To: Office for Civil Rights, Office of the Secretary, U.S. Department of Health and Human Services

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Date: Wednesday, February 15, 2023

RE: Comments on Proposed Rulemaking: ***Safeguarding the Rights of Conscience as Protected by Federal Statutes***, 88 Fed. Reg. pp. 820 to 830 (January 5, 2023) RIN 0945-AA18

*Submitted via the Federal eRulemaking Portal at http://www.regulations.gov We follow instructions at website link "Comment or Submission" and enter the keywords "Conscience Recission NPRM". Microsoft Word "print-to-PDF" format

INTRODUCTION

Going as far back as the 1970s, from time to time the U.S. Congress has acted to protect the conscience of health care workers and providers who cannot deliver certain services because of their religious beliefs or moral objections. In many instances nondiscrimination protections were included to further define one of the forms of prohibited denials of conscience. Although these

individuals and provider organizations were not granted a private right of action,[1] since January 2009 they have been able to file a complaint with the U.S. Department of Health and Human Services ("HHS") and pursue an administrative investigation and remedy.[2] The health care workers and providers most typically safeguarded by this long series of enactments, amendments, and riders have profound reservations concerning abortion, sterilization, assisted suicide, or euthanasia. The Medicare and Medicaid programs secure a physician's right to inform patients about their full range of treatment options and to decline participation in a patient's health care directive, as well as to decline on moral or religious grounds to refer for abortion.[3] More recently these rights of conscience and ethical autonomy extend to those who would decline to become involved in hormone therapy and surgery for gender transition.

In our pluralistic society at a time when the country's cultural diversity has never been greater, Americans have had to learn to live together with our deepest differences. Numbering about two dozen, these several congressional interventions to protect religiously or ethically informed conscience are a great tribute to the nation's tolerance and decency. Were the conscience protections created by these statutes not operable and liberally enforced by the executive branch, our country's political polarization would only get worse.

These Comments are submitted in response to a Notice of Proposed Rulemaking ("2023 NPRM") announced by HHS on December 29, 2022, and published in the Federal Register, 88 Fed. Reg. pp. 820-30, on January 5, 2023. The 2023 NPRM proposes to largely rescind the May 21, 2019, final rule entitled *Protecting Statutory Conscience Rights in Health Care: Delegations of Authority* ("2019 Final Rule"),[4] while substantially restoring the framework of the February 23, 2011, final rule entitled *Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws* ("2011 Final Rule").

COMMENTS

Our observations and arguments are divided into three points:

POINT ONE: The Statutory Rights of Conscience Are Not to Be Diminished to a Balancing Test. The 2023 NPRM claims that a reversion to the 2011 Rule is needed "because [provisions of the 2019 Final Rule] undermine the *balance* Congress struck between safeguarding conscience rights and protecting access to health care." 88 Fed. Reg. at 820 (emphasis added). *See also id.* at 824 (2019 Final Rule "would upset the statutory *balance* between protecting providers' conscience rights and patients' ability to access . . . care") (emphasis added), 825 ("The Department proposes to rescind the . . . 2019 Rule because those portions . . . undermine the *balance* Congress struck between safeguarding conscience rights and protecting access to health care . . . .") (emphasis added), 826 ("The Federal health conscience protection and nondiscrimination statutes represent Congress' attempt to strike a careful *balance*.") (emphasis

[1] *See* Cenzon-DeCarlo v. Mount Sinai Hosp., 626 F.3d 695, 699 (2d Cir. 2010) (holding that Church Amendments, 42 U.S.C. 300a-7(c), do not imply a private right of action).
[2] *See* 88 Fed. Reg. at 823 (January 5, 2023).
[3] *Id.* at 822.
[4] The regulations reflecting the 2019 Final Rule are codified at 45 C.F.R. Part 88.

added), and 826 ("In light of . . . how the 2019 Final Rule approached the *balance* struck by Congress in the underlying statutes, the Department proposes to partially rescind the 2019 Final Rule . . . .") (emphasis added).

