October 3, 2022

Via Web Portal only

U.S. Department of Health and Human Services,
Office for Civil Rights,
Attention: 1557 NPRM (RIN 0945-AA17),
Hubert H. Humphrey Building, Room 509F,
200 Independence Avenue SW,
Washington, DC 20201

RE: American Center for Law and Justice's Comment in Opposition to Proposed Rule: Proposed Rule by the Centers for Medicare and Medicaid Services; Office for Civil Rights (OCR), Office of the Secretary, HHS: Nondiscrimination in Health Programs and Activities, RIN Number 0945-AA17 Docket Number: HHS-OS-2022-0012

Dear Secretary Becerra,

The American Center for Law and Justice (ACLJ) submits the following comments, on behalf of itself and over 227,103 of its supporters[1] opposing the adoption of the proposed Rule (hereinafter "Proposed Rule") issued by the Department of Health and Human Services ("The Department") on August 4, 2022.[2]

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.[3]

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[1] These comments are joined by over ACLJ supporters who have signed our Petition Stop Forcing Doctors and Nurses to Perform Abortions, *available at* https://aclj.org/pro-life/stop-forcing-doctors-and-nurses-to-perform-abortions.

[2] Nondiscrimination in Health Programs and Activities, A Proposed Rule by the Centers for Medicare & Medicaid Services, Office for Civil Rights, Office of the Secretary, HHS; 87 FR 47824 (proposed August 4, 2022) (to be codified at 42 CFR 438, 42 CFR 440, 42 CFR 457, 42 CFR 460, 45 CFR 80, 45 CFR 84, 45 CFR 86, 45 CFR 91, 45 CFR 92, 45 CFR 147, 45 CFR 155, 45 CFR 156) [hereinafter Proposed Regulation].

[3] *See Summum v. Pleasant Grove*, 555 U.S. 460 (2009); *NOW v. Scheidler*, 547 U.S. 9 (2006); *McConnell v. FEC*, 540 U.S. 93 (2003); *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357 (1997); *Lamb's Chapel v.*

The Proposed Rule should not be adopted because; (1) it is in excess of statutory authority; and, (2) it violates the Constitutionally protected rights of the free exercise of religion and free speech.

I. BACKGROUND

Medical care and religious belief have long been intertwined. Taking seriously the admonition of Matthew 25:35, "[f]or I was hungry and you gave me something to eat, I was thirsty and you gave me something to drink, I was a stranger and you invited me in, . . . "[4] religious believers have provided medical care to many.

For example, the first hospital in North America was founded by the parish, Church of Our Lady of Solitude, in St Augustine, Florida in the year 1597.[5] The first hospital in the thirteen colonies, Pennsylvania Hospital, was founded in 1751 by Dr. Thomas Bond and Benjamin Franklin.[6]

The founding charter of Pennsylvania Hospital is explicit in its founders' motivation, saying:

> CHARTER OF THE PENNSYLVANIA HOSPITAL
>
> Anno Regni Georgii IL Regis, Magnae Brittanie, Franciae & Hiberniae, Vigesimo Quarto.
>
> …An ACT to encourage the establishing of an Hospital for the Relief of the Sick Poor of this Province . . .
>
> WHEREAS the saving and restoring useful and laborious Members to a Community is a Work of publick Service, and the Relief of the Sick Poor is not only an Act of Humanity, **but a religious Duty**…."[7] (Emphasis added).

The two hospitals above are not unique. Mercy Hospital of Pittsburgh, the first United States Catholic Hospital, was founded in 1847 by the Sisters of Mercy.[8] Others followed. The Daughters of Charity of St. Vincent de Paul founded a hospital in Los Angeles in 1869.[9]

Center Moriches Sch. Dist., 508 U.S. 384 (1993); *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987).

[4] Matthew 25:35 (NIV).

[5] William M. Straight, *Medicine in St. Augustine During the Spanish Period*, 55 J. OF THE FLA. MED. ASS'N 731, 736.

[6] *History of Pennsylvania Hospital: Historical Timeline*, UPHS, https://www.uphs.upenn.edu/paharc/timeline/ (last visited Sept. 22, 2022).

[7] Thomas G. Morton & Frank Woodbury, The History of the Pennsylvania Hospital 10 (New York, Arno Press 1973).

[8] *History*, TRINITY HEALTH, https://www.trinity-health.org/about-us/history (last visited Sept. 22, 2022).

