March 6, 2023

Hon. Xavier Becerra
Secretary
U.S. Department of Health and Human Services
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue SW, Washington, DC 20201

Attention: Office for Civil Rights
In Re: RIN number 0945-AA18
Docket ID: HHS-OCR-2023-0001

Dear Secretary Becerra:

Thank you for the opportunity to comment on proposed rule: RIN 0945-AA18. On January 5, 2023, the Department of Health and Human Services (HHS) issued a notice of proposed rulemaking (NPRM) titled "Safeguarding the Rights of Conscience as Protected by Federal Statute." The proposed rule would partially rescind the final rule, dated May 21, 2019, titled "Protecting Statutory Conscience Rights in Health Care: Delegations of Authority" (2019 Final Rule),[1] but would retain the framework created by the final rule, dated February 23, 2011, titled "Regulation For the enforcement of Federal Health Care Provider Conscience Protection Laws" (2011 Final Rule). HHS has also proposed to eliminate certain federal conscience protections it deems "redundant or confusing," or because they "undermine the balance Congress struck between safeguarding conscience rights and protecting access to health care access."

Modern health care practices give rise to conflicts with the religious beliefs and moral convictions of payers, providers, and patients alike, and we applaud HHS for recognizing these conflicts. Attempting to resolve those conflicts or balance the relevant interests, however, does not occur in a vacuum, driven only by political preferences. The historical importance and priority given to the right of conscience in general, and the exercise of religion in particular, has been formalized in constitutional, statutory, and regulatory protections that set a higher bar for policy changes like the one HHS has proposed.

We urge HHS to retain the 2019 Final Rule in its entirety and oppose the proposed changes. We believe the 2019 Final Rule best comports with the overriding importance, recognized by all three branches of the federal government of the rights of conscience and religious exercise, and that the reasoning of the U.S. District Courts that enjoined the 2019 Final Rule is flawed.

[1] Department of Health and Human Services, "Protecting Statutory Conscience Rights in Health Care; Delegations of Authority," 84 Fed. Reg. 23170.

The Historical Primacy of the Right of Conscience

When enacting the International Religious Freedom Act in 1998, the House of Representatives unanimously declared that the "right to religious freedom undergirds the very origin and existence of the United States." You served in the House when this legislation passed by voice vote and, therefore, joined in that acknowledgement. You were right.

More than a century before independence, the Maryland colony enacted the Act Concerning Religion, which protected the "free exercise" of religion. The Virginia Declaration of Rights included the "free exercise of religion, according to the dictates of conscience" as part of "the basis and foundation of government." The Virginia Statute for Religious Freedom identified religious freedom as one of the "natural rights of mankind."

These Virginia measures provided the foundation for the U.S. Constitution's First amendment, which places the "free exercise of religion" as its first individual right. In fact, in its first case involving the religion clauses, the Supreme Court unanimously acknowledged that the Virginia statute for Religious Freedom "defined" religious freedom.

This defining commitment to religious freedom continues to this day. In his 2010 Religious Freedom Day proclamation, President Barack Obama said that religious freedom is "the natural right of all humanity – not a privilege for any government to give or take away." It is, he said, a "critical foundation of our Nation's liberty." Presidents of both parties have similarly recognized the special nature of religious freedom. In 2002, President George W. Bush called it "a cornerstone of our Republic, a core principle of our Constitution, and a fundamental human right." And this year, President Joe Biden pledged to protect "the right to practice religion fully and freely."

We offer this brief background for more than just historical interest. The right of conscience in general, and to religious exercise in particular, are not simply one of many ordinary competing values or policy preferences. In his *Memorial and Remonstrance Against Religious Assessments*, James Madison explained that the exercise of religion "is precedent, both in order of time and in degree of obligation, to the claims of Civil Society." Similarly, the Supreme Court has long held that First Amendment freedoms, including the exercise of religion, are in a "preferred" position. Justice Sandra Day O'Connor has explained that, because "religious liberty…occupies a preferred position," government may not, directly or indirectly, encroach upon it "unless required by clear and compelling governmental interests 'of the highest order.'"

Federal Laws Protecting the Right of Conscience

The historical place and significance of religious freedom, therefore, became established as a constitutional priority and has found expression and application in federal law for decades. This includes drawing a line at forcing the public to subsidize abortion or healthcare workers to participate in performing an abortion.

The **Church Amendments**, enacted in the 1970s, prohibit requiring "any individual or entity" receiving grants, contracts, or loans under several federal statutes to perform or assist in abortion, or making facilities or personnel available to do so, if contrary to "religious beliefs or moral convictions."

The **Coats-Snowe Amendment**, enacted in 1996, prohibits discrimination against health care entities that do not provide or require training in performing abortions.

The **Balanced Budget Act**, enacted in 1997, provides that neither Medicaid nor Medicare Advantage health plans are required to provide, reimburse for, or cover counseling or referral services over objections based on moral or religious grounds.

The **Weldon Amendment**, first enacted in 2005, provides that no funds appropriated for the Departments of Labor, HHS, or Education "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."

