Congress of the United States
Washington, DC 20515

March 6, 2023

VIA Federal eRulemaking Portal

Xavier Becerra
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

RE: Comments on Proposed Rule: Safeguarding the Rights of Conscience as Protected by Federal Statutes, 88 Fed. Reg. 820 (January 5, 2023), (RIN): 0945-AA18, Docket ID 2022-28505

Secretary Becerra:

We write to express our concerns with the U.S. Department of Health and Human Services' (HHS) Proposed Rule, "Safeguarding the Rights of Conscience as Protected by Federal Statutes," 88 Fed. Reg. 820.

While the Proposed Rule improves upon the discriminatory 2011 rule, "Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws"[1] currently in place, the Proposed Rule leaves gaps in the investigation and enforcement process, and ignores the balance Congress struck when it provided unqualified rights of conscience.

Congress has enacted federal conscience statutes that govern HHS-funded programs to "protect the rights of individuals, entities, and health care entities to refuse to perform, assist in the performance of, or undergo certain health care services or research activities to which they may object for religious, moral, ethical, or other reasons."[2] The proposed rule falls short of properly enforcing these laws as written and consistent with Congressional intent. The lack of enforcement is evidenced not only by the failure to investigate and prosecute conscience violations by HHS in the last several years, but also the decision by HHS to walk back enforcement actions initiated by the previous administration, as detailed below.

The proposed regulations should be updated to include additional aspects of the 2019 rule, "Protecting Statutory Conscience Rights in Health Care; Delegations of Authority,"[3] that directs specific requirements and prohibitions for each statutory conscience protection to ensure no entity is receiving federal funding while also violating the law and compelling individuals to participate in activities and procedures with which they disagree.

Regulatory Background

In 2008, HHS issued the rule, "Ensuring that Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law"[4] to clarify and enforce the Church, Coats-Snowe and Weldon Amendments. In 2009, the Obama Administration proposed to rescind the 2008 rule in its entirety, but ultimately in 2011, rescinded most, but not all of the 2008 rule. Notably, the 2011 revisions struck "implementation" of the Church, Coates-Snowe and Weldon Amendments, and just kept "enforcement," rendering the rule inadequate.

In 2019, the Trump Administration issued "Protecting Statutory Conscience Rights in Health Care; Delegations of Authority" to uphold and enforce 25 existing conscience protections governing HHS-funded programs.[5] These federal laws, many of which received bipartisan support in Congress, were passed to allow doctors, nurses, medical students, and healthcare professionals to serve all their patients without being forced to provide, participate in, pay for, provide coverage of, or refer for, services such as abortion, sterilization, or assisted suicide. The statutes also protect patients and

[1] 76 FR 9968
[2] 84 FR at 23263
[3] 84 FR 23170
[4] 73 FR 78071
[5] 84 FR 23170

parents. The core sentiment of the rule was that "freedom from discrimination on the basis of religious belief or moral conviction … means being free not to act contrary to one's beliefs."

The 2019 final rule clarified what covered entities need to do to comply with applicable conscience provisions and required applicants for HHS federal financial assistance to provide assurances and certifications of compliance. The rule also specified compliance obligations for covered entities, including cooperation with HHS' Office for Civil Rights (OCR), maintenance of records, reporting, and non-retaliation requirements.

The Department must enforce all conscience protections governing HHS-funded programs.
Each of the 25 conscience protections in federal statute that govern HHS-funded programs were appropriately regulated under the 2019 rule. HHS must continue to implement and enforce all of them. These laws include:

Church Amendments[6] - among other things, protects the conscience rights of individuals and entities that object to performing or assisting in the performance of abortion or sterilization procedures if doing so goes against their religious beliefs or moral convictions.

Coates-Snowe Amendment[7] - protects individuals who object to participating or training in the performance of abortions.

Weldon Amendment[8] - bars recipients of federal funds (including state and local governments) from discriminating against healthcare entities that refuse to "provide, pay for, provide coverage of, or refer for abortions."

Medicare Advantage[9] - prohibits entities from being denied participation in the Medicare Advantage program because the entity will not "provide, pay for, provide coverage of, or provide referrals for abortions."

