March 6, 2023

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

RE: Conscience NPRM, RIN 0945-AA18
Safeguarding the Rights of Conscience as Protected by Federal Statutes
Comments of the American Center for Law and Justice

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

The American Center for Law and Justice ("ACLJ") submits the following comments in opposition to the Notice of Proposed Rulemaking issued by the U.S. Department of Health and Human Services ("Safeguarding the Rights of Conscience as Protected by Federal Statutes"), as published in the Federal Register on January 5, 2023 (hereafter, the "Proposed Rule" or "NPRM"). The ACLJ is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States in several significant cases involving the freedoms of speech and religion and have submitted formal comments regarding proposed rulemaking on a wide variety of issues, including conscience rights.[1]

The ACLJ urges HHS to withdraw the NPRM in its entirety. The 2019 Final Rule should not be amended in any way. We also urge HHS to recommit itself to defending that Rule in court and, upon a favorable ruling overturning the decisions that invalidated the Rule, vigorously enforce its terms. The idea the Proposed Rule would, if finalized, safeguard the rights of conscience more so than the 2019 Rule is woefully mistaken.

In the absence of any court holding that a plaintiff has a private right of action to sue a covered entity under federal conscience statutes such as the Church Amendments, the Coats-Snowe Amendment, and the Weldon Amendment, it is imperative that the HHS Office for Civil Rights take its obligation to investigate and enforce these laws seriously. The previous administration did just that by, for example, issuing notices of violation against the University of

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[1] *See*, *e.g.*, *Pleasant Grove v. Summum*, 555 U.S. 460 (2009) (holding that the government is not required to accept counter-monuments when it displays a war memorial or Ten Commandments monument); *McConnell v. FEC*, 540 U.S. 93 (2003) (holding that minors have First Amendment rights); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993) (holding that denying a church access to public school premises to show a film series violated the First Amendment); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding that allowing a student Bible club to meet on a public school's campus did not violate the Establishment Clause); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987) (striking down an airport's ban on First Amendment activities).

Vermont Medical Center and the State of California,[2] and filing suit against UVMMC, *U.S. v. Univ. of Vermont Med. Ctr.*, No. 2:20-cv-00213, (D. Vt.). The previous administration also promulgated the 2019 Final Rule which, in furtherance of this country's "long history of providing protections in health care for individuals and entities on the basis of religious beliefs or moral convictions," remains HHS's greatest and best effort to ensure that conscience rights in the health care field will be zealously safeguarded. 84 Fed. Reg. 23,170 (May 21, 2019).

The 2019 Rule provided clear evidence that—at least at *that* time—HHS took seriously the need to protect the conscience rights of healthcare personnel. Among other things, the 2019 Rule gave HHS important enforcement tools to protect conscience rights, including the ability to investigate complaints and conduct investigations, make referrals to the Department of Justice for violations, and address discriminatory conduct by, among other things, withholding federal funds, where necessary. Sec. 88.7. These provisions make, of course, perfect sense. If OCR is going to investigate and enforce federal conscience statutes, it needs the tools and framework to do so.

The 2019 Rule also required certain recipients of federal funds to submit compliance certifications, to maintain records to demonstrate compliance, and to cooperate with OCR's enforcement activities. Assurances and certifications would have to be submitted when applying or reapplying for federal assistance from HHS. Sec. 88.4. This also makes sense. If covered entities are to be bound by the anti-discrimination provisions of federal conscience statutes, the government is entitled to receive certifications of compliance. Covered entities that do not wish to comply with the Church Amendments, for example, or that do not wish to certify that they comply, can simply refuse to accept federal funding.

Another important feature of the 2019 Rule is its definitions of key terms contained in federal conscience statutes, clarifying their scope and providing adequate notice to covered entities of their meaning. Defined terms include, "Assist in the performance," "Discriminate or Discrimination," and "Referral." Sec. 88.2. No one can seriously dispute that regulatory definitions of important statutory terms are of enormous benefit to those who must comply with them and who are protected by them. In the absence of such definitions, HHS officials are free to create and apply their own definitions in an *ad hoc* fashion, and stakeholders will be left to guess or surmise how HHS officials will understand key statutory terms.

The 2019 Rule also makes explicit the purpose of the Rule itself, as well as HHS's commitment to ensuring compliance with federal statutes protecting conscience:

> Consistent with their objective to protect the conscience and associated anti-discrimination rights of individuals, entities, and health care entities, the statutory provisions and the regulatory provisions contained in this part are to be interpreted and implemented broadly to effectuate their protective purposes.

Sec. 88.1.

[2] *See* August 28, 2019, Notice of Violation in OCR Transaction No. 306427, and January 24, 2020, Notice of Violation in OCR Transaction Numbers 17-274771 and 17-283890.

