



March 26, 2018

U.S. Department of Health and Human Services  
Office for Civil Rights  
Attention: Conscience NPRM, RIN 0945-ZA03  
Hubert H. Humphrey Building, Room 509F  
200 Independence Avenue SW  
Washington, DC 20201

[VIA OVERNIGHT DELIVERY]

**RE: *Protecting Statutory Conscience Rights in Health Care; Delegations of Authority*  
Department of Health and Human Services, Office for Civil Rights  
RIN 0945-ZA03**

Dear Sir or Madam:

The American Center for Law and Justice (“ACLJ”) submits the following comments in response to the proposed rule issued by the United States Department of Health and Human Services (“Department”): *Protecting Statutory Conscience Rights in Health Care; Delegations of Authority*, RIN 0945-ZA03 (“Rule”).<sup>1</sup>

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 a number of significant cases involving the freedoms of speech and religion.<sup>2</sup> For decades, the ACLJ has actively represented medical professionals and paraprofessionals who have faced discrimination and adverse employment actions for refusing to violate their religious and moral conscience in the provision of health care services.

## **I. Introduction**

The Rule establishes important safeguards and enforcement mechanisms that will help ensure that the right to conscience, as protected by numerous federal statutes and regulations, will

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<sup>1</sup> These comments are also submitted on behalf of more than 115,000 individuals who have signed the ACLJ’s Petition to Support HHS Pro-Life Policy Initiatives.

<sup>2</sup> 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).

be honored by those charged with the duty of complying with those laws. It is a welcomed and necessary measure that should be finalized as proposed.

The Rule simply—but importantly—facilitates the enforcement of existing statutes. It helps to ensure that funds designated by the Department are not used to engage in coercive and/or discriminatory practices as prohibited by, for example, the Church Amendments (42 U.S.C. § 300a-7), the Public Health Service Act § 245 (PHSA) (42 U.S.C. § 238n), and the Weldon Amendment (Consolidated Appropriations Act, 2008, Pub. L. No. 110-161, § 508(d), 121 Stat. 1844, 2209). While these statutory provisions expressly protect the conscience rights of healthcare entities and personnel, it is apparent that such provisions have increasingly been disregarded either by health service providers themselves or by government entities. The conscience rights of healthcare personnel are increasingly at risk of being subordinated to the desires and opinions of others. Importantly, the Rule does not create new substantive law. Rather, by requiring compliance with *existing law*, it merely provides a mechanism by which the anti-discrimination provisions of the Church Amendments, the PHSA, and the Weldon Amendment can be effectively enforced, thus ensuring the full protection of conscience rights in the medical arena.

## **II. The Rule Helps to Safeguard the Sacred Right of Conscience, a Founding Principle that Should Continue to Animate Governmental Action.**

The Rule offers important regulatory protections for conscience rights. That respect for conscience is fully consistent with the long and well-established history in this country of governmental accommodation of religious beliefs and practices.

“The pursuit of religious liberty was one of the most powerful forces driving early settlers to the American continent and remained a powerful force at the time of the founding of the American republic.” Brett G. Scharffs, *The Autonomy of Church and State*, 2004 B.Y.U.L. Rev. 1217, 1230 (2004). Even before the ratification of the Constitution, “tension between religious conscience and generally applicable laws, though rare, was not unknown.” *City of Boerne v. Flores*, 521 U.S. 507, 557 (1997) (O’Connor, dissenting). The resolution of conflicts over matters such as “oath requirements, military conscription, and religious assessments” demonstrates that “Americans in the Colonies and early States thought that, if an individual’s religious scruples prevented him from complying with a generally applicable law, the government should, if possible, excuse the person from the law’s coverage.” *Id.* Exemptions were understood as “a natural and legitimate response to the tension between law and religious convictions.” Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1466 (1990).