Section 1553 of the Affordable Care Act[10] - prohibits entities receiving federal assistance and health plans created under the Patient Protection and Affordable Care Act (ACA) from discriminating on the basis that an individual or entity does not participate in assisted suicide, euthanasia, or mercy killing.

Section 1303 of the Affordable Care Act[11] - prohibits HHS from requiring coverage of abortion or abortion-related services in qualified health plans or as part of its essential health benefits plan under the ACA.

Section 1411 of the Affordable Care Act[12] - requires HHS to provide religious exemptions from the individual mandate for those who have a sincerely held religious belief that is inconsistent with the health care coverage.

Counseling and referral provisions[13] - prohibits HHS and states administering Medicaid from requiring a Medicare Advantage organization or Medicare managed care organization to provide, reimburse for, or provide coverage of, a counseling or referral service if the organization would object to the provision of such service on moral or religious grounds.

Advance Directives[14] - ensures that no one administering or providing Medicare or Medicaid programs will be required to inform or counsel about causing the death of the individual, such as by assisted suicide, euthanasia, or mercy killing, including with respect to a portion of an advance directive that directs such action.

Global Health Programs[15] - ensures organizations, including faith-based organizations, are not discriminated against or compelled to (1) endorse or utilize a multisectoral or comprehensive approach to combating HIV/AIDS; or (2) endorse,

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[6] 42 U.S.C. 300a-7
[7] Section 245 of the Public Health Service Act, 42 U.S.C. 238n
[8] Pub. L. 117-103, div. H, title V General Provisions, § 507(d)(1)
[9] Pub. L. 115-245, Div. B, sec. 209
[10] 42 U.S.C. 18113
[11] 42 U.S.C. 18023
[12] 42 U.S.C. 18081
[13] 42 U.S.C. 1395w-22(j)(3)(B) and 1396u-2(b)(3)(B))
[14] 42 U.S.C. 1395cc(f), 1396a(w)(3), and 14406
[15] 22 U.S.C. 7631(d)

utilize, make a referral to, become integrated with, or otherwise participate in any program or activity to which the organization has a religious or moral objection as a condition of participating in global health assistance programs.

The Helms, Biden, 1978, and 1985 Amendments[16] - Prohibits recipients of federal funds from paying for the performance of abortions or sterilizations as a method of family planning, coercing individuals to practice abortions or sterilizations, or paying for research related to abortion or involuntary sterilization as a method of family planning.

Newborn and Infant Hearing Loss Screening[17] - prohibits the preemption of state laws that allow for religious objections to screening for hearing loss in children.

Medical Screening, Examination, Diagnosis, Treatment, or Other Health Care or Services[18] - prohibits State Medicaid Plans from compelling any person to undergo any medical screening, examination, diagnosis, or treatment or to accept any other health care or services if such person, or in the case of a child, the child's parents, objects on religious grounds.

Occupational Illness Examinations and Tests[19] - prohibits the authorization or requirement of medical examination, immunization, or treatment, for those who object on religious grounds.

Vaccination[20] - requires State-administered pediatric vaccine distribution programs to provide pediatric vaccines in compliance with all applicable State law related to protections and exemptions for conscience and religious freedom.

Specific Assessment, Prevention and Treatment Services[21] - prohibits the requirement that a parent or legal guardian provide a child with medical services against the religious beliefs of the parent or legal guardian.

Religious nonmedical health care[22] - ensures religious nonmedical health care entities are not discriminated against for services provided or not provided to individuals conscientiously opposed to medical treatment, including treatment against the individual's sincerely held religious belief. It also ensures that religious nonmedical health care institutions are not subjected to oversight that would violate the religious beliefs of the institution or its personnel, and ensures the acceptance of religious exemptions from certain Medicaid requirements.

