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October 5, 2021

Robinsue Frohboese, J.D., Ph.D.
Acting Director and Principal Deputy
Office for Civil Rights
U.S. Department of Health and Human Services
[redacted]

RE: OCR Transaction Number 18-306427

Dear Ms. Frohboese:

This letter responds to your July 30, 2021, correspondence regarding OCR's decision to withdraw the August 28, 2019, Notice of Violation ("NOV") issued against the University of Vermont Medical Center ("UVMMC") in the above-referenced transaction number. I would like to raise three issues regarding the reasoning and content of that letter.

First, your letter states that the NOV was withdrawn in light of two federal court decisions that have called into question the premise "that the Church Amendments create an 'unqualified right' of objecting employees to decline to participate in procedures to which they have a religious or moral objection." This rationale makes little sense. Neither case you cite is a binding decision of a U.S. court of appeals, let alone a decision of the U.S. Supreme Court. The U.S. district court decisions cited in your letter have no precedential value whatsoever. *See, e.g.*, *ATSI Communs., Inc. v. Shaar Fund, Ltd.*, 547 F.3d 109, 112 (2d Cir. 2008) ("District court decisions . . . create no rule of law binding on other courts").

The recourse for a loss at the district court, especially one involving a matter of grave import—such as the protection of moral and religious conscience rights—is not to raise the white flag and surrender, but to pursue appellate review. (I need not cite the multitudinous times HHS has appealed adverse decisions.) Here, while HHS did appeal the decisions you cite, HHS itself short circuited that review process by moving to stay the appeals after the cases were fully briefed and oral arguments scheduled.

The further justification for withdrawing the NOV—that "[n]o court has upheld the application of the standard that was applied in the NOV to the Church Amendments"—misses the mark. No court has *rejected* that standard in a case

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where the DOJ sued an entity for violating the Church Amendments. In fact, the DOJ's lawsuit against UVMMC was the first time, to our knowledge, that DOJ has ever pursued such litigation. The DOJ had a unique opportunity in that case to obtain a court ruling of what the correct standard should be, but it unilaterally dismissed the case on July 30, 2021, with no explanation to the court why it did so.

If OCR "takes seriously its role in protecting the rights of medical providers," it is difficult to fathom why HHS has all but abandoned the appeals in the cases arising out of Washington and New York. It is also difficult to understand why HHS instructed the DOJ to abandon the lawsuit against UVMMC when neither of the district court decisions cited in your letter have any binding, precedential effect on the federal court where that case was filed.

It takes a fair dose of chutzpah for OCR to suggest that "the legal issues surrounding the standard applied in the NOV are serious enough to warrant a withdrawal of the NOV," where the government itself has (1) sought and obtained a stay of the appeals involving those very issues, and (2) voluntarily dismissed the only case ever brought by the government against an entity for violating the Church Amendments where those issues could have been adjudicated.

Second, your letter fails to note that the NOV was premised on *two* separate and distinct findings: (1) that UVMMC's Conflict-of-Care Policy violates the Church Amendments, *and* (2) that UVMMC discriminated against health care personnel who have religious or moral objections to participating in abortions. Thus, even if the first finding has been undermined by the district decisions you cite (it has not, as just explained), those decisions do not address the substance of OCR's second finding. Indeed, even if one to interpret the Church Amendments as incorporating a "reasonable accommodation" standard, akin to Title VII's framework for religious accommodations, OCR specifically found, with respect to its second finding, that "[a]lthough UVMMC could have readily, and without interruption to patient services, accommodated the religious or moral objections to elective abortion of its health care personnel, it nevertheless intentionally and unnecessarily assigned objecting personnel to such procedures." Your letter does not explain why this second and independent charge against UVMMC has been withdrawn, not only to the detriment of our client's interests, but other UVMMC medical personnel as well.

Third, your letter states that, notwithstanding the withdrawal of the NOV, OCR "will continue to evaluate the underlying complaint." Our office filed a complaint with OCR on behalf of our client over three years ago, on May 9, 2018. Our client was interviewed by OCR over two years ago, on August 12, 2019. According to the now-withdrawn NOV, OCR undertook an extensive investigation, reviewing documents and interviewing witnesses. What more could OCR possibly need to evaluate the underlying complaint? Our client's rights under federal conscience laws were clearly violated by UVMMC. Because the Second Circuit has held that

the Church Amendments do not confer a private right of action to enforce its terms, our client is unable to pursue litigation on these grounds in her own name. *Cenzon-DeCarlo v. Mount Sinai Hosp.*, 626 F.3d 695, 699 (2d Cir. 2010). It is therefore the responsibility of OCR, and OCR alone, to vindicate the rights of our client who, as OCR previously found, was wrongfully coerced into participating in an abortion against her religious convictions.

It has been two months since OCR assured us that it is continuing to evaluate the complaint. We have heard nothing. We therefore ask that OCR provide us with the status of its ongoing evaluation. Our client is so entitled.

Very truly yours,

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