Under the **Affordable Care Act**, enacted in 2010, qualified health plans may not discriminate against healthcare providers or facilities that refuse to provide, pay for, cover, or refer for abortion. The Affordable Care Act also prohibits coercion of providers and health care entities into participating or assisting with euthanasia or assisted suicide.

Congress also included conscience provisions related to vaccinations, advanced medical directives, religious nonmedical health care, hearing screening, occupational illness testing, and mental health treatment, among others. The notice of proposed rulemaking mentions covers all of these statutory conscience protections but fails to mention the **Religious Freedom Restoration Act** (RFRA). Enacted nearly unanimously in 1993, RFRA allows the federal government to substantially burden "a person's exercise of religion" only if doing so "is the least restrictive means of furthering [a] compelling governmental interest." The Senate Judiciary Committee report on RFRA states that the United States "was founded upon the conviction that the right to observe one's faith, free from Government interference, is among the most treasured birthrights of every American." RFRA twice passed the House without opposition during your tenure.

Two features of this law are particularly relevant. First, this is the toughest legal standard in American law and reinforces that the free exercise of religion is a preferred right. Second, and perhaps more important, RFRA's legal standard applies to all existing federal statutory and regulatory law. Changes to conscience protections like the one your department has proposed, especially when they lower or weaken those protections, must comply with RFRA.

Finally, the agency should consider the **Hyde Amendment**, first enacted in 1976, and how it prevents appropriations for the Departments of HHS and Education and related agencies from being used for most abortions or for health insurance benefits that include abortion. The

Congressional Research Service has outlined "Hyde-like" appropriations restrictions that apply to other departments such as State, Justice, and Defense. Even when *Roe v. Wade* was a controlling precedent, the Supreme Court repeatedly upheld the constitutionality of such restrictions.

The Legal Standard

A rule is unlawful under the Administrative Procedure Act if it is "arbitrary and capricious." This results where an agency "entirely fail[s] to consider an important aspect of the problem" or where the agency's reasoning "runs counter to the evidence before the agency."[2] Further, when an agency changes its previous regulatory positions, it must provide "good reasons" for the change and "a reasoned explanation...for disregarding facts and circumstances that underlay or were engendered by the prior policy."[3] Moreover, "An agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate."[4]

Comparing the 2011 and 2019 Final Rules

On August 26, 2008, HHS issued a proposed rule titled ''Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law.''[5] Addressing the statutory conscience protections in effect at that time, the rule stated that regulations were necessary in order to:

> 1. Educate the public and health care providers on the obligations imposed, and protections afforded, by Federal law;
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> 2. Work with state and local governments and other recipients of funds from the Department to ensure compliance with the nondiscrimination requirements embodied in the Federal health care provider conscience protection statutes;
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> 3. When such compliance efforts prove unsuccessful, enforce these nondiscrimination laws through various Department mechanisms to ensure that Department funds do not support coercive or discriminatory practices, or policies in violation of Federal law; and

[2] Am. Bankers Ass'n v. Nat'l Credit Union Admin., 934 F.3d 649, 663 (D.C. Cir. 2019) (quoting Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm, 463 U.S. 29, 43 (1983)).
[3] Organized Village of Kake v. U.S. Dep't of Agriculture, 795 F.3d 956, 966 (9th Cir. 2015) (quoting FCC v. Fox TV Stations, Inc., 556 U.S. 502, 515 (2009)).
[4] FCC v. Fox at 537.
[5] ''Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law,'' 73 Fed. Reg. 50274.

4. Otherwise take an active role in promoting open communication within the health care industry, and between providers and patients, fostering a more inclusive, tolerant environment in the health care industry than may currently exist.[6]

Three years later, in the 2011 Final Rule, HHS rescinded much of the 2008 rule, including provisions defining certain terms used in one or more of the conscience provisions and various compliance certification requirements. The 2011 Final Rule retained a provision designating the Office of Civil Rights (OCR) to receive and coordinate the handling of complaints of alleged violations of only three conscience provisions: the Church Amendments, the Weldon Amendment, and the Coats-Snowe Amendment.

On May 21, 2019, HHS issued its own final rule,[7] concluding that withdrawal of the 2008 Final Rule had created confusion about the various conscience provisions and noting a significant increase in complaints alleging conscience protection violations. The 2019 Final Rule applied to all the conscience protection laws that HHS is charged with enforcing and:

1. added additional statutory provisions to the rule's enforcement scheme;

2. adopted definitions of various statutory terms;

3. imposed assurance and certification requirements;

4. reaffirmed OCR's enforcement authority;

5. imposed record-keeping and cooperation requirements;

6. established enforcement provisions and penalties (such as withdrawal of funding); and

7. adopted a voluntary notice provision.

In the current NPRM, HHS has proposed retaining three aspects of the 2019 Final Rule: application to all the federal conscience law provisions identified in the 2019 Final Rule, several provisions related to complaint handling and investigations, and a voluntary notice provision. While we support retaining coverage of all federal conscience law provisions, the 2023 NPRM in many respects turns the clock back on the protection of the right of conscience.