The federal conscience rights protected by the relevant congressional statutes named in 2023 NPRM Proposed Rule 88.1 are categorical. They are not to be "balanced" against and thereby diminished by competing interests. A balancing test is contrary to the plain text of these statutes. By way of illustration, we have set out in the APPENDIX the Church Amendments, the Coats-Snowe Amendment, and the Weldon Amendment. The text of each statute unequivocally states a categorical right—not a balancing test.

A balancing test is also wrong as a matter of common sense. Consider two physicians, one practicing in New York City and the other in rural western Kansas, both objecting to abortion as a matter of their Catholic faith. Under a balancing test, the conscientious rights of the physician in New York are honored because there are others ready to perform the abortion, but not so with the physician in rural Kansas. When dealing with conscientious objection—America's highest-ranking ideal going back to excusing Quakers from fighting in the Revolution—it makes no sense to water down this ideal.

The claims of conscience like those under the Church Amendments and Weldon Amendment are not like those under the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. 2000bb, *et seq*. RFRA is a balancing test. Even RFRA, however, is a balancing that is weighted in favor of the religious complainant—a standard commonly referred to as strict scrutiny. The 2023 NPRM commentary quoted in the text would impose yet a different balancing test, one evenly weighted as between the disputing parties. This would be material, legal error.

True, "[p]atients also have autonomy rights . . . . And they have health needs, sometimes urgent ones." 88 Fed. Reg. at 826. But those needs are not to be met by administratively devaluing the rights of conscientious objectors who were extended those rights categorically by Congress. Rather, the provision of federal health benefits legislatively due others is to be met by the government using its many and other vast resources.

The 2023 NPRM poses a false choice between either honoring statutory conscience rights or mere delay in delivering health care benefits.[5] It is the government that is statutorily charged by Congress to step up and *both* honor conscience and deliver the health benefits.

POINT TWO: What may Occur is Not "Discrimination" Resulting in Harm to Patients, But a Failure in Governmental Duty Sometimes Causing Delay in Medical Benefits. The 2023 NPRM claims that reversion back to the 2011 Rule is needed to prevent "discrimination" against certain beneficiaries of federally funded health care. *See* 88 Fed. Reg. at 824 (2019 Final Rule "lead[s] to *discrimination* against patients") (emphasis added). *See also id.* at 825 (2019 Final "[R]ule would lead to increased *discrimination* and denials of care" as well as lead to

[5] Delay is altogether different from a genuine emergency. For the most part we are not dealing with life-threating emergency services.

taking note of the "importance of access to [medical] care free from *discrimination* . . . .") (emphasis added).

"Discrimination," however, is an altogether wrong word for what is going on here. If patients and other beneficiaries of federally funded health care who experience delay in accessing medical services are to be characterized as victims of "discrimination," then reason dictates it is the conscientious objectors who are the cause of this "discrimination." This is a false and invidious characterization. It is a none-too-veiled attempt to saddle those invoking their congressionally provided rights of conscience with the pejorative term "discrimination."

Those lodging complaints with HHS are merely asserting their statutory rights of conscience granted to them by Congress. If, on occasion, there is a delay in medical services to patients, it is because the public sector has failed to use its considerable resources to promptly serve those patients. The United States Government is capable of simultaneously meeting two duties: honoring conscience and delivering medical services in a competent manner. The assertion that individuals and medical providers invoking their statutory conscientious rights under federal law are the immediate and effective cause of "third-party harm" by victimizing patients via "discrimination" is to cast these honorable people and entities in a false light.

The debate here over federal regulation is no place for *ad hominem* rhetoric. HHS commentary should be scrubbed of all references to conscientious objectors as discriminators.

POINT THREE: The 2023 NPRM Strips the Office for Civil Rights of Effective Procedural Tools to Enforce These Rights of Conscience. The 2023 NPRM Proposed Rules 88.2, 88.3, and Appendix A fail to provide sufficient due process in the form of incentives for recipients of federal funds to provide notice of rights at the workplace. The proposed rules also fail to make the Office for Civil Rights ("OCR") welcoming to complainants. The rule should begin with instructions on providing useful as well as needed content to a complaint, it fails to showcase the independence and resources within OCR to promptly and thoroughly investigate, and, if a complaint appears meritorious, the rule should display the wherewithal at OCR to pursue the matter to a remedy that is calculated to vindicate conscience as valued by Congress in these several laws.