[9] *History of St. Vincent Medical Center*, ST. VINCENT MEDICAL CENTER, https://web.archive.org/web/20070401200845/http://www.stvincentmedicalcenter.com/about/history.htm (last visited Sept. 22, 2020).

People of all religious persuasions founded hospitals. The Episcopal Church founded the Good Samaritan Hospital in Portland, Oregon in 1875.[10] Jewish charities founded Mt. Sinai Hospital in 1855 in New York City.[11] The Baptist Health System of San Antonio, Texas began in 1903 as the San Antonio Associated Charities.[12]

Medical care was not limited to the building of hospitals. For example, one Dr. Pablo Soler, routinely treated indigenous patients while providing medical services to the Californian Monterey mission in the 1790s.[13] He mentions a surgery on an indigenous man who had been gored by a bull and whose entrails had been dragged on the ground.[14] The surgery but not the patient was unique.[15]

Also, religious hospitals and organizations (and other philanthropists) provided medical care and assistance in the segregated South to black communities.[16] One means of assistance was to aid black communities in the building and running of their own hospitals.[17]

Religious hospitals and medical professionals today provide significant medical care to the poor and underserved. There are 6,093 hospitals in the United States and, 5,139 of these are Community Hospitals (who provide most of the care).

The community hospitals are divided into three groups:

Number of Nongovernment Not-for-Profit Community Hospitals	2,960
Number of Investor-Owned (For-Profit) Community Hospitals	1,228
Number of State and Local Government Community Hospitals	951[18]

A total of 726 of these hospitals are religious in nature, and the number of religious hospitals is increasing.[19]

Furthermore, "patients in nonprofit church-owned hospitals had shorter lengths of stay, better mortality rates, and higher levels of overall satisfaction than those receiving care in for-

[10] *History*, LEGACY Health, https://web.archive.org/web/20070807111117/http://www.legacyhealth.org/body.cfm?id=1822 (last visited Sept. 22, 2022).
[11] The History of the Mount Sinai Hospital, MOUNT SINAI, https://www.mountsinai.org/locations/mount-sinai/about/history (last visited Sept. 22, 2022).
[12] Our History, BAPTIST HEALTH System, https://www.baptisthealthsystem.com/about/our-history (last visited Sept. 22, 2022).
[13] George D. Lyman, *The Scapel under Three Flags in California*, 4 CAL. HIST. SOC'Y Q. 142, 146 (1925).
[14] *Id.*
[15] *Id.*
[16] Thomas J. Ward, Jr., *Black Hospital Movement in Alabama*, ENCYCLOPEDIA OF ALABAMA (May 5, 2022), http://encyclopediaofalabama.org/article/h-2410.
[17] *Id.*
[18] *Fast Facts on U.S. Hospitals, 2022*, AMERICAN HOSPITAL ASSOCIATION (Jan. 2022), https://www.aha.org/statistics/fast-facts-us-hospitals.
[19] Emily Webb, *What Place Does Faith Have in the Health Care Business?*, GEORGIA HEALTH News (Dec. 14, 2018), https://www.georgiahealthnews.com/2018/12/place-faith-health-care-business/.

profits and government-run facilities.[20]" Their "religious mission" has a positive effect on their performance.[21]

Medical professionals are more religious than the norm. Seventy-six percent of doctors believe in God in contrast to 39% of scientists and 70% of Americans overall.[22] "It is very difficult to understand why physicians have a stronger predisposition to faith, religion and religious adherence than peers of equivalent educational and economic levels. It could be that religious faith itself plays a role in a person's choice to become a physician."[23] Furthermore, "physician religion is characterized not only by the high percentage of doctors that believe in a deity, but also by a wide diversity in physician religions" such as Catholic, Christian, Jewish, Buddhist, Hindu and Muslim. [24]

It is not only doctors who are religious. Nurses frequently find themselves "called" to their profession.[25] Religion is also a personal resource for nurses when they provide care to very ill patients.[26]

Both doctors and nurses let the patient take the lead in bringing faith or religion into the providing of care.[27]

II. LEGAL ANALYSIS

A. The Proposed Rule exceeds the Department's statutory grant of authority because it acts in excess of statutory limitations and contrary to constitutional right.

1. The Department may not act contrary to and in excess of statutory limitation – and especially one that violates the clear will of Congress as expressed by statute.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . ." U.S. Const. amend. I.