While claiming that it safeguards conscience rights and provides clarity, for example, HHS proposes *eliminating* the following aspects of the 2019 Final Rule:

- Definition of terms, including "assist in the performance," "discriminate or discrimination," "entity," "federal financial assistance," "health care entity," "health service program," "recipient," "referral or refer," "sub recipient," and "workforce."[8]

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[6] ''Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law,'' 73 Fed. Reg. 78072, 78074.
[7] 84 Fed. Reg. 23170.
[8] Eliminating definitions of description

- Detailed explanation of the applicability of and prohibitions or requirements under the different conscience protection laws.
- Assurance and certification of compliance requirements.
- Compliance requirements, including requirement to maintain records, cooperate with OCR enforcement, and refrain from intimidation or retaliatory acts.
- Detailed explanation of enforcement authority, including resolution through withholding federal funds or referral to the Department of Justice (DOJ) for lawsuit.
- Rule of construction "in favor of a broad protection of the free exercise of religious beliefs and moral convictions" (to the maximum extent permitted by law).

Demonstrating its weakened commitment to protecting the right of conscience, the proposed regulations would allow, rather than require, OCR to enforce the conscience protection laws. There is no reasoned basis for this change. As proposed, OCR need only seek voluntary resolutions of complaints, will take no action when negotiations fail, and will only pursue informal means of complaint resolution. This change runs contrary to how OCR enforces every other civil right under its jurisdiction, yet the NPRM does not provide a basis for this disparity. Additionally, without any basis, legitimate claims will no longer be referred to the Department of Justice for litigation when informal resolution efforts fail.

Again, unlike enforcement of other civil rights (such as those under Section 1557 of the Affordable Care Act), the proposed rule also removes any mention of potential loss of funding or other remedies for violating conscience provisions or any compliance requirement indicating that duties imposed by the applicable statutes regarding conscience protections have been met. Under the 2023 proposed rule, there are no consequences for failure to respond to complaints. There is no potential loss of federal funding for violation of obligations under the conscience provisions, either. In short, by removing the 2019 Final Rule's substantive enforcement provisions, the 2023 NPRM virtually guarantees that conscience rights will rarely, if ever, actually be vindicated.

We think it should go without saying that protecting something as historically and legally important as the right of conscience requires concrete definitions, clear and robust policies, and consistent enforcement. The 2023 NPRM backtracks on all of these. It lacks even a detailed explanation for its necessity (both in the statutory history and the analytical reasoning). While the 2019 Final Rule contained a precise and thorough definition of discrimination[9] and clarified that accommodations granted to religious employees were not discriminatory, the 2023 NPRM deletes all relevant definitions, including of key terms such as "discrimination" or "discriminate." This places the right of conscience in an uncertain and precarious position. The NPRM arbitrarily

[9] Department of Health and Human Services, "Protecting Statutory Conscience Rights in Health Care; Delegations of Authority," 84 Fed. Reg. 23170, 23263, § 88.2 Definitions.

and capriciously asserts that these clarifying definitional provisions caused confusion, when in fact, their elimination as proposed will confuse the public.

While weakening and retreating from protection of the right of conscience, the NPRM states: "Patients also have autonomy, right, and moral and religious convictions. And they have health needs, sometimes urgent ones. Our health care systems must effectively deliver services – including *safe legal abortions* – to all who need them in order to protect patients' health and dignity." (emphasis added). That abortion is the Biden administration's political priority is widely known, but promoting it at the expense of the fundamental right of conscience is the wrong balance. By failing to define discrimination, removing all substantive enforcement provisions from the 2019 Final Rule, and stressing the importance of access to abortion, which the Supreme Court has recognized is not a right protected under the Constitution, the agency has tipped the scales against religious and moral objectors arbitrarily and capriciously.

Decisions Enjoining the 2019 Final Rule Should not be Relied Upon

States, localities, and non-governmental parties challenged the 2019 Final Rule in three jurisdictions,[10] and the U.S. District Court in each case granted summary judgment to the plaintiffs and enjoined the 2019 Final Rule from taking effect. The 2023 NPRM states that it "is informed by" those three decisions, suggesting that they are relying on the effect or reasoning of these decisions in order to mandate significant changes to the 2019 Final Rule. While the previous administration had appealed these decisions, those appeals were unjustifiably abandoned by the Biden administration and the agency is now issuing its own proposed rule.[11] Reliance on those decisions, however, is misplaced.

All three lawsuits challenged the 2019 Final Rule under the Administrative Procedure Act[12] (APA), which governs how federal agencies develop and issue regulations, including publication of proposed and final rules in the *Federal Register*. The APA also outlines requirements for other agency actions such as issuance of policy statements, licenses, and permits. Agencies are required to "engage in reasoned decision-making, and…to reasonably explain…the bases for the actions they take and the conclusions they reach."[13]

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[10] See, Washington v. Azar, 426 F. Supp. 3d 704 (E.D. Wash. 2019), appeal pending, No. 20–35044 (9th Cir.); City & Cnty. of San Francisco v. Azar, 411 F. Supp. 3d 1001 (N.D. Cal. 2019), appeal dismissed, 2020 WL 3053625, (9th Cir., June 01, 2020); New York v. HHS, 414 F. Supp. 3d 475 (S.D.N.Y. 2019), appeal withdrawn, 2022 WL 17974424, (2nd Cir., Dec. 08, 2022).