In 1775, for example, the Continental Congress passed a resolution exempting individuals with pacifist religious convictions from military conscription:

As there are some people, who, from religious principles, cannot bear arms in any case, this Congress intends no violence to their consciences, but earnestly recommend it to them, to contribute liberally in this time of universal calamity, to the relief of their distressed brethren in the several colonies, and to do all other services to their oppressed Country, which they can consistently with their religious principles.

*Id.* at 1469 (citation omitted).

Thus, even when the country was in dire need of men to take up arms to fight for its independence, our forefathers knew that conscience is inviolable and must be honored. They understood that to conscript men into military service against their religious conscience would have undermined the very cause of liberty to which they pledged their lives, fortunes, and sacred honor.

The care and concern for religious freedom prior to the ratification of the Constitution was the underlying and animating principle of the religion clauses of the First Amendment:

The core value of the religion clauses is liberty of conscience in religious matters, an ideal which recurs throughout American history from the colonial period of Roger Williams to the early national period of the Founders. All three traditions of church and state—Enlightenment, pietistic, and political centrist—regarded religious liberty as an inalienable right encompassing both belief and action and as an essential cornerstone of a free society.

A. Adams & C. Emmerich, *A Heritage of Religious Liberty*, 137 U. Pa. L. Rev. 1559, 1664 (1989).<sup>3</sup>

Examples of this truth are seen most clearly in the writings of the Founding Fathers themselves. 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.*

George Washington, the Father of the Country, noted that “the establishment of Civil and Religious Liberty was the Motive that induced me to the field of battle.” Michael Novak & Jana Novak, *Washington’s God*, 111 (2006). In his famous 1789 letter to the Quakers, he 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).

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<sup>3</sup> The states at the time of the founding were similarly concerned with the preservation of religious liberty and conscience. “Between 1776 and 1792, every state that adopted a constitution sought to prevent the infringement of ‘liberty of conscience,’ ‘the dictates of conscience,’ ‘the rights of conscience,’ or the ‘free exercise of religion.’” *A Heritage of Religious Liberty*, *supra*, at 1600-01.

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 which 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).

### **III. The Rule Helps to Safeguard the Constitutional and Statutory Guarantee of Conscience Rights.**

The First Amendment to the United States Constitution provides protection for the right to espouse any particular belief and to act in accordance with that belief. Preserving the conscience rights of Americans is thus of paramount *constitutional* concern. The Rule helps to ensure that such rights are properly protected. The Supreme Court has noted that the “full and free right to entertain any religious belief, to practice any religious principle and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, *is conceded to all.*” *Watson v. Jones*, 80 U.S. 679, 728 (1871) (emphasis added). The Court has also explained that “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.” *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

The First Amendment’s Free Speech Clause also operates to secure the cherished freedom of belief and thought. *See Wooley v. Maynard*, 430 U.S. 705, 714 (1977). As the Court noted in both *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969), and *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923), freedom of thought necessarily requires freedom from coercive government indoctrination. Freedom from coercive or discriminatory policies and practices such as those prohibited by the Church Amendments, the PHSA, and the Weldon Amendment fits squarely into this cherished right.

For many, the act of engaging in a medical procedure that ends in the termination of a pregnancy (or that otherwise touches on “sanctity of life” issues) is not morally neutral. The “abortion debate” is consequently highly controversial and politically-charged. Individuals simply cannot be forced onto one side of that debate, much less forced to participate in the very practices being debated. *Effective* conscience protection in the health services field is therefore vital. Unfortunately, many healthcare professionals have been placed in situations where they are forced to choose between their conscience and their job, or more troubling, between their conscience and the law.