"Agencies have only those powers given to them by Congress, and 'enabling legislation' is generally not an 'open book to which the agency [may] add pages and change the plot line.'" *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (Citations omitted). "An agency has no power to "tailor" legislation to bureaucratic policy goals by rewriting unambiguous statutory terms." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2445 (2014). Further, an Agency may not act

[20] Alicia Caramenico, *Study: Nonprofit Church-owned Hospitals Better than Secular*, FIERCE HEALTHCARE (Jun. 13, 2013), https://www fiercehealthcare.com/healthcare/study-nonprofit-church-owned-hospitals-better-than-secular.
[21] *Id.*
[22] *Surprising Results About Physicians' Belief in God*, MEDICAL ECONOMICS (Oct. 20, 2016), https://www.medicaleconomics.com/view/surprising-results-about-physicians-belief-in-god.
[23] *Id.*
[24] *Id.*
[25] *How Nurses Follow Christ's Call to Care for One Another*, GENEVA COLLEGE (May 22, 2019), https://www.geneva.edu/blog/career/nurses-follow-christs-call.
[26] Elizabeth Johnston Taylor, Carla Gober Park & Jane Bacon Pfeiffer, *Nurse Religiosity and Spiritual Care*, 70 J. OF ADVANCED NURSING 2612 (2014).
[27] *Id.*; *Surprising Results About Physicians' Belief in God*, *supra* note 22.

"contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; [or] (D) without observance of procedure required by law." 5 U.S.C. § 706(2).

Numerous statutes establish a right of conscience to not participate in an abortion. For example, the Church Amendments state:

> **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; 42 U.S.C. 300a-7.

Other statutes, notably the Religious Freedom Restoration Act (42 U.S.C. 2000bb et seq.), the Coats-Snowe Amendment (42 U.S.C. 238n), Section 1553 of the Patient Protection and Affordable Care Act (42 U.S.C. 18113), Section 1303 of the Patient Protection and Affordable Care Act (42 U.S.C. 18023), and the Weldon Amendment (Consolidated Appropriations Act, 2019, Pub. L. 115-245, Div. B sec. 209 and sec. 506(d) (Sept. 28, 2018)) have similar prohibitions, all of which are applicable to the Department's proposed rule.

"[I]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." *Norwood v. Harrison*, 93 S. Ct. 2804, 2810 (1973).

2. The Department's Proposed Rule acts in excess of statutory limitation – and especially one that violates the clear will of Congress as expressed by statute.

a. The Department lacks statutory authority to decide conscience exemptions on a case by case basis.

The Department's proposed rule would require a covered entity to refrain from discrimination against any individual "on the basis of . . . sex . . . ."[28] The Department's proposed

[28] Fact Sheet: Nondiscrimination in Health Programs and Activities Proposed Rule Section 1557 of the Affordable Care Act, Department of Health & Hum. Servs., *available at* https://www hhs.gov/civil-rights/for-providers/laws-regulations-guidance/regulatory-initiatives/1557-fact-

rule further defines "sex" to include "pregnancy or related conditions including pregnancy termination."[29] In proposed to expand the definition of "sex" under this rule, the Department is opening up religious health care providers to penalties for practicing medicine in accordance with the dictates of their religious or moral beliefs, including the belief that killing an innocent preborn child through abortion is murder.

While the Proposed Rule never uses the word "abortion," there is obviously no dispute as to what "termination of pregnancy" entails—it is a euphemism for the destruction of unborn human life. And in light of the Supreme Court's recent decision in *Dobbs v. Jackson Women's Health Org*., 142 S. Ct. 2228 (2022), it is a medical decision that it is not afforded any special status or protection under the U.S. Constitution. To the contrary, because "procuring an abortion is not a fundamental constitutional right [and] has no basis in the Constitution's text or in our Nation's history," restrictions placed on abortion need only satisfy rational-basis review. *Id*. at 2283." However, the free exercise of religion is a constitutional right and the Department may not restrict that right in order to further its preferred policy of making abortion available.