[11] To the extent HHS is still able to defend the 2019 Final Rule in court, it should do so. In the alternative it must adopt as much of the 2019 Final Rule's definitions and enforcement mechanisms as legally permissible. For the reasons stated below, it would be arbitrary and capricious for it not to.

[12] 5 U.S.C. §§ 551–559.

[13] Bhd. of Locomotive Eng'rs & Trainmen v. Fed. R. R. Admin, 972 F.3d 83, 115 (D.C. Cir. 2020) (quoting Dep't of Homeland Sec. v. Regents of the Univ. of Cal., ___ U.S.___, 140 S. Ct. 1891, 1905, 207 L.Ed.2d 353 (2020)) (cleaned up).

Although reviewing courts are not entitled to "substitute [their] own judgment for that of the agency,"[14] neither are courts permitted to "rubber stamp" agency actions. Instead, courts "must ensure that the agency considered all of the relevant factors."[15]

In each of the three challenges to the 2019 Final Rule, the district court failed to properly assess either HHS's statutory authority to promulgate the 2019 Final Rule or its factual analysis in doing so, improperly concluding that the rule was "arbitrary and capricious."

New York v. U.S. Department of Health and Human Services

A challenge to the 2019 Final Rule was mounted by 19 states including the State of New York, the District of Columbia, three local governments, and various health care provider associations the same year. As had the plaintiffs in the other challenges discussed below, they alleged a violation of the APA, among others.[16] Plaintiffs argued that HHS's systematic interpretation and implementation of over 30 statutory "conscience provisions" recognizing right of individual or entity to abstain, as conscience-based objectors, from participating in medical procedures, programs, services, or research activities on account of religious or moral objection to health care services provided by recipients of federal funds, was outside the scope of its authority.

The court began by delving into the nature and number of complaints received regarding potential conscience violations ahead of the 2019 Final Rule. The 2019 Final Rule relied in part on the fact that HHS OCR had received only 34 conscience complaints between November 2016 and January 2018 and experienced a "significant increase," to 343 complaints, during FY2018. The court questioned these numbers and inappropriately took on the role of OCR adjudicator by judging that only a small fraction of the 343 self-identified conscience complaints were relevant to the conscience protection statutes.[17] The potential for a majority of the complaints to not ultimately result in a violation finding is entirely typical for civil rights complaints and should not have caused the court any concern.[18] Although the court's assessment of the complaints, even though improper, does not undercut the basis for the 2019 rulemaking, it nevertheless supports another independent basis for the 2019 rulemaking—namely, a general lack of lack of knowledge and widespread "confusion" regarding the conscience protection statutes.

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[14] Am. Bankers Ass'n, 934 F.3d at 663 (internal quotation marks omitted).

[15] Oceana, Inc. v. Ross, 920 F.3d 855, 863 (D.C. Cir. 2019).

[16] New York v. HHS, 414 F. Supp. 3d 475 (S.D.N.Y. 2019), appeal withdrawn, Nos. 19–4254 et al. (2d Cir.)

[17] OCR investigators would typically contact and interview complainants before making any merits determinations. See How OCR Enforces Civil Rights Discrimination Laws and Regulations, https://www.hhs.gov/civil-rights/for-providers/compliance-enforcement/enforcement-process/index.html.

[18] See Equal Employment Opportunity Commission, Title VII of the Civil Rights Act of 1964 Charges (Showing "reasonable cause" findings in only 2.4% of all employment discrimination complaints filed with the EEOC in FY 2021). https://www.eeoc.gov/data/title-vii-civil-rights-act-1964-charges-charges-filed-eeoc-includes-concurrent-charges-adea.

More importantly, HHS *today* contends that a full seven percent of its complaints are conscience related (compared to 27% for all other protected classes).[19] As HHS OCR received over 51,000 complaints in 2022, the conscience docket now accounts for nearly 3,600 complaints. This demonstrates that the goal of increasing attention to the rights of conscience specifically intended by the 2019 Final Rule worked exceedingly well. To put it in proper perspective, this represents an over 100 times increase in conscience complaints received in 2022 compared to November 2016 and January 2018 and an over 10 times increase in complaints cited to support the 2019 Final Rule. It would be the height of arbitrariness and capriciousness to withdraw clarifying definitions and remove enforcement mechanisms from a rule that has worked exactly as planned and predicted in 2019.

The court made other legal errors besides its assessment of the complaints, however. It determined, among other things, that the 2019 Final Rule was a substantive (rather than a "housekeeping measure"), that the promulgation of the rule exceeded HHS's rulemaking and enforcement authority, that the rule was arbitrary and capricious, and that the rule's definition of "discrimination" was not a "logical outgrowth" of its notice of proposed rulemaking. The judge in the case, Engelmayer, agreed that the 2019 Final Rule's definition of "discrimination," and "entity," as well as the rule's enforcement mechanism (the withdrawal of federal funding) were significant enough to change the responsibilities of federal funding recipients, and therefore made the rule, as plaintiffs argued, a "watershed."

HHS countered that the rule was merely "housekeeping," and therefore interpretive in nature. It argued the rule was only related to how HHS is governed and administers federal statutes, and that providing guidance on key terms was essential to the enforcement of conditions imposed on federal funding under the conscience statutes.