Over the years, the ACLJ has undertaken representation in a number of real-life cases which demonstrate that these concerns are not speculative:

- In *Moncivaiz v. Dekalb*, 2004 U.S. Dist. LEXIS 3997 (N.D. Ill. Mar. 12, 2004), a bilingual part-time secretary working in DeKalb’s Women Infants and Children (WIC) program was denied a promotion to full-time secretary because of her moral and religious objections to translating the possibility of abortion as an option for dealing with an unwanted pregnancy. *Id.* at \*3.
- In *Adamson v. Superior Ambulance Service*, Civil Action No. 04C-3247 (N.D. Ill., filed May 7, 2004), an Emergency Medical Technician was fired when she informed her employer that, because of her religious objection to abortion, she would not assist in the performance of a non-emergency, elective abortion by transporting the patient to an abortion clinic.
- In *Baretela v. Unity Health System*, Case No. 08cv6110L (W.D.N.Y., filed March 10, 2008), Michelle Baretela, a social worker in New York, was fired for her refusal, on conscience grounds, to make referrals for abortions. Despite the fact that providing information to patients on any type of medical or surgical procedure was beyond the scope of both Baretela’s training and practice as an out-patient social worker, her employment was terminated solely on the basis of her conscientious objection to participating in abortion referrals.
- In *Vandersand v. Wal-Mart Stores, Inc.*, 525 F. Supp. 2d 1052 (C.D. Ill. July 31, 2007), a pharmacist was placed on an unpaid leave of absence after a Planned Parenthood nurse complained about his conscientious objection to dispensing potentially abortifacient drugs.
- In *Menges v. Blagojevich*, a group of Illinois pharmacists sued then-Governor Rod Blagojevich and other state officials after implementation of a state administrative regulation requiring pharmacies to dispense potential abortifacients “without delay.” The statute provided no exceptions for religious or conscientious objections to such services.
- In May 2002, ACLJ attorneys tried the case of *Diaz v. Riverside Health Services*. Michelle Diaz was a nurse in California who was fired from her job at a public hospital because she refused, on conscience grounds, to participate in abortions or to dispense a potential abortifacient.
- The ACLJ has also provided legal assistance to nurses at hospitals in California and Vermont who were told by their superiors that they must participate in abortion procedures or face disciplinary action.

Had the employers in these situations been required to *certify* compliance with the Church Amendments, as the Rule provides, these issues might have been resolved, with protection for conscience rights, without any need for legal intervention to vindicate those rights. Even more importantly, without the enforcement mechanism of the Rule, it is uncertain how the prohibitions set forth in the Church Amendments, for example, are to be enforced, as courts have been reluctant

to recognize a private cause of action under that statute. *See, e.g., Moncivaiz*, 2004 U.S. Dist. LEXIS 3997; *Nead v. Eastern Illinois Univ.*, 2006 U.S. Dist. LEXIS 36897 (C.D. Ill. June 6, 2006).

Like teachers and students in the public school setting, healthcare professionals should not be forced to check their religious or conscience beliefs at the clinic, hospital or research lab door. The conscience protections required by the Church Amendments, the PHSA, and the Weldon Amendment afford valuable protection for the First Amendment conscience rights of these individuals. While additional education and outreach on the issue of conscience protection may be beneficial, and certainly should be undertaken, those means alone are not as likely to ensure proper enforcement of these federal laws. The Rule is therefore an important regulatory enforcement mechanism for statutory conscience protections that already exist.

#### **IV. There is National Precedent for Right-of-Conscience Protection Legislation.**

Based undoubtedly on the foundational constitutional principles that guarantee conscience rights to Americans, this Nation possesses a decades-long history of explicit and affirmative right-of-conscience protections. In the healthcare arena, right-of-conscience legislation is widespread. In fact, out of all fifty states, only three fail to provide some express form of conscience protection to health professionals. In the forty-seven states that do provide such protection, however, there are varying levels of protection. For instance, in some states, healthcare personnel may raise a valid conscientious objection to engaging in abortion-related medical practices only if they provide proof or the reasons for objecting in writing.<sup>4</sup> Various states simply require a conscientious objector, whether an individual or a healthcare entity, to provide prior notice.<sup>5</sup> Importantly, nineteen states enforce outright prohibitions against requiring health professionals—including both entities and employees—to engage in medical procedures resulting in abortion.<sup>6</sup>