The Department proposes to enforce Section 1557 (also cited or referred to as 42 U.S.C.S. § 18116) on a case-by-case basis. Specifically, "the Department can determine whether an exemption or modification of the application of certain provisions is appropriate under the corresponding Federal conscience or religious freedom law. . . . the Department also maintains a strong interest in taking a case-by-case approach to such determinations, which will allow it to account for any harm an exemption could have on third parties."[30]

This is contrary to Congressional statutory intent. The Church Amendments cited above prohibit "any. . . public official or other public authority to require---- . . . [an] individual to perform or assist . . . . [an] abortion. . . ." The other statutes are similar. No "exemption" or "modification of application" is discussed. The Department does not have any discretion to determine if an individual may be required to perform or assist an abortion. When the Church Amendments apply, the individual may not be required to perform or assist in an abortion contrary to their religious beliefs or moral convictions, period.

Furthermore, "any harm an exemption could have on third parties" is irrelevant. The Church Amendments unconditionally prohibit a public official or public authority from requiring any individual to participate in an abortion in violation of their faith or morals.

The Department has only those powers given to it by Congress and, here, Congress has said unambiguously that no individual shall be required to perform an abortion by any public authority (which surely includes the Department). Thus, the proposed rules' case-by-case standard with its deference to "harm" to third parties is an act in excess of statutory limitations and it should be withdrawn. The very purpose of purpose of the statutes that Congress has put in place to prohibit forcing an individual to perform or participate in abortion is to prevent the grave harm that would occur to that individual if they were forced to participate in murder—the killing of an innocent human being through abortion.

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sheet/index.html#:~:text=The%20proposed%20rule%20states%20that,algorithms%20in%20its%20decision%2Dmaking (last visited Sept .29, 2022).

[29] *Id.*

[30] Proposed Regulation, *supra* note 2.

b. The Department lacks statutory authority to exclude the exceptions of Title IX.

Title IX includes a provision, known as the "abortion neutrality" provision which states:

> **Nothing in this chapter shall be construed to require** or prohibit **any person**, or public or private entity, **to provide** or pay for **any benefit or services,** including the use of facilities, **related to an abortion.** Nothing in this section shall be construed to permit a penalty to be imposed on any person or individual because such person or individual is seeking or has received any benefit or service related to a legal abortion.[31]

"The Department's view is that Section 1557 does not require the Department to incorporate the language of Title IX's abortion neutrality provision into its Section 1557 regulation,"[32] despite the fact that a court previously "reasoned that the Department was required to incorporate the language of Title IX's abortion neutrality provision."[33] To justify this view, the Department simply states: "we disagree with that decision, which does not bind this new rulemaking."[34] Rather than learn from its past mistakes, the Department once again seeks to step outside the bounds of its authority and disregard Congressional directives to respect the religious and moral rights of health care providers.

Indeed, in this proposed rule, the Department incorporates the sections of Title IX that it prefers, while refusing to incorporate the parts it dislikes. In rationalizing its decision to leave out Title IX protections for religious medical providers, the Department states:

> As a practical matter, then, many patients and their families may have little or no choice about where to seek care, particularly in exigent circumstances, or in cases where the quality or range of care may vary dramatically among providers. Moreover, health care consumers are not always aware that the health care entities from which they seek care may be limited in the care they provide. Incorporation of Title IX's religious exception would therefore seriously compromise Congress's principal objective in the ACA of increasing access to health care.[35]

In other words, the Department has decided ***for Congress*** that title IX's abortion neutrality provision would inhibit ***Congress's*** objectives. Yet, it is the *Department*, not Congress, who is refusing to incorporate Congressional provisions[36] that exist to protect the constitutional rights of religious health care providers not to provide or participate in abortion – an act that violates their very conscience. Moreover, abortion is not, and never has been, health care.

Section 1557 of the proposed rule states in relevant part:

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[31] 20 U.S.C. §1688 (emphasis added).
[32] Proposed Regulation, *supra* , *supra* note 2.
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] See, e.g., Centers for Medicare and Medicaid Services, *Nondiscrimination in Healthcare Programs and Activities*, FEDERAL REGISTER (Aug.4, 2022), https://www.federalregister.gov/d/2022-16217/p-1558.

> **(a) In general.** Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, ... The enforcement mechanisms provided for and available under such title VI, title IX, section 504, or such Age Discrimination Act shall apply for purposes of violations of this subsection. 42 U.S.C.S. § 18116

The Proposed Regulation incorporates all of the above referenced statutes but Title IX's abortion neutrality provisions.[37]

"Statutory interpretation, as we always say, begins with the text." *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016). "When a term goes undefined in a statute, we give the term its ordinary meaning." *Kouichi Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2002 (2012). Here, each statute cited in Section 1557 (excepting the Rehabilitation Act's citation) contains the Latin phrase "et seq." The words "et seq." are an abbreviation for *et sequentes*, which means "and those [pages or sections] that follow." *Black's Law Dictionary*, 574 (7th ed. 1999).