HHS was right. The 2019 Final Rule was the very type of interpretive rule determined by federal courts to be one that simply offers clarity to federal funding recipients of their existing obligations.[20] Rules of this sort allow agencies "to explain ambiguous terms in legislative enactments without having to undertake cumbersome proceedings."[21] Interpretive rules do not "effect[] a substantive change in the regulations,"[22] contrary to how this federal court ruled.

Even the challenged assurance and certification requirements of the 2019 Final Rule simply implemented other requirements in the contracts and grant regulations that require federal

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[19] HHS Announces New Divisions Within the Office for Civil Rights to Better Address Growing Need of Enforcement in Recent Years, Feb. 27, 2023. https://www.hhs.gov/about/news/2023/02/27/hhs-announces-new-divisions-within-office-civil-rights-better-address-growing-need-enforcement-recent-years.html.

[20] Gen. Motors Corp. v. Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc)); The *Attorney General's Manual on the Administrative Procedure Act* defined an interpretive rule as one "issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers." AG Manual, *supra* note 48, at 30.

[21] Am. Hosp. Ass'n. v. Bowen, 834 F.2d 1037, 1045 (D.C. Cir. 1987).

[22] Warder v. Shalala, 149 F.3d 73, 80 (1st Cir. 1998) (quoting Shalala v. Guernsey Mem'l Hosp., 514 U.S. 87, 100 (1995)).

funding recipients to comply "with U.S. statutory and public policy requirements."[23] Any of the substantive requirements of the rule did nothing more than repeat the text of the underlying federal conscience statutes themselves and specify which entities the statutes affect.

Instead of following fundamental administrative law principles, this court and the others discussed below, achieved a particular outcome that aligned with their policy preferences. This is not an appropriate justification for striking down an agency's rule.

Washington v. Azar

In *Washington v. Azar*,[24] the state of Washington challenged the 2019 Final Rule, claiming that it was not in accordance with HHS's authority or other federal statutes, and was arbitrary and capricious under the APA. In granting summary judgment to the plaintiffs, however, the district court did exactly what the Supreme Court has said it may not do, that is, the court substituted its own judgment for that of the agency.[25]

The court in *Washington* adopted the ruling and reasoning *of New York v. U.S. Department of Health and Human Services* with practically no independent analysis of the opinion.

Where it did engage in independent analysis, however, it erred. The court arbitrarily rejected the Department's conclusion that access to health care is undermined by religious providers or entities exiting the medical field when forced to choose between their beliefs and their jobs. Instead, the court substituted its own view that "the Rule would severely and disproportionately harm certain vulnerable populations, including women; lesbian, gay bisexual, and transgender people (LGBT individuals); individuals with disabilities; and people living in rural areas."[26] Under the court's logic, it would be better for a lone Catholic hospital in a rural community to shut down entirely than allow it to decline to remove a healthy uterus at the request of male-identifying biological woman. This disregards the plain fact that access to general care for everyone, including LGBT persons, would go down without enforcement as set forth in the 2019 Final Rule.

But even if the conscience protection statutes disproportionately affected LGBT individuals, nothing in the APA requires an agency to automatically defer to the views of a particular group. Moreover, any disparate impact would be a consequence of the *statutes themselves*, not the 2019 Final Rule merely enforcing them. It would thus be arbitrary and contrary to law to change regulations to substantially diminish enforcing valid laws simply because the agency or a court does not like some contemplated potential effects. The 2019 Final Rule was not arbitrary or capricious simply because the court disagreed with HHS's judgements or ultimate conclusion

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[23] See 45 C.F.R. § 75.300(a).
[24] Washington v. Azar, 426 F.Supp.3d 704 (E.D. Wash. 2019).
[25] F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 513 (2009).
[26] Washington v. Azar, 426 F.Supp.3d at 721.

that the benefits of the 2019 Final Rule outweighed the costs. Rather than give HHS's judgments "particularly deferential review,"[27] the district court simply substituted its own judgment.

Finally, the court held the 2019 Final Rule arbitrary and capricious because HHS allegedly failed to conduct a reasoned analysis of the requirements of medical ethics. Specifically, the court asserts that the Rule's statutory definitions "would allow an employee to refuse to participate in life-saving treatment without notice…withhold basic information from patients…and deprive patients of the ability to provide informed consent." The court levels this charge without citing to any evidence in the record or even citations to the text of the 2019 Final Rule. The conscience protections statutes have a narrow focus and center largely on questions of abortion, sterilization, and assisted suicide. None of which involve life-saving care. As is substantiated in comments submitted on the current rulemaking from groups like the American Association of Pro-life Obstetricians and Gynecologists, abortion is never needed to save the lives of pregnant mothers with any medical complications ranging from cancer to ectopic pregnancy, and therefore the conscience protection statutes do not infringe on medical ethics or conflict with EMTALA in any way. But even if they theoretically did, it would again, be a consequence of the statutes themselves, not the regulations of 2019 enforcing them.