Conscience protection exists outside the healthcare context as well. In 1965, the Supreme Court held that selective service draftees may raise conscientious objections to mandatory military service. *United States v. Seeger*, 380 U.S. 163 (1965). Acknowledging that such objections are oftentimes based on an ethical or moral belief, as opposed to a religious belief, the Court defined a conscientious objection as “[a] sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption . . .” *Id.* at 176. The Court explained that permitting a conscientious objection under this standard

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<sup>4</sup> ALA. CODE § 22-21B-4 (LexisNexis 2017); ARIZ. REV. STAT. ANN. § 36-2154 (2009); CAL. HEALTH & SAFETY CODE § 123420(a) (West 2006); GA. CODE ANN. § 16-12-142 (2007); IDAHO CODE ANN. § 18-612 (West 2004); 720 ILL. COMP. STAT. ANN. 510/13 (West 2003); KY. REV. STAT. ANN. § 311.800 (LexisNexis 2007); MASS. GEN. LAWS ANN. ch. 112, § 12I (West 2003); N.Y. CIV. RIGHTS LAW § 79-i (McKinney 1992); 43 PA. CONS. STAT. ANN. § 955.2 (West 1991); VA. CODE ANN. § 18.2-75 (2004).

<sup>5</sup> CAL. HEALTH & SAFETY CODE § 123420(c) (West 2006); NEB. REV. STAT. § 28-337 (1995); OR. REV. STAT. § 435.475 (2007).

<sup>6</sup> ARK. CODE ANN. § 20-16-601(a) (2005); CONN. AGENCIES REGS. § 19-13-D54(f) (2005); DEL. CODE ANN. tit. 24, § 1791 (2005); FLA. STAT. ANN. § 390.0111(8) (West 2007); HAW. REV. STAT. ANN. § 453-16(e) (LexisNexis 2005); IND. CODE ANN. § 16-34-1-4 (LexisNexis 1993); IOWA CODE ANN. § 146.1 (West 2005); KAN. STAT. ANN. § 65-443 (2002); ME. REV. STAT. ANN. tit. 22, §§ 1591, 1592 (2004); MICH. COMP. LAWS ANN. § 333.20181 (West 2001); MINN. STAT. ANN. § 145.414 (West 2005); N.M. STAT. ANN. § 30-5-2 (LexisNexis 2003); N.C. GEN. STAT. § 14-45.1(e), (f) (LexisNexis 2007); N.D. CENT. CODE § 23-16-14 (2002); OHIO REV. CODE ANN. § 4731.91 (LexisNexis 2004); 18 PA. CONS. STAT. ANN. § 3213(d) (West 2000); S.D. CODIFIED LAWS § 34-23A-12 (2004); TENN. CODE ANN. § 39-15-204 (2006); WYO. STAT. ANN. § 35-6-106 (LexisNexis 2007).

“avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and is in accord with the well-established congressional policy of equal treatment for those whose opposition [] is grounded in their religious tenets.” *Id.* In 1970, *Welsh v. United States* clarified the *Seeger* test simply to ensure that non-religious moral convictions could still qualify as conscientious objections. 398 U.S. 333 (1970). Both *Seeger* and *Welsh* now serve benchmarks for conscience clause legislation. Demonstrating the legal effect of *Seeger* and *Welsh*, the Department of Defense currently permits members of the military to raise conscientious objections to being drafted into military service or to engaging in sustained military enlistment.<sup>7</sup>