We acknowledge that Congress has not expressly directed HHS to effectuate these conscience protections by promulgation of regulations. And we appreciate there are limitations to HHS's housekeeping authority and general compliance powers. Still, HHS can do considerably more without exceeding its authority and thus ought to do more, in order to effectuate the statutory protections.

Existing Regulation 45 C.F.R. 88.4: In lieu of this regulation, there should be a requirement that the terms of all grant agreements set forth the names of all conscience statutes that a grantee maybe subject to because of the receipt of federal financial assistance. It is common for grant agreements to list the various laws and regulations which grantees must comply with. This is nothing more than written notice of applicable provisions of the law. With such a paragraph highlighting applicable conscience protections, a grantee would be encouraged to seek advice

from legal counsel, voluntarily post a notice of rights for their employees, advise their human resource officers to be alert for requests that conscience be honored, and otherwise proceed in a manner that comports with the law. Given that placement of such a paragraph in grant agreements is mere business prudence, such a rule is well within the housekeeping authority of HHS.

Proposed Regulation 88.2: The 2023 NPRM is more helpful than the highly limited 2011 Final Rule, but it does not go far enough. As proposed, Regulation 88.2 grants OCR the authority to receive and handle complaints, conduct investigations, seek voluntary resolution before and after a finding of noncompliance, and to work with those HHS units that oversee the grant or contract that is the recipient of federal funding with the duty to honor conscience.

The Proposed Regulation should state that the complainant may be represented by legal counsel.

The Proposed Regulation should state that any investigation by OCR is to take place by a neutral examiner.

The Proposed Regulation states that if there is a finding by the OCR examiner of compliance by the grantee, the findings of fact and conclusions of law should be in writing and promptly provided by the examiner to all parties. It is also true, however, that if there is a finding by the OCR examiner of noncompliance by the grantee, the examiner's findings of fact and conclusions of law should be in writing and promptly provided by the examiner to all parties. Only after the latter task is completed should the parties enter informal conciliation or negotiation.

If an OCR investigation leads to a finding of noncompliance, this is a breach of the funding statute under which the grant was awarded. Proposed Regulation 88.2 should more explicitly authorize OCR to work closely with the grant administrator to bring about compliance with the conscience requirements under the authority of grant administration. If there is a continued failure of compliance, then there is an ongoing breach of the grant agreement and the normal remedial enforcement processes should follow—even to the point of suspension or termination of the grant. All this should be more explicitly stated in the regulation so that complainants can see that there is enforcement authority behind the right of conscience.

Upon a finding of noncompliance, Proposed Regulation 88.2(d)(2) says "the matter will be resolved by informal means whenever possible." But that sentence should be immediately followed by one that says: "As necessary, formal enforcement processes will be pursued by OCR by working with the agency component that oversees the grant or contract, including possible suspension or termination of the grant under the general authority to administer the terms of a grant." The present text is woefully misbalanced. It gives the false impression that the proposed rule has little formal enforcement authority behind it, that OCR is toothless. This discourages the filing of complaints because obtaining a just and fair process appears futile. And, by making it seem that OCR will do little, it emboldens grantees not to act to protect conscience.

Upon a finding by OCR of noncompliance, the complainant should be promptly informed that he or she (or the entity) may want to pursue the matter as a religious accommodation under other

federal legislation. For example, Title VII of the '64 Civil Rights Act (42 U.S.C. 2000e(j)) or RFRA may provide other means of obtaining relief. Such remedies are parallel to the rights of conscience being looked into by OCR, and the complainant should be informed by OCR that it will not drop the complaint just because the complainant is pursuing other legal remedies.

Proposed Regulation 88.3 and Appendix A: The 2023 NPRM provides for a voluntary notice of rights posted at the grantee's workplace, webpage, and the like. While such a notice is deemed "a best practice" there is no posting requirement. In contrast, 2019 Final Rule 88.5(a) incentivizes posting of a notice by regarding it "as non-dispositive evidence of compliance with the applicable substantive provisions of" 45 C.F.R. Part 88. Whether it be the existing incentive or something equally valuable, without the rule providing "a carrot or a stick," few grantees will post the desired notice, thereby keeping employees ignorant of their rights.