As Section 1557 cites "Title IX . . . . (20 U.S.C. 1681 et seq.)" and the Department may not tailor a statute to its policy goals, *Util. Air Regulatory Grp.*, 134 S. Ct. at 2445, the Department is not free to ignore the parts of Title IX that it does not like.

Further, the Department is trying to have its cake and eat it too, as it incorporates its own choice of Title IX regulations—applicable to religious health care providers, ("Under this proposed rule, too, recipients would be required to comply with the specific prohibitions on discrimination found in the Department's Title IX regulations[38]…"). The Department may not ignore Title IX's abortion neutrality provision.

Rather, it must incorporate into the Proposed Rule the entirely of Title IX's definition of discrimination, including its abortion neutrality provision. Thus, the Proposed Rule is contrary to statutory limits and must be revised.

c. The Department lacks authority to define a refusal to provide an abortion as discrimination.

The Proposed Rule states in relevant part at §92.206:

> (a) General. A covered entity must provide individuals equal access to its health programs and activities without discriminating on the ***basis of sex***;

[37] *Id.*
[38] *Id*. at 47878.

> (b) Specific discriminatory actions prohibited. In providing access to health programs and activities, a covered entity must not: (1) Deny or limit health services, including those that are offered exclusively to individuals of one sex . . . .[39]

As previously stated, the Department interprets "sex" to include "pregnancy or related conditions including pregnancy termination." This rule is contrary to the statutes discussed above because it is a de facto prohibition on a refusal to provide an abortion. More precisely, by defining a denial or limitation to provide health services on the basis of the individual's sex as a form of discrimination; it makes a refusal to provide an abortion an act of discrimination.

This definition is also contrary to case law. The Supreme Court has rejected the idea that opposition to abortion is an example of discrimination against women. See, *Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753, 763 (1993) (Opposition to abortion is not an "invidiously discriminatory animus" against women).

Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2235 (2022) reaffirmed this holding of *Bray* when it rejected the proposed theory that the liberty interest of the "Fourteenth Amendment's Equal Protection Clause" protects a right to abortion. The *Dobbs* Court stated: "that theory is squarely foreclosed by the Court's precedents, which establish that a State's regulation of abortion is not a sex-based classification and is thus not subject to the heightened scrutiny that applies to such classifications. See *Geduldig v. Aiello*, 417 U.S. 484, 496, n. 20, 94 S. Ct. 2485, 41 L. Ed. 2d 256; *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 273-274, 113 S. Ct. 753, 122 L. Ed. 2d 34."

Therefore, the Department must revise the above language to reflect what the law as it can neither tailor a statute nor overturn a Court decision.

CONCLUSION

No doctor or nurse or other medical professional is refusing to treat a woman who had an abortion or terminated a pregnancy, to use the Department's euphemism. They are refusing to do an abortion but not, say treat a woman who has had an abortion but now presenting for gallstones, a broken leg or even for bleeding after a botched abortion. They would treat her for all of these things. The Proposed Rule forbids a discrimination not asserted in order to compel medical professionals to perform an abortion contrary to their conscience, in violation of their legal rights and in excess of the Department's statutory grant of power.

The Department proposes to use the full enforcement powers invested in it by §1557 to withdraw Federal funding for the programs it administers if hospitals refuse to provide or to compel its employees to provide abortions. However, Congress has directed in the statutes cited above that Federal funds are not to be conditioned on the provision of abortion or used to compel the recipients to aid or assist in abortions. The ACLJ and its supporters oppose the proposed Rule and urge the Department to withdraw it and administer §1557 as Congress envisioned and directed.

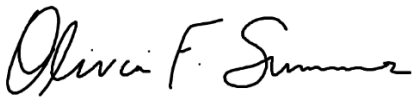
[39] *Id*. at 47918.

Thank you for the opportunity to provide a comment on this critical matter.

Sincerely,

AMERICAN CENTER FOR LAW & JUSTICE

Jordan Sekulow
Executive Director



Olivia F. Summers
Associate Counsel for Public Policy

John A. Monaghan
Senior Litigation Counsel