We appreciate the Proposed Rule retains the full scope of conscience protections enacted by Congress, as the 2019 rule did. But, the Proposed Rule merely lists the statutory citations for each conscience protection and removes context provided in the 2019 Rule, including explicit applicability, requirements, and prohibitions for each law. Rather than minimizing "the potential for harm resulting from any ambiguity and confusion,"[23] by eliminating this context, HHS is making it harder for covered entities to have a full understanding of the implications of the law and how they will be applied and enforced. This puts undefined discretion in the hands of HHS officials, who have a history of ignoring conscience protection enforcement. As such, the Department should include the full list of laws *with* their applicability, requirements, and prohibitions explained, as included in the 2019 rule at 88.3.[24]

Congress struck the balance of interests in conscience protection laws.
Further, while the Proposed Rule purports to uphold "the balance Congress struck between safeguarding conscience rights and protecting access to health care," it's important to clarify that Congress did not delegate the power to balance competing interests to HHS. Rather, it weighed the competing interests itself, and as exemplified in each statute above, chose to provide individuals and entities with explicit conscience protections.

Religious diversity adds to the strength of our society and medical field, and no doctor should have to choose between giving up his or her faith or moral convictions and abandoning a vital medical mission. Similarly, rather than excluding aspiring health care professionals from the field because of their religious, moral, ethical or medical beliefs, robust conscience protections, and the enforcement of such protections, are needed to establish and maintain access to basic

[16] 22 U.S.C. 2151b(f), Pub. L. 115-245, div. K, title VII, § 7018
[17] 42 U.S.C. 280g-1(d)
[18] 42 U.S.C. 1396f
[19] 29 U.S.C. 669(a)(5)
[20] 42 U.S.C. 1396s(c)(2)(B)(ii)
[21] 42 U.S.C. 290bb-36(f), 5106i(a)
[22] 42 U.S.C. 1320a-1(h), 1320c-11, 1395i-5, 1395x(e), 1395x(y)(1), 1396a(a), and 1397j-1(b)
[23] 88 FR 826
[24] 84 FR at 23264-23269

health care. Congress enacted the laws outlined above to protect this right of conscience in health care for precisely such reasons.

Like Congress' decision to not fund abortions in most circumstances, a health care provider's decision not to participate in an abortion or procedures that can result in sterilization, does not prohibit the patient from seeking such interventions elsewhere.

Such protections pose no conflict with other Federal laws, such as the Emergency Medical Treatment and Active Labor Act, which explicitly requires stabilizing treatment for a "pregnant woman … or her unborn child" when either needs emergency care.[25] As the 2011 final rule affirmed, these areas of law have operated side by side for many years and both should and can be fully enforced.[26]

The Proposed Rule insinuates that the desires of patients may supersede the statutory conscience rights of a provider who cannot or will not perform certain services due to his or her conscience. The Proposed Rule claims that "our health care systems must effectively deliver services - including safe, legal abortions - to all who need them in order to protect patients' health and dignity."[27] Leaving aside that the current Administration has focused immense attention on promoting and paying for abortion, including at times, in violation of federal and state law, such a claim will only lead to further diminution of conscience rights provided by Congress. It is unfortunate, but not surprising, that in the wake of the decision in *Dobbs v. Jackson Women's Health Organization*, HHS has still prioritized abortion access over nearly anything else, including following and enforcing the law.

As held by the Supreme Court in *Dobbs*, "the Constitution does not confer a right to abortion."[28] As such, the Proposed Rule should focus on enforcing conscience protections enacted by Congress, rather than insinuating that providers should be compelled to participate in services for which there is no legal right in federal law. Abortion is not life-saving. It is life-taking.

The Department has a history of relegating enforcement action under previous rules.
Of great concern with the Proposed Rule is HHS' attempt to bypass implementing effective investigation and enforcement mechanisms, such as those established by the 2019 rule. Without this, doctors and nurses lack a crucial tool to ensure that the conscience protections that Congress passed are enforced. Past administrations at times looked the other way when these statutory protections were violated. Under the current Administration, HHS has in multiple cases stopped enforcing conscience protection laws knowing that there are no comparable legal remedies available for victims of discrimination. As the agency is aware, some courts have held that certain conscience protection statutes enacted by Congress do not provide for a private right of action for individuals or entities who have been discriminated against.[29]

Instead of supporting proposed legislation like the *Conscience Protection Act*[30] to allow victims of discrimination to also have their day in court, HHS is blocking possible legal remedy for victims of discrimination by dropping enforcement actions and clear mechanisms for investigation and enforcement, and making it harder for any further discrimination claims to be filed, investigated, and remedied.[31]

As outlined below, actions by states like California and employers like the University of Vermont Medical Center, as well as the hostility toward religious and moral convictions shown by HHS in rescinding enforcement actions and mechanisms, demonstrate the importance of an adequate rule to enforce these laws.