City & County of San Francisco v. Azar

In *City & County of San Francisco v. Azar*,[28] the plaintiffs argued that HHS had exceeded its rulemaking authority in violation of the APA. In granting summary judgment to the plaintiffs, the court concluded that HHS did not possess the authority to promulgate a rule interpreting and implementing statutory provisions recognizing a right of funding recipients with conscientious objections to certain medical services.

Nor, the court held, did HHS have the "housekeeping authority" to promulgate a rule that could lead to termination of an entity's financial assistance. In this respect, Judge Alsup determined that the 2019 Final Rule substantively changed the rights and responsibilities of health care providers and threatened federal funding for noncompliance. HHS, he wrote, misconstrued the underlying statutes by a "redefinition of statutory terms" that allegedly expanded the scope of protected conscience objections and upset the balance between the "uninterrupted flow" of abortions and sterilizations and conscience rights that Congress had struck.

First, as the court recognized, whatever balance Congress struck was in reaction to a regime where abortion was required to be legal in federal law and across all fifty states because of *Roe v. Wade*. The *Dobbs* decision of 2022, however, explicitly overruled that regime in its entirety. The burden therefore is on the agency to demonstrate why the conscience protection statutes, which were passed to limit the harms of a nationwide abortion-on-demand regime, should not be enforced with the tools made available by the 2019 Final Rule post-*Dobbs*. It would be arbitrary and capricious for the agency to not consider the fundamental shift in the legal and

[27] Trout Unlimited v. Lohn, 559 F.3d 946, 959 (9th Cir. 2009).
[28] City & Cnty. of San Francisco v. Azar, 411 F. Supp. 3d 1001 (N.D. Cal. 2019).

policy landscape now that states and the federal government can protect unborn life at all stages and in an environment where many states strictly limit abortion, and some have outlawed abortion entirely. In several such states, any alleged "balance" struck between conscience protection and abortion access is entirely gone as no lawful interest remains on the other side. The agency must contend with this new reality.

Additionally, the federal conscience statutes themselves[29] implicitly granted HHS the authority to condition its funds on compliance with those statutes and to ensure that recipients comply with their requirements.[30] The authority to ensure compliance with grant conditions is consistent with the well-established power of the United States "to fix the terms and conditions upon which its money allotments to state and other governmental entities should be disbursed."[31] Abandonment of this remedy for conscience protection statutes is arbitrary and capricious.

Likewise, certain federal statutes[32] grant HHS the very "housekeeping authority" that the district court declined to recognize.[33] Both 5 U.S.C. § 301[34] and 40 U.S.C. § 121(c) authorize HHS to promulgate regulations to administer its funding instruments. HHS did so through its Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS awards (UAR) and its Acquisition & Regulation guidelines (HHSAR). The UAR requires "that Federal funding is expended and associated programs are implemented *in full accordance with U.S. statutory* and public policy *requirements* including, but not limited to, those protecting public welfare, the environment, and *prohibiting discrimination*."[35] Similarly, the HHSAR permits HHS to include "requirements of law" and "HHS-wide policies" in its contracts.[36] Naturally, the prohibition against religious discrimination for federal funding recipients comes from, among others, the very federal conscience statutes at issue in the 2023 NPRM and 2019 Final Rule.

In using this "housekeeping authority," the 2019 Final Rule did not alter or amend the obligations of the respective underlying conscience statutes[37] but simply ensured that recipients

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[29] See extensive explanation of agency statutory authority as laid out in the 2019 Final Rule: 84 Fed. Reg. at 23,183–86.

[30] See United States v. Mead Corp., 533 U.S. 218, 229 (2001) (observing that delegated authority may be explicit or implicit).

[31] See United States v. Marion Cty. Sch. Dist., 625 F.2d 607, 609 (5th Cir. 1980) (collecting Supreme Court cases).

[32] See 5 U.S.C. § 301 (federal funding is in "full accordance with U.S. statutory and public policy requirements including…prohibiting discrimination"); 40 U.S.C. § 121(c) (HHS may include "requirements of law" and policies in its contracts).

[33] 45 C.F.R. § 75.300(a) (emphasis added).

[34] For example, the UAR, 5 U.S.C. § 301 provides this "housekeeping authority," stating:

> The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

[35] 45 C.F.R. § 75.300(a) (emphasis added).

[36] See 48 C.F.R. § 301.101(b)(1).

[37] 84 Fed. Reg. at 23,185.

of federal funds did not violate them. If HHS retreats from the view that substantive funding and housekeeping statutes grant it sufficient authority to promulgate interpretive rules and enforcement-based regulations, it *must be consistent* and repeal every regulation relying on such authorities, not just those related to conscience protection.[38]

In *Chevron, USA v. National Resources Defense Council, Inc.*,[39] the Supreme Court counseled deference to an agency's interpretation and application of its underlying statutory authority. A court must first ask "whether Congress has directly spoken to the precise question at issue."[40] If the answer is yes, the court is required to give effect to Congress's intent. If the answer is no because the statute is ambiguous, "the question for the court is whether the agency's answer is based on a permissible construction of the statute."[41] While the court may have preferred other definitions that fit certain policy objectives, that is not a legitimate basis for finding the 2019 Final Rule arbitrary and capricious. Instead, assuming the court believed that these terms were ambiguous, the court was required to accept HHS's definitions "so long as that reading is reasonable, '*even if the agency's reading differs from what the court believes is the best statutory interpretation*.'"[42]

