services, March 8, 2010, <https://adflegal.blob.core.windows.net/web-content-dev/docs/default-source/documents/case-documents/cenzon-decarlo-v.-the-mount-sinai-hospital/cenzon-decarlo-v-the-mount-sinai-hospital---adf-letter-to-u-s-dept-of-hhs.pdf?sfvrsn=6>

²³ *Cenzon Decarlo v. Mount Sinai Hospital*, U.S. Court of Appeals, 2nd Circuit, November 23, 2010, <http://caselaw.findlaw.com/us-2nd-circuit/1545634.html>

²⁴ U.S. Department of Health and Human Services, letter from Linda C. Colón to Matthew S. Bowman, Alliance Defending Freedom, and David Reich, MD, Interim President, Mount Sinai Hospital, February 1, 2013,

In 2011, the HHS Office of Refugee Resettlement began to give “strong preference” to applicants for a federal antitrafficking grant that would be willing to provide referrals for abortion for trafficking victims. The U.S. Conference of Catholic Bishops, which had been using that federal grant for five years to serve victims of sex slavery and human trafficking, has a long-standing policy of declining to refer victims for contraception or abortion. Yet, despite higher scores for effectiveness than other organizations applying and despite the Church Amendments’ prohibition on discrimination against grant applicants based on participation in abortion, the Conference of Catholic Bishops lost the grant competition and was stripped of funding for its important work on behalf of vulnerable women, men, and children.²⁵

Whether it’s a nurse caring for patients, consumers purchasing health insurance, or an organization serving vulnerable people, Americans should be able to count on their ability to live and work in accordance with their conscience. HHS’s historical record on this front is, at best, mixed.

Through this proposed rule, HHS is, in effect, trying to turn back the clock. Once again, Americans would have to rely on a (potentially hostile) government bureaucrat to investigate, and act on, a complaint that their civil rights have been violated. This should not be the case. Additionally, the department failed to provide an adequate explanation for this rescission.

The department’s proposed rule claims multiple times that the 2019 rule “created confusion or harm by undermining the balance struck by Congress in the statutes themselves.” At another point, the proposed rule notes that “several reproductive health organizations similarly commented that the proposed rule would upset the statutory balance between protecting providers’ conscience rights and patients’ ability to access reproductive care.

The department’s 2023 proposed rule emphasizes “balance” between conscience protections and a patient’s ability to access reproductive care like an abortion or sex-sterilization surgeries. If the department is genuinely concerned with maintaining “balance,” then robust and clearly

<https://adflegal.blob.core.windows.net/web-content-dev/docs/default-source/documents/case-documents/cenzon-decarlo-v.-the-mount-sinai-hospital/cenzon-decarlo-v-the-mount-sinai-hospital---results-of-hhs-investigation.pdf?sfvrsn=6>

²⁵ The original grant document is no longer available on the HHS website, but the terms of the grant were widely reported at the time. See Sarah Torre, “Obama Administration Puts Politics Before Trafficking Victims?” *The Daily Signal*, December 1, 2011, <http://dailysignal.com/2011/12/01/obama-administration-puts-politics-before-trafficking-victims/>; Jerry Markon, “Health, Abortion Issues Split Obama Administration and Catholic Groups,” *The Washington Post*, October 31, 2011, https://www.washingtonpost.com/politics/health-abortion-issues-split-obama-administration-catholic-groups/2011/10/27/gIQAXV5xZM_story.html?utm_term=.4793456cd278; Mary Ann Walsh, “The ABC Factor at HHS—Anybody But Catholics,” *USCCBlog*, October 13, 2011, <http://usccbmedia.blogspot.com/2011/10/abc-factor-at-hhs-anybody-but-catholics.html>; and Florrie Burke and Andrea Powell, “HHS and the Catholic Church: Examining the Politicization of Grants (Minority Day of Hearing),” testimony before the Committee on Oversight and Government Reform, U.S. House of Representatives, December 14, 2011, <https://oversight.house.gov/hearing/hhs-and-the-catholic-church-examining-the-politicization-of-grants-minority-day-of-hearing/>

defined conscience protections are essential. To respect both those individuals and entities who want to perform an abortion or related procedures and those who, given their sincerely held moral, religious, and ethical beliefs do not, the department must provide those who wish to abstain with clear, well-defined, and strongly enforced protections. It isn't "balance" to force both parties to perform or aid in said procedures.

To achieve balance, the department must maintain the 2019 rule's enforcement mechanism and provision; uphold the 2019 rule's definition of discrimination, violation of conscience protections, and included behavior; require the Office of Civil Rights to respond to all complaints on a "shall enforce" over a "may enforce" basis; and the department should not allow the Office of Civil Rights to offer informal, nonbinding resolutions.

Conscience Statutes Don't Require Elevating Abortion Access

The second conscience provision in the Church Amendments, 42 U.S.C 300a-7(c)(1), prohibits any entity that receives a grant, contract, loan, or loan guarantee under certain Department-implemented statutes from discriminating against any physician or other health care personnel in employment, promotion, termination of employment, or the extension of staff or other privileges because "the individual performed or assisted in the performance of a lawful sterilization procedure or abortion." Still, a position of neutrality towards any individual or entity that performs an abortion does not require conscience protections to elevate abortion access.

Nonetheless, Secretary Becerra is on the record promoting abortion access. He said, "we are telling doctors and others involved in the provision of abortion care, that we have your back." The department's proposed rule seems more in line with this administrations' efforts to promote abortion access through every aspect of federal law and regulation.

As Ryan T. Anderson argues in his recent book, *Tearing Us Apart: How Abortion Harms Everything and Helps Nothing*,

Poll after poll shows that most Americans do not support this administration's goal of policy preference for abortion on-demand at any point in pregnancy, paid for by the taxpayers. "Opinion polling over the past few decades indicates that America's permissive abortion policy is unpopular with the American people, most of whom would prefer to see each state set its own laws regarding abortion and most of whom would like to see abortion regulated more strictly than it is now."²⁶

HHS' 2023 proposed rule would rescind conscience regulations that protect health-care professionals from being forced to assist with abortions and protect others from having to pay for abortions. Now, given the inclusion of sex-sterilization surgeries, it could force health-care professionals to perform gender transition surgeries against their sincerely held beliefs.

²⁶ Anderson, Ryan T. and DeSanctis, Alexandra. *Tearing Us Apart: How Abortion Harms Everything and Solves Nothing*. Washington, DC, Regnery Publishing, 2022, p. 175.

Conclusion

A robust respect for the sacred rights of conscience, both in government and among private citizens and institutions, enables Americans to work and live alongside each other despite deep, sincere differences on ethical and moral matters. Conscience protections take nothing away from anyone. Rather, they uphold the traditional American principles of equality, pluralism, and tolerance.

The proposed rule does not adequately protect Americans conscience rights. For the reasons outlined above, we urge the Department to return to the 2019 framework and robustly protect conscience rights.

Respectfully,

Melanie Israel
Policy Analyst, DeVos Center for Life, Religion, and Family
The Heritage Foundation

Emma Waters
Research Associate, DeVos Center for Life, Religion, and Family
The Heritage Foundation