Against this backdrop of conscience protection in both the medical and military fields, the Rule is a welcome, and certainly not surprising or arbitrary, step toward the full protection of the conscience rights of American healthcare workers. Importantly, it adds a crucial measure of enforceability and accountability that has often been lacking under federal law. As previously stated, although the matter has yet to be definitively decided, courts have been hesitant to find a private cause of action under the Church Amendments, *see e.g., Moncivaiz*, 2004 U.S. Dist. LEXIS 3997. In the absence of such a private cause of action, certification of compliance with federal law, and the oversight it would provide, is more than appropriate to help safeguard the protections afforded by these laws. Indeed, it is the very job of executive agencies to enact regulations implementing legislation passed by Congress. As the Supreme Court has recognized, Congress often leaves statutory “gaps” to be filled by administering agencies. *See Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005). While the specific regulations adopted are certainly within the discretion of the agency, the important point is that there be *some* regulation to fill these gaps.

#### **V. The Rule Does Not Create New Substantive Law, But Merely Serves as a Means of Enforcing Pre-Existing Law.**

Cries of alarm from pro-abortion ideologues regarding the Rule are exaggerated and unwarranted. The regulation does not create new substantive law. Rather, and among other things, it simply defines key terms and requires that healthcare entities certify that they are in compliance with existing law. In reality, these groups take issue not so much with the Rule, but with the federal laws that the Rule seeks to enforce. By requiring recipients of Department funds to certify compliance with federal law, the Rule merely—but importantly—ensures greater accountability for those who might otherwise be tempted to coerce healthcare professionals to violate their consciences. In the face of numerous statutes seeking to protect moral and religious conscience in the health services field (*i.e.*, the Church Amendments, the PHSA, and the Weldon Amendment), it cannot be realistically argued that concerns regarding such coercion in the workplace and elsewhere are not valid. Certifying compliance with federal law on these matters is simply a logical and essential measure to ensure that these laws are understood, implemented, and followed.

Similar to a request for a federal grant in which a proposed grantee must certify that it is in compliance with, and will remain in compliance with, all federal and state Equal Opportunity laws and regulations, the Rule is a simple device for enhancing recipient compliance with existing federal law. The same arguments made here against the regulation could also be made in the Equal Opportunity situation and would equally lack merit. If a grant recipient is unwilling to certify that

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<sup>7</sup> *See* Department of Defense Directive 1300.6, [https://www.centeronconscience.org/files/DODI\\_2017.pdf](https://www.centeronconscience.org/files/DODI_2017.pdf).

it is in compliance with the law and will remain so, chances are the recipient is already looking for ways to get around the law.

Furthermore, the federal laws protecting conscience rights that the Rule will enforce allow for healthcare personnel to step out of the way, not in the way, of access to legal healthcare services. Because the Rule merely provides a means of enforcing the substantive protections afforded by current federal law, nothing in the regulation could reasonably be construed as hindering anyone's access to lawful healthcare services. Rather than *elevating* the conscience rights of healthcare providers over the right of patients' access to healthcare services, the Rule actually *enhances* access, both by welcoming providers with conscientious scruples who might not enter the field, and by ensuring that those patients who *want* a pro-life physician or pharmacist, for example, will not be precluded from finding one.

## VI. Conclusion

The Rule ensures that the conscience protections currently afforded by federal statute to healthcare professionals are properly enforced. It does not create new law, but simply serves to prevent federal funds from being used to support coercive or discriminatory practices that violate existing federal law, including the Church Amendments, the PHSA, and the Weldon Amendment. The ACLJ commends the Department for acting in accordance with the founding principles of our country, principles that should continue to animate and inform all the government does. The Rule should be finalized as written.

Very truly yours,



Jay Alan Sekulow  
Chief Counsel  
AMERICAN CENTER FOR LAW & JUSTICE



Francis J. Manion  
Senior Counsel  
AMERICAN CENTER FOR LAW & JUSTICE

Geoffrey R. Surtees  
Senior Counsel  
AMERICAN CENTER FOR LAW & JUSTICE

Carly F. Gammill  
Senior Litigation Counsel  
AMERICAN CENTER FOR LAW & JUSTICE