This language is not window dressing. It is evidence of HHS's (then) commitment to ensuring that conscience rights are respected and protected to the furthest extent of the law. Indeed, the importance of safeguarding the rights of conscience dates to the very founding of the country. The Founding Fathers spoke often of the rights of conscience. James Madison, the Father of the Constitution, opined that "[c]onscience is the most sacred of all property," and that man "has a property of peculiar value in his religious opinions, and in the profession and practice dictated by them." Property (March 29, 1792), in The Founders' Constitution, Vol. 1, Doc. 23 (P. Kurland & R. Lerner eds. 1987). He understood that one's duty to the "Creator . . . . is precedent, both in order of time and in degree of obligation, to the claims of Civil Society." A Memorial and Remonstrance Against Religious Assessments (1785), in The Sacred Rights of Conscience, 309 (D. Dreisbach & M.D. Hall eds. 2009). "The Religion . . . of every man must be left to the conviction and conscience of every man," preventing efforts to "degrade[] from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority." *Id.*

In his famous 1789 letter to the Quakers, the Father of the Country, George Washington, wrote:

> The conscientious scruples of all men should be treated with great delicacy and tenderness: and it is my wish and desire, that the laws may always be extensively accommodated to them, as a due regard for the protection and essential interests of the nation may justify and permit.

Letter to the Annual Meeting of Quakers (1789), in The Papers of George Washington, 266 (Dorothy Twohig ed. 1993).

Thomas Jefferson observed that "[n]o provision in our Constitution ought to be dearer to man than that which protects the rights of conscience against the enterprises of the civil authority." To the Society of the Methodist Episcopal Church at New London, Connecticut (Feb. 4, 1809). Like Madison, Jefferson understood the right of conscience to be a pre-political one, i.e., one that could not be surrendered to the government as a term of the social contract: "[O]ur rulers can have authority over such natural rights only as we have submitted to them. The rights of conscience we never submitted, we could not submit. We are answerable for them to our God." Notes on the State of Virginia, in The Basic Writings of Thomas Jefferson, 157-58 (Philip S. Foner ed., 1944).

In sum, "[t]he victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State." *Girouard v. United States*, 328 U.S. 61, 68 (1946). And it is the longstanding commitment to that principle that has animated the "happy tradition" in our country "of avoiding unnecessary clashes with the dictates of conscience." *Gillette v. United States*, 401 U.S. 437, 453 (1970).

The federal conscience statutes and the 2019 Rule are a vital expression of the need to protect conscience rights in an area where discrimination against pro-life persons is clearly evident: the vast field of health care services.

Unfortunately—but not surprisingly, given the pro-abortion ideology of the current administration—the NPRM effectively guts the 2019 Rule. It does so by, *inter alia*, eliminating the purpose and rule of construction of the Rule, deleting definitions of key terms, removing assurance

and certification of compliance requirements, and negating the need of covered entities to cooperate with OCR enforcement.

Why has HHS done this? The answer is not difficult to fathom. President Biden and HHS Secretary Becerra have made it clear that this administration supports an aggressive agenda of abortion on demand.[3] The NPRM reflects that ideological commitment but isn't so bold as to state its true agenda in plain terms. Rather, the NPRM claims that the 2019 Rule has caused confusion, undermines the balance between conscience and access to healthcare services, and has raised numerous legal questions. The NPRM says that it is "informed" by three court decisions "that vacated the 2019 Final Rule prior to it taking effect."[4]

If the 2019 Rule's definitions of key statutory terms seriously caused confusion (such as to the likes of the radically pro-abortion, anti-conscience ACOG[5]), then one would think the NPRM would have redefined those terms to dispel any confusion. It does not do so. The NPRM provides no definitions of those key terms at all, but simply deletes them. When has the lack of a definition ever clarified the meaning of a term? The absurdity is apparent. Instead of putting stakeholders on notice as to what "assist," "discriminate," and "referral," entail, for example, the NPRM leaves them in the dark. Not only are fund recipients lacking in necessary guidance, but health care personnel cannot know for certain whether their conscientious refusal to participate in an objectionable procedure is covered by the terms of a federal conscience statute or not.

Another reason proffered by HHS for gutting the 2019 Rule is that the 2019 Rule undermines "the balance Congress struck between safeguarding conscience rights and protecting access to health care access." Nonsense. Take, for example, 42 U.S.C. 300a-7(c)(1). This paragraph of the Church Amendments prohibits covered entities from discriminating in employment decisions based on an individual not wanting to perform or assist in an abortion or sterilization because of that individual's religious beliefs or moral convictions. The text of the statute does not say that discrimination is permissible if it negatively impacts a person's access to health care services. The statute does not say that the interests of a conscientious objector must be balanced against some vague Congressional intent (especially as interpreted by an administration steeped in abortion ideological commitments). The statute straightforwardly provides that certain entities may not discriminate against those who will not perform or assist in abortions or sterilizations. Period.