<u>Under the NPRM, Religious Objectors Will Get Short Shrift.</u>

Among its justifications for substantial recission of the 2019 Final Rule, HHS argues[43] that conscience rights must be balanced against the need for healthcare, stating:

- "The Federal health conscience protection and nondiscrimination statutes represent Congress' attempt to strike a careful balance. Some doctors, nurses, and hospitals, for example, object for religious or moral reasons to providing or referring for abortions or assisted suicide, among other procedures. Respecting such objections honors liberty and human dignity. It also redounds to the benefit of the medical profession."
- "Patients also have autonomy, rights, and moral and religious convictions. And they have health needs, sometime urgent ones. Our health care systems must effectively deliver services— including safe legal abortions—to all who need them in order to protect patients' health and dignity."
- "Congress sought to balance these considerations through a variety of statutes. The Department will respect that balance."

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[38] "Unexplained inconsistency" between agency actions is "a reason for holding an interpretation to be an arbitrary and capricious change." Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Services, 545 U.S. 967, 981 (2005).
[39] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).
[40] Id. at 842.
[41] Id. at 843.
[42] Perez-Guzman v. Lynch, 835 F.3d 1066, 1079 (9th Cir. 2016) (quoting Nat'l Cable and Telecomms. Ass'n v. Brand-X Internet Servs., 545 U.S. 967, 980 (2005))(emphasis added).
[43] Department of Health and Human Services, "Safeguarding the Rights of Conscience as Protected by Federal Statutes," 88 Fed. Reg. 826 https://www.govinfo.gov/content/pkg/FR-2023-01-05/pdf/2022-28505.pdf

Unfortunately, HHS's desire to strike a "balance" between access to care related to abortion and sterilization and nondiscrimination in the provision of health care is not in any way supported by the text or historical application of the conscience protection laws HHS is tasked with enforcing. As stated earlier, if there is any wiggle room with respect to "balance" the agency must recalibrate in light of the fact that abortion is not, repeat not, a right found in the Constitution. To ignore this change in legal circumstances on such a fundamental question with respect to balancing of "rights" regarding abortion, would be arbitrary and capricious. In fact, if the agency is truly concerned with balancing conscience rights against the interests of those individuals seeking access to controversial medical services it would protect religious organizations and medical providers that object to providing such controversial procedures under the conscience statutes and leave any "gaps" to be filled by the private sector or government actors where not contrary to law. Forcing all organizations and personnel to perform procedures that are contrary to their religious or moral beliefs is clearly contrary to the letter of the law of the conscience provisions HHS is tasked with enforcing.

The administration has paid lip service to the several provisions of federal law that prohibit recipients of federal funding from coercing individuals and entities in the healthcare field into performing actions they find religiously or morally objectionable despite a centuries-long tradition of recognizing religious liberty as the first among our freedoms. The weakening of the 2019 Final Rule, the return to the structure of the inadequate 2011 Final Rule, would be a further and dangerous expansion of the administration's attacks on conscience in keeping with HHS's well-known resistance to the *Dobbs* decision.[44] In addition, because the government, rather than private parties, has the central role in enforcement of federal conscience and anti-discrimination laws, the need for adequate enforcement of those laws is essential, and the agency's proposal to limit its enforcement efforts is particularly pernicious.[45] The removal of enforcement provisions for violation of the foregoing conscience protections sets up an inevitable conflict between religious objectors and recipients of federal funding who are eager to maintain that funding in the name of raw politics, not reasoned rulemaking.

The most controversial medical interventions, including services related to abortion, sterilization, assisted suicide/end-of-life, vaccines, and those related to "gender-affirming," or "gender-transition" medical services (including, but not limited, to cross-sex hormones, puberty blockers, and surgery—whether for minor children or adults), will prove unnavigable under this

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[44] *See e.g.*, Secretary's Report, HEALTH CARE
UNDER ATTACK An Action Plan to Protect and Strengthen Reproductive Care, August 2022,
https://www.hhs.gov/sites/default/files/hhs-report-reproductive-health.pdf.

[45] In lawsuits filed by health care providers for alleged violations of certain conscience protection laws, including those discussed supra, courts have generally held that such laws do not contain, or imply, a private right of action sufficient to provide relief from such violations by covered entities. See, e.g., Cenzon-DeCarlo v. Mount Sinai Hospital, 626 F.3d 695 (2d Cir. 2010); Hellwege v. Tampa Family Health Centers, 103 F. Supp. 3d 1303 (M.D. Fla. 2015); Nat'l Instit. of Family and Life Advocates, v. Rauner, 2017 WL 11570803, (N.D. Ill. July 19, 2017).

proposed rule. Advancements in medical technology—for example, procedures governing in vitro fertilization, the evolving state of "gender affirming" care, and new or altered abortion modalities—will only expand the worries of conscientious objectors. For religious or moral objectors to these interventions, the proposed rule will not adequately protect them from having to participate in, cover, or pay for such interventions, on top of the fact that there are plenty of willing providers of those services where they are legal.[46] The proposed rule does not strike the correct balance in favor of religious liberty, and the lack of robust enforcement mechanisms renders the proposed rule toothless.