Appendix A to the 2023 NPRM has a model text for the voluntary notice. Appendix A to the 2019 Final Rule is a far superior model text. It reads as more user friendly, and it gives more and helpful information in the body of the notice. The 2023 NPRM notice is stripped down as if there was a word limit. The notice needs to be more forthcoming with inviting prose and encouragement. It will cost HHS nothing to retain the 2019 Final Rule model notice, whereas retention will enhance HHS's ability to protect conscience as Congress has specified that it should.

Thank you for your attention to the foregoing Comments.

Respectfully submitted,

Thomas More Society, Christian Legal Society, National Association of Evangelicals, Institutional Religious Freedom Alliance, and Center for Public Justice

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A P P E N D I X

Church Amendments, 1973

42 USC §300a-7(b)

Prohibition of public officials and public authorities from imposition of certain requirements contrary to religious beliefs or moral convictions.

The receipt of any grant, contract, loan, or loan guarantee under 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.) by any individual or entity does not authorize any court or any public official or other public authority to require -

(1) such individual to perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions; or

(2) such entity to -

(A) make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions,or

(B) provide any personnel for the performance or assistance in the performance of any sterilization procedure or abortion if the performance or assistance in the performance of such procedures or abortion by such personnel would be contrary to the religious beliefs or moral convictions of such personnel.

42 U.S.C. 300a-7 (c)(1)
Discrimination prohibition.

(1) No entity which receives a grant, contract, loan, or loan guarantee under 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 -

(A) discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel, or

(B) 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.

42 U.S.C. 300a-7 (c)(2)

(2) No entity which receives after July 12, 1974, a grant or contract for biomedical or behavioral research under any program administered by the Secretary of Health and Human Services may -

(A) discriminate in the employment, promotion, or termination of employment of any physician or other health care personnel, or

(B) 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 any lawful health service or research activity, because he refused to perform or assist in the performance of any such service or activity on the grounds that his performance or assistance in the performance of such service or activity would be contrary to his religious beliefs or moral convictions, or because of his religious beliefs or moral convictions respecting any such service or activity.

42 U.S.C. 300a-7 (d).
Individual rights respecting certain requirements contrary to religious beliefs or moral convictions.

No individual shall be required to perform or assist in the performance of any part of a health service program or research activity funded in whole or in part under a program administered by the Secretary of Health and Human Services if his performance or assistance in the performance of such part of such program or activity would be contrary to his religious beliefs or moral convictions.

42 U.S.C. 300a-7 (e).
Prohibition on entities receiving Federal grant, etc., from discriminating against applicants for training or study because of refusal of applicant to participate on religious or moral grounds.

No entity which receives, after September 29, 1979, any grant, contract, loan, loan guarantee, or interest subsidy under 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 Assistance and Bill of Rights Act (42 U.S.C. 6000 et seq.) may deny admission or otherwise discriminate against any applicant (including applicants for internships and residencies) for training or study because of the applicant's reluctance, or willingness, to counsel, suggest, recommend, assist, or in any way participate in the performance of abortions or sterilizations contrary to or consistent with the applicant's religious beliefs or moral convictions.

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Coats – Snowe Amendment, 42 U.S.C. § 238n - Abortion-related discrimination in governmental activities regarding training and licensing of physicians

(a) IN GENERAL The Federal Government, and any State or local government that receives Federal financial assistance, may not subject any health care entity to discrimination on the basis that—

(1) the entity refuses to undergo training in the performance of induced abortions, to require or provide such training, to perform such abortions, or to provide referrals for such training or such abortions;

(2) the entity refuses to make arrangements for any of the activities specified in paragraph (1); or

(3) the entity attends (or attended) a post-graduate physician training program, or any other program of training in the health professions, that does not (or did not) perform induced abortions or require, provide or refer for training in the performance of induced abortions, or make arrangements for the provision of such training.

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Weldon Amendment, Consolidated Appropriations Act, 2009, Pub. L. No. 111-117, 123 Stat 3034 United States Public Laws 111th Congress:

SEC. 508. . . . (d)(1) 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.