

November 1, 2023

VIA ELECTRONIC TRANSMISSION

Secretary Xavier Becerra
U.S. Department of Health & Human Services
Hubert H. Humphrey Building
200 Independence Avenue, S.W.
Washington, D.C. 20201

RE: Comments on Proposed Rule: Unaccompanied Children Program Foundational Rule, 88 Fed. Reg. 68908 (October 4, 2023), RIN 0970-AC93, Docket ID 2023-21168.

Dear Secretary Becerra,

We write today in fervent opposition to the Office of Refugee Resettlement (ORR) proposed rule, “Unaccompanied Children Program Foundational Rule,” which blatantly violates prohibitions on the use of federal funds to facilitate abortions and ignores the best interest of the unaccompanied minor. The proposed rule should be immediately withdrawn.

In September 2022, we wrote¹ in opposition to the Department of Health and Human Services (HHS) Field Guidance #21,² which directed providers to promote and facilitate abortions for pregnant minors in violation of federal law. Although that letter went unanswered, we made abundantly clear then to both HHS and the Department of Homeland Security (DHS) that, since 1976, Congress has included the Hyde Amendment in annual appropriations bills, which restricts HHS from funding elective abortions.³ Further, that *Azar v. Garza*⁴ is not license for federal staff to use taxpayer dollars, facilities, staff, and other resources to circumvent any State laws that protect life or federal prohibitions on funding abortions.

Instead of adhering to the law, responding to Congressional inquiry, heeding Congress’ warning, and treating unaccompanied minors with the dignity and respect they deserve as young mothers, HHS ORR has decided to codify these flagrant violations of the Hyde Amendment through the proposed rule.

The proposed rule would continue the practice of directing ORR staff to submit requests to transfer pregnant minors to ORR facilities in other states in order to circumvent state laws that protect life while continuing the practice of distributing dangerous chemical abortion drugs without direct medical supervision to vulnerable children. Additionally, the proposed rule would now include abortion to the definition of “medical services requiring heightened ORR

¹ United States Senators. (September 23, 2022) Letter to Secretary Becerra to oppose the promotion of abortion for UACs. <https://www.lankford.senate.gov/wp-content/uploads/media/doc/Lankford%20Letter%20to%20Becerra%20on%20UAC%20abortions.pdf>

² Administration for Children & Families, Office of Refugee Resettlement, *Field Guidance #21*, October 1, 2021.

³ Consolidated Appropriations Act, 2023, Public Law 117-328, Div. H, sec. 506

⁴ *Azar v. Garza*, 54 U.S. ____ (2018).

involvement,” to prioritize the taking of unborn life rather than prioritizing the interests of the Unaccompanied Alien Child (UAC).

As you are aware, federal law requires that HHS “ensure that the interests of the child are considered in decision and actions related to the care and custody of an unaccompanied alien child.”⁵ It is of great concern that the proposed rule makes the harmful, politically-motivated assumption that abortion is what is in the best interest of a pregnant UAC. This prioritization of abortion will inevitably lead to further trauma and harm, including the cover up of human smuggling and sex trafficking.

Further, the proposed rule neglects the conscience and religious freedom protections that Congress has afforded to ORR employees and contractors. The proposed rule would shockingly require ORR staff and contractors to transport children across state lines for the purpose of obtaining an abortion. The preamble vaguely acknowledges conscience protections and rights under the Religious Freedom Restoration Act, stating without elaboration that ORR operates the program “in compliance with the requirements of the Religious Freedom Restoration Act and other applicable Federal conscience protections, as well as all other applicable Federal civil rights laws and applicable HHS regulations.” However, the text of the proposed rule itself neglects to include reference to these protections.

For example, the Weldon amendment prohibits funds from being used to discriminate against those who do not provide, pay for, provide coverage of or refer for abortions.⁶ ORR is considered a health care entity under the law’s definition, and Weldon’s protections necessarily apply to funds used for transportation, staffing, and medical services for abortion. Additionally, the Coats-Snowe amendment explicitly protects health care entities from discrimination based on a refusal to arrange for the performance of abortion.⁷ We ask that any final rule requiring ORR to facilitate abortions explicitly explain how ORR staff will be able to avail themselves of protections under federal conscience protection laws, such as the Weldon and Coats-Snowe amendments.

In a similar context involving female detainees, the Department of Justice established a policy in accord with Congress’s direction in the federal conscience protection laws to ensure no person would be required to perform or facilitate any abortion. In contrast, the lack of explicit conscience protections in this rule further demonstrates that the proposed rule exceeds statutory authority and contravenes Congressional intent.

The proposed rule also neglects to include reference to Title VII of the Civil Rights Act of 1964, which prohibits federal agencies, including HHS, from discriminating against employees because of their religious beliefs, observances and practices, which includes religious objections to abortion and disregard for state laws protecting life.⁸ Title VII further provides employees reasonable accommodations for the religious beliefs, observances, and practices. We ask in any

⁵ 6 U.S. Code 279(b)(B)

⁶ Consolidated Appropriations Act, 2023, Public Law 117-328, Div. H, sec. 507(d)

⁷ 42 U.S. Code 238n

⁸ Pub. L. 88-352

final rule that ORR explicitly acknowledge Title VII protections and explain the accommodation request process for employees.

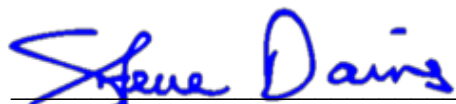
We also ask that in any final rule ORR explicitly acknowledge that protections under the Religious Freedom Restoration Act would apply to individual employees, as well as organizations and contractors who serve UACs and object on religious grounds to the taking of unborn life via abortion.

It is unacceptable that the Biden administration would choose to extend its radical abortion agenda to vulnerable, often helpless, migrant children, instead of dedicating its time and efforts toward addressing the crisis at our southern border. In fiscal year 2022, there were 2.37 million migrant encounters at the southern border; through August of fiscal year 2023, there were at least an additional 2.23 million. Customs and Border Protection Agents have seized nearly 14.7K pounds of deadly fentanyl in fiscal year 2022 and 25.6K pounds in fiscal year 2023 and stopped 227 individuals on the terrorist watchlist crossing the southern border in the last two fiscal years as well. Rather than enact common-sense policies that would help secure the border and curb the flow of migrants and drugs into our country, the Biden administration has chosen to ignore the crisis and instead promote its illegal and unconscionable directive on taking unborn life. Every life is worthy of protection, born or unborn, and the UACs who are encountered at the border need appropriate and compassionate humanitarian assistance, not more violence.

The proposed rule neglects to include an estimate or cost analysis on how many abortions HHS would facilitate under this proposed rule, including whether such abortions would be chemical or surgical and where such abortions would take place, as well as each state and locality that HHS would transport UACs to in order to facilitate abortions. The proposed rule also neglects to include a cost analysis for the funding that has been or would be spent on facilitating abortions for minors including, staff time, transportation and accommodation costs

Any final rule regarding the care of UACs should expressly respect state laws regarding the protection of unborn life, honor federal conscience and religious freedom protections, and ensure that no HHS policies prioritize abortion over the care of UACs or following the law.

Sincerely,



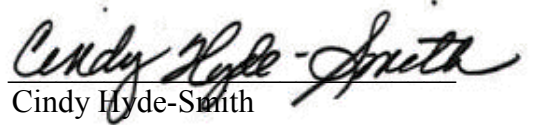
Steve Daines
United States Senator



James Lankford
United States Senator



Roger Marshall, M.D.
United States Senator



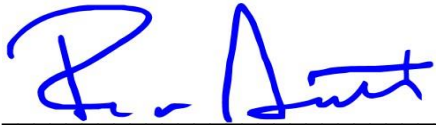
Cindy Hyde-Smith
United States Senator



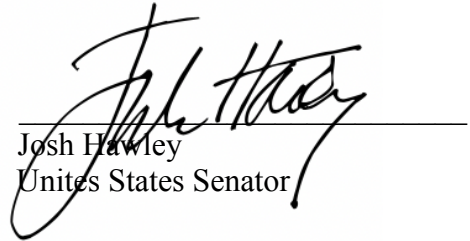
Joni Ernst
United States Senator



Mike Braun
United States Senator



Rick Scott
United States Senator



Josh Hawley
United States Senator



Ted Cruz
United States Senator