The State of California - In August of 2014, the California Department of Managed Care (DMHC) issued a directive requiring all plans under the DMHC authority to immediately include coverage for all legal abortions even if the abortion-

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[25] 42 U.S.C. 1395dd
[26] 76 FR at 9973
[27] 88 FR at 826
[28] *Dobbs v. Jackson Women's Health Organization*, 597 U.S.____ (2022).
[29] 84 FR at 23178
[30] Conscience Protection Act, S. 401, 117th Cong. (2021). https://www.congress.gov/bill/117th-congress/senate-bill/401
[31] Severino, R. (2021, June 11) The Biden-Becerra Budget: Equity Is In, Religious Freedom Is Out. *National Review.* https://www.nationalreview.com/2021/06/the-biden-becerra-budget-equity-is-in-religious-freedom-is-out/

excluding plan had been previously approved by DMHC.[32] As a result, abortion was immediately inserted into the plans of pro-life churches and schools without their consent and against their consciences, despite the Weldon Amendment. The State of California estimated that at least 28,000 individuals subsequently lost their abortion-free health plans as a result of this mandate.[33]

The California Catholic Conference and a group of evangelical churches pursued their only option and filed a complaint with OCR. In June of 2016, OCR announced it found no violation, and closed its investigation without further action based on a flawed understanding of the Amendment.[34] OCR argued that Weldon only protected health insurance plans, not the purchasers of such plans.

But on January 24, 2020, under a new Administration, OCR reversed its decision. HHS issued a Notice of Violation to California, in which it concluded that "the Weldon Amendment's protection for health insurance and any other kind of plans is not a protection that may only be invoked or complained of by issuers. Per the Amendment, the term 'health care entity' includes an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or *any other kind* of health care facility, organization, or plan."[35]

Because the State of California refused to comply with the Weldon Amendment, the Centers for Medicare & Medicaid Services announced on December 16, 2020, that California would be denied $200,000,000 in federal funds per quarter, beginning in the first quarter of 2021.

Though California had taken no actions to come into compliance with the Weldon Amendment, on August 13, 2021, HHS OCR withdrew the Notice of Violation and closed the complaints filed with OCR, again relying on its flawed definition of a "health care entity" under the Weldon Amendment.[36]

The University of Vermont Medical Center - On August 28, 2019, HHS OCR issued a notice of violation against a grant-recipient, The University of Vermont Medical Center (UVMMC), after it forced a nurse to assist in an elective abortion, despite her well-known objections to abortion, in violation of the Church Amendments.[37] UVMMC not only violated one nurse's conscience rights[38], but it kept policies in place that explicitly required members with conscience objections to participate in procedures to "ensure that patient care is not negatively impacted."[39] UVMMC easily could have accommodated objections without any disturbance to the services it provided, as it had for other non-religious and non-abortion-related objections, but it did not. It also refused to come into compliance after engagement with OCR.

HHS then referred the matter to the United States Department of Justice (DOJ), which brought an enforcement action against UVMMC on December 16, 2020.[40] However, on July 30, 2021, the DOJ voluntarily dismissed the case, without any binding settlement.

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[32] U.S. Department of Health and Human Services Office for Civil Rights. (January 24, 2020) [Notice of Violation -- OCR Transaction Numbers 17-274771 and 17-283890] at https://public3.pagefreezer.com/content/HHS.gov/31-12-2020T08:51/https://www.hhs.gov/sites/default/files/ca-notice-of-violation-abortion-insurance-cases-01-24-2020.pdf

[33] *Id.*

[34] Samuels, Jocelyn (June 21, 2016). [Letter from Office for Civil Rights, to Catherine W. Short, Vice President of Legal Affairs, Life Legal Foundation (and others)] at https://adfmedialegalfiles.blob.core.windows.net/files/CDMHCInvestigationClosureLetter.pdf

[35] U.S. Department of Health and Human Services Office for Civil Rights. (January 24, 2020) [Notice of Violation -- OCR Transaction Numbers 17-274771 and 17-283890] at https://public3.pagefreezer.com/content/HHS.gov/31-12-2020T08:51/https://www.hhs.gov/sites/default/files/ca-notice-of-violation-abortion-insurance-cases-01-24-2020.pdf

[36] Frohboese, Robinsue (August 13, 2021). [Letter from Office for Civil Rights to State of California, OCR Transaction Numbers 17-274771 and 17-283890] at https://www.hhs.gov/conscience/conscience-protections/ca-letter/index.html

[37] U.S. Department of Health and Human Services Office for Civil Rights (August 28, 2019) [Notice of Violation -OCR Transaction Number 18-30642] at https://www.hhs.gov/sites/default/files/uvmmc-nov-letter_508.pdf. The Church Amendments create an unqualified (not a "balanced") right for healthcare personnel "to decline to participate in abortions without fear of adverse employment actions or loss of staff privileges." The burden to apply the law and allow for accommodations is not on the objectors, but rather the providers.

[38] United States of America v. University of Vermont Medical Center, p. 8 (District of Vermont 2020) https://www.justice.gov/opa/press-release/file/1345321/download HHS OCR found that the hospital scheduled approximately 10 nurses who had registered conscience objections to assist with approximately 20 abortion procedures.

[39] U.S. Department of Health and Human Services Office for Civil Rights (August 28, 2019) [Notice of Violation -OCR Transaction Number 18-30642] at https://www.hhs.gov/sites/default/files/uvmmc-nov-letter_508.pdf.

[40] United States of America v. University of Vermont Medical Center, p. 8 (District of Vermont 2020) https://www.justice.gov/opa/press-release/file/1345321/download. UVMMC's violation was part of an "ongoing pattern, practice, and policy of discriminating against health care providers who believe that the performance, or the assistance in the performance, of abortions is contrary to their religious beliefs or moral convictions."

HHS' aforementioned actions signal to recipients of federal dollars all around the country that they don't need to comply with the law because HHS will not enforce it. They also signal that this Administration would rather allow consciences to be violated at the behest of the abortion lobby rather enforce the law and protect religious liberty. Unfortunately, the Proposed Rule only strengthens those signals.

The Proposed Rule lacks implementation and enforcement, causing confusion.
Rather than ensuring the implementation and enforcement of conscience statutes enacted by Congress, HHS is focused on ensuring access to abortion, and so-called "gender-affirming care" procedures that can and do result in sterilization. Without sufficient enforcement by HHS, doctors and nurses lack a crucial tool to ensure that the protections that Congress enacted are implemented and enforced. The Proposed Rule lacks the clarity and direction provided under the 2019 rule, and instead of being used as a tool with which OCR can implement the law, will be used as an excuse to choose to promote abortion access rather than respect conscience rights. HHS should include additional provisions of the 2019 rule to ensure proper enforcement of the law.

HHS has a duty to robustly enforce statutory conscience rights. This is especially important due to other rules issued under this Administration, including "Ensuring Access to Equitable, Affordable, Client-Centered, Quality Family Planning Services"[41] and "Patient Protection and Affordable Care Act; Updating Payment Parameters, Section 1332 Waiver Implementing Regulations, and Improving Health Insurance Markets for 2022 and Beyond,"[42] as well as proposed rules that lack explicit conscience protections, including "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance"[43] and "Nondiscrimination in Health Program and Activities."[44] In those rules, HHS made general claims that laws regarding religious freedom will be upheld, but included no robust enforcement schemes.

Members of Congress are greatly concerned that the Proposed Rule excludes the bulk of the 2019 rule, especially the detailed explanation of the robust enforcement scheme, and replaces it with top-line statements that the agency can "seek voluntary resolution of complaints" and "consult and coordinate with the relevant Departmental funding component, and utilize existing regulations enforcement, such as those that apply to grants, contracts, or other programs and services."

Regarding complaint handling and investigating, we appreciate that the Department has reiterated and asserted its authority to enforce conscience protection statutes through (1) receiving and handling complaints, (2) conducting investigations, (3) consulting on compliance within the Department, (4) seeking voluntary resolutions of complaints, and (5) consulting and coordinating with the relevant Departmental funding component, and utilizing existing regulations enforcement, such as those that apply to grants, contracts, or other programs and services.[45]

Section 88.2 of the Proposed Rule also briefly explains the process for investigation, supervision and coordination, and resolution. Unfortunately, these provisions are inadequate. First, the Proposed Rule largely strikes all compliance requirements established by the 2019 rule that would only serve to support the Department's efforts to ensure compliance if and when a violation is reported.

HHS must also make clear its responsibility to coordinate with other agencies, including the DOJ, to make enforcement referrals when necessary, as it unfortunately has had to do in the past. HHS should also clarify what authority it has under existing regulation and law to take actions such as temporarily withholding funds, denying use of federal funds, suspending award activities, terminating federal financial assistance, and other legally available actions. The Department should revisit 88.6 and 88.7 of the 2019 rule to retain additional provisions regarding compliance requirements and enforcement authority that would assist the Department in investigating and enforcing conscience protection laws.

Further, HHS does not always need to wait for a complaint to ensure compliance – the Department should do so proactively. Including in the Proposed Rule HHS' authority to initiate compliance reviews would serve to protect both individuals and entities, as well as federal dollars. HHS has the primary responsibility to ensure these laws are being followed. It is only logical that covered entities provide written assurance upon applying for federal funds. Such a

[41] 86 FR 56144
[42] 86 FR 53412
[43] 87 FR 41390
[44] 87 FR 47824
[45] 88 FR at 829

requirement would proactively affirm these entities will comply with the law. It does not pose an undue burden on applicants to affirm compliance with the law. If a recipient of federal funds refuses to affirm the conscience protections attached to those funds, then the agency should award the dollars to entities who will act lawfully – whether that be a grantee, sub-recipient, state, or any other recipient of federal dollars to which Congress has stipulated conscience protections. This requirement, as put forward in the 2019 rule not only served to certify that recipients of federal funds agreed to comply with the law, but also as an educational tool, so that applicants knew the standard to which they would be held, and that discrimination would not be tolerated. The Department should include 88.4 of the 2019 final rule to require that recipients of federal funds comply.

The Proposed Rule lacks clear definitions, creating ambiguity.
The Proposed Rule appears to subjugate statutory conscience rights to other interests, which is contrary to the text of the law and Congressional intent. For example, the Proposed Rule strikes all the definitions laid out in the 2019 rule and eliminates the detailed explanation of the existing conscience protection statutes and only focuses on enforcement. This proposal is highly problematic considering the Department's lack of enforcement against the State of California in 2016 and the subsequent rescission of enforcement action in 2021 was based on an incorrect understanding of a "health care entity." Without clear definitions, HHS officials will be left to decide for themselves what constitutes a violation under these laws. Protecting conscience rights and upholding the law is not just a job for Administrations that agree with the law. It is the Constitutional obligation and responsibility of every Administration.

The Department should include the clear definitions provided in the 2019 rule that in addition to providing clarification for the Department in its enforcement efforts, will provide clarity and therefore protections for individuals who are covered under these laws to know their rights well enough to know when they are being violated. This is important, especially for the following definitions: (1) assist in the performance (2) discriminate or discrimination (3) entity (4) federal financial assistance (5) health care entity (6) health service program (7) recipient (8) referral or refer for (9) sub-recipient and (10) workforce. All of these terms were properly defined in the 2019 rule.

The Department should improve voluntary notice provision.
Both the previous and the proposed rules considered it voluntary best practice to post a notice of rights under federal conscience and antidiscrimination laws. However, the Proposed Rule removes encouragement of the notice and does not affirm that it would be used as non-dispositive evidentiary support in compliance investigations. Of concern is the suggestion that, "where possible, and where the recipient does not have a conscience-based objection to doing so, the notice should include information about alternative providers that may offer patients services the recipient does not provide for reasons of conscience."[46] Recipients of federal funds with statutory conscience protections to certain services are under absolutely no obligation to refer their patients to the services for which they object, never mind list it on the notices meant to inform them of their conscience rights.

Further, the example provided in Appendix A as model text of a notice to post is substantially weaker than and lacks the clarity of the suggestion provided within the 2019 rule. The Department should recommend the same suggested notice that was included in Appendix A in the 2019 rule. [47] Rather than minimizing confusion, the model text provided in the Proposed Rule lacks clarity and will only lead to fewer reports of discrimination when employees and other covered entities are unaware of their rights.

The issuance of the Proposed Rule raises concerns with conflicts of interest.
Before we conclude, it is important to draw attention to the ethical concerns with your oversight of the Proposed Rule. During your time as Attorney General of California, OCR twice found you violated federal law protecting conscience and religious freedom in health care. First, for discriminating against California pro-life pregnancy resource centers by forcing them to advertise for abortions[48], and second, for forcing almost everyone in California to buy abortion insurance regardless of their moral and religious objections, as explained in detail above. In the first case, you lost at the Supreme Court[49] and in the second, HHS disallowed California $200 million per quarter in funding.

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[46] *Id.* at 830
[47] 84 FR at 23272
[48] U.S. Department of Health and Human Services Office for Civil Rights (January 18, 2019) [Notice of Violation - OCR Transaction Numbers 16-224756 and 18-292848] at https://public3.pagefreezer.com/content/HHS.gov/31-12-2020T08:51/https://www.hhs.gov/sites/default/files/california-notice-of-violation.pdf
[49] *National Institute of Family and Life Advocates* v. *Becerra*, 585 U. S. ___ (2018)

You also sued HHS to stop the 2019 rule, which adequately implemented and enforced laws enacted by Congress.[50] Such actions raise significant ethical concerns with the purpose, drafting and implementation of the Proposed Rule. We are apprehensive of your ability to impartially implement regulations to uphold and enforce the very laws you have actively tried to dismantle for years. The development of this Proposed Rule and the issuance of a subsequent final rule must be done ethically, and free of any conflicts of interest.

Conclusion

Emblematic of our nation's founders, Thomas Jefferson declared in 1809 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."[51] While this Proposed Rule is marginally stronger than the wholly inadequate 2011 rule, it is still insufficient to implement and enforce Congressional statutes protecting conscience rights.

Federal dollars should be spent and programs should be executed consistent with laws established by Congress. HHS should borrow additional provisions from the 2019 rule to ensure that conscience rights are adequately protected. We urge HHS to update the proposed regulations as we detail above to robustly enforce health care conscience rights in accord with federal law and Congressional intent.

Sincerely,

James Lankford
United States Senator

Andy Harris, M.D.
Member of Congress

Cindy Hyde-Smith
United States Senator

Kevin Cramer
United States Senator

Roger Marshall, M.D.
United States Senator

Marsha Blackburn
United States Senator

Thom Tillis
United States Senator

Marco Rubio
United States Senator

CC: Melanie Fontes Rainer
Director
Office for Civil Rights, U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

[50] State of California by and Through Attorney General Xavier Becerra v. Alex M. Azar (Northern District of California 2019) https://affordablecareactlitigation.files.wordpress.com/2019/05/file0.139400793510628-1.pdf

[51] "From Thomas Jefferson to Richard Douglas, 4 February 1809," Founders Online, National Archives, https://founders.archives.gov/documents/Jefferson/99-01-02-9714.

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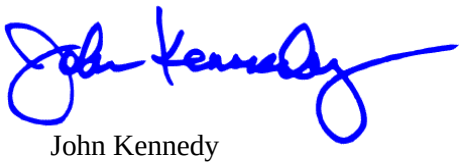

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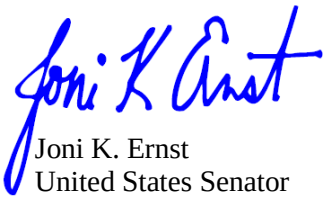

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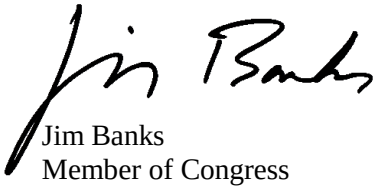

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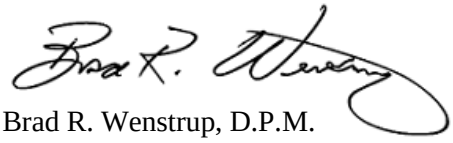

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