The untenable assertion of the NPRM on this point is seen by looking, for example, to the Federal Death Penalty Act of 1994. That statue protects state and federal employees from being

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[3] *See, e.g.*, July 8, 2022, Executive Order of President Biden ("Protecting Access to Reproductive Health Care Services"), stating that "[i]t remains the policy of my Administration to support women's right to choose and to protect and defend reproductive rights. Doing so is essential to justice, equality, and our health, safety, and progress as a Nation." *See also* June 24, 2022, statement of HHS Secretary, Xavier Becerra, stating that, in light of *Dobbs*, "I have directed every part of my Department to do any and everything we can here. As I have said before, we will double down and use every lever we have to protect access to abortion care. To everyone in this fight: we are with you."

[4] *See Washington v. Azar*, 426 F. Supp. 3d 704 (E.D. Wash. 2019), *City & Cnty. of San Francisco v. Azar*, 411 F. Supp. 3d 1001 (N.D. Cal. 2019), *New York v. HHS*, 414 F. Supp. 3d 475 (S.D.N.Y. 2019).

[5] ACOG believes that "respect for conscience" is only a "only a *prima facie* value, which means it can and should be overridden in the interest of other moral obligations that outweigh it in a given circumstance." American College of Obstetricians and Gynecologists (ACOG), Committee on Ethics, "The Limits of Conscientious Refusal in Reproductive Medicine," opinion no. 385, November 2007.

forced to participate in federal executions or the prosecution of capital crimes contrary to their "moral or religious convictions." 18 U.S.C. §3597 (b). The statute contains no explicit or implicit balancing of the right to a moral or religious exemption. For this reason, it would be absurd to assert that the statutory right of a person not to participate in an execution needs to be balanced against the government's interest in carrying out a lawfully imposed death sentence.

If Congress wants to balance the unqualified protection from discrimination in 42 U.S.C. 300a-7(c)(1) with some other interest, Congress can do so by amending the law. To argue that the 2019 Rule must be gutted because of some Congressional balancing nowhere evident in the text of the law is not just specious reasoning, it is a contortion of the plain structure of the law that HHS is itself charged with enforcing.

The NPRM's reliance on three court legal decisions to buttress its critiques of the 2019 Rule cannot be taken seriously. The decisions cited by the NPRM are not decisions of the United States Supreme Court. They are not decisions of any U.S. court of appeals. They are decisions of U.S. district courts that have no precedential weight whatsoever. *See, e.g.*, *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case") (quoting 18 J. Moore et al., Moore's Federal Practice § 134.02[1][d], p. 134-26 (3d ed. 2011)). Yes, those decisions imposed injunctions, and those injunctions are binding. So what did the previous administration do? It appealed those decisions. Once the *current* administration took the reins of bureaucratic power, what did *it* do? Did it aggressively defend the 2019 Rule on appeal that the very same agency, HHS, appealed in the first place? No. It stipulated to a withdrawal of the appeal in the Second Circuit case and stayed the appeals in the Ninth Circuit until such time that HHS could gut the core protections of the 2019 Rule. HHS's effective abandonment of those appeals prove just how serious HHS is in safeguarding the rights of conscience: not at all.

Finally, the NPRM's reworking of the 2019 Rule's very purpose speaks volumes. It ditches the 2019 Rule's statement of what interests the federal conscience and anti-discrimination laws serve and it deletes the rule of construction that the "statutory provisions and the regulatory provisions contained in this part are to be interpreted and implemented broadly to effectuate their protective purposes," sec. 88.1, even though it is a "familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes." *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967).

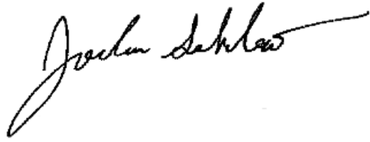
Based on the foregoing, if HHS chooses to adopt the totality of the NPRM as a final rule, the ACLJ would suggest one minor modification: the first word in the rule's title should be changed as follows: "*Undermining* the Rights of Conscience as Protected by Federal Statutes."

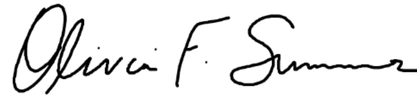
CONCLUSION

The ACLJ respectfully requests that the NPRM be withdrawn in its entirety. It also asks that HHS recommit itself to defending the rights of healthcare personnel, as protected by federal conscience statutes and the 2019 Final Rule. HHS should move to lift the stays in the appeals before the Ninth Circuit and defend the 2019 Rule before that court. Should the Ninth Circuit affirm the adverse rulings of the district courts, then HHS should do what it has done in the past

with respect to other HHS rules challenged in federal court: seek review at the United States Supreme Court.

Very truly yours,





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