These concerns are not the stuff of fantasy. This administration has demonstrated an extensive history of limiting the rights of conscience within the healthcare context. The 2023 NPRM claims "The Department remains committed to educating patients, providers, and other covered entities about their rights and obligations under the conscience statutes and remains committed to ensuring compliance." Yet under the Biden administration and you, Secretary Becerra, HHS has taken unprecedented actions[47] to ignore the very conscience rights it is tasked with enforcing. In July 2021, in coordination with DOJ's dismissal of an enforcement lawsuit, OCR withdrew[48] a notice of violation against the University of Vermont Medical Center for violating the Church Amendments. While the previous administration had found a violation after the medical center forced a nurse to participate in an abortion despite her known religious objection, OCR took the exceedingly rare step of withdrawing the violation notice on the premise that district court precedent on the 2019 Final Rule, discussed above, had called the basis for the violation finding into question. But it did no such thing as the enforcement action was taken entirely independent of the 2019 Final Rule and, after extensive fact finding, proved a quintessential violation of the Church Amendments. Under your leadership, OCR also rescinded violation notices against the state of California for forcing nuns and other religious objectors to provide insurance coverage for abortion, in clear violation of the Weldon Amendment, and HHS restored $200 million in disallowed Medicaid funds that properly resulted from the violation.[49]

Among other measures, Secretary Becerra, you recently eliminated OCR's stand-alone Conscience and Religious Freedom Division and prevented career professionals with expertise in the enforcement of conscience protection laws from investigating complaints under those

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[46] For a comprehensive list of transgender services providers, see The Gender Mapping Project, https://www.gendermapper.org/. As for abortion, they are overwhelmingly provided by abortion clinics which would not be impacted by preserving the 2019 Final Rule because such facilities by definition have not religious or moral objection to abortion.

[47] Rachel Morrison, *The Federalist*, "President Biden and Health and Human Services Secretary Xavier Becerra have launched unprecedented attacks on people of faith," March 18, 2022. https://thefederalist.com/2022/03/18/in-its-first-year-bidens-hhs-relentlessly-attacked-christians-and-unborn-babies/

[48] Department of Health and Human Services, Letter to University of Vermont Medical Center Letter, OCR Transaction Number 18-306427, July 20, 2021, https://www.hhs.gov/conscience/conscience-protections/uvmmc-letter/index.html

[49] Department of Health and Human Services, Letter to State of California, OCR Transaction Numbers 17-274771 and 17-283890, August 13, 2021, https://www.hhs.gov/conscience/conscience-protections/ca-letter/index.html

laws.[50] You eliminated conscience protection and the free exercise of religion from OCR's mission statement (while adding "equity") and specifically excised OCR's responsibility for "[e]nsuring that federal agencies, state and local governments, health care providers, health plans, and others comply with federal laws guaranteeing the free exercise of religious beliefs and moral convictions and the right to be free from coercion in HHS conducted or funded programs."[51] You took away the OCR Director's authority over "religious freedom" claims.[52] You even eliminated OCR's authority to assure your own agency complies with the Religious Freedom Restoration Act.[53]

The foregoing actions were all taken despite your very public commitment to Congress that "the work [of the Conscience and Religious Freedom Division] will not change."[54] As such, this proposed rule is further proof that HHS is arbitrarily, capriciously, and unlawfully abandoning its obligation to ensure enforcement and compliance with laws designed to protect people of faith and moral conviction.

Conclusion

In enacting and implementing statutes, Congress and executive branch agencies have significant latitude in prioritizing some political or policy objectives over others. When it comes to impacting fundamental rights such as the right of conscience, however, that latitude is more circumscribed. When it comes to specific text on these questions, even more so. Here, the historical, cultural, and legal tradition of protecting the right of conscience began more than 350 years ago and has deep constitutional, statutory, and even regulatory roots. The right of conscience in general, and the free exercise of religion in particular, have what the Supreme Court has described as a "preferred position" and, therefore, are not simply on a long list of interchangeable policy preferences. The 2019 Final Rule more clearly and thoroughly comported with the importance and priority of religious freedom, while the 2023 NPRM, by unjustifiably compromising religious freedom in favor of certain political priorities, does not. It relies instead on flawed precedents to promote political objectives at the expense of religious freedom and your agency does not, and cannot, adequately support the proposed changes and modifications to the 2019 Final Rule in compliance with the APA.

This testimony is submitted in our individual capacities, and any organizational affiliation is for identification purposes only.

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[50] Notice: Statement of Organization of the Office for Civil Rights
(OCR) of the Department of Health and Human Services, 88 Fed. Reg. 12954 (effective Feb. 25, 2023).
https://www.govinfo.gov/content/pkg/FR-2023-03-01/pdf/2023-03892.pdf.

[51] Compare *id.* with 83 Fed. Reg. 2803.

[52] See previous footnote.

[53] Id.

[54] Questioning from Sen. James Lankford (R-OK) to Xavier Becerra during Senate Finance Committee hearing entitled: "The President's FY 2022 HHS Budget." June 10, 2021, https://www.youtube.com/watch?v=BsYcj1hQKgQ

Sincerely,

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