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March 27, 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, S.W.
Washington, D.C. 20201
Submitted via Regulations.gov

RE: Protecting Statutory Conscience Rights in Health Care RIN 0945-ZA03

To Whom It May Concern:

Americans United for Separation of Church and State submits the following comments to the Notice of Proposed Rulemaking by the Department of Health and Human Services, "Protecting Statutory Conscience Rights in Health Care," which was published on January 26, 2018.

Americans United is a nonpartisan advocacy organization dedicated to preserving and advancing the constitutional principle of church-state separation, which is the foundation of religious freedom for everyone. The U.S. Constitution grants all Americans the right to believe—or not believe—without government interference or coercion. But it also ensures that no one can use religion as a justification for ignoring the laws that protect the rights of others.

The Proposed Rule attempts to expand existing refusal-of-care laws and would allow hospitals, insurance companies, and almost anyone involved in the provision of healthcare to use religious beliefs to deny patients care.

Religious freedom is fundamental, but so is the right to get the healthcare you need. The government should never allow the religious beliefs of a healthcare provider to come before what is best for the patient. A patient's healthcare should always come first.

The Proposed Rule would exceed the Department's authority, threaten the health and well-being of patients, violate the Constitution, conflict with existing laws, and undermine healthcare providers' ability to deliver care. Accordingly, we urge the Department to withdraw the Proposed Rule.

The Proposed Rule Exceeds the Department's Authority by Impermissibly Expanding Refusal-of-Care Laws

With this Proposed Rule, the Department is attempting to allow any individual or entity that is tangentially involved—even a hospital board of directors or a receptionist who schedules

procedures—to use religious beliefs to determine a patient's access to care. This sweeping religious exemption extends far beyond any statutory authority.

The Proposed Rule claims to clarify three existing refusal-of-care laws—the Weldon, Church, and Coats-Snowe Amendments—related to abortion and sterilization. Each of these statutes refers to specific, limited circumstances in which healthcare providers or healthcare entities may not be required to participate in abortion and sterilization procedures. The Proposed Rule, however, attempts to expand the reach of these refusal-of- care laws to healthcare services beyond abortion and sterilization. In fact, it seeks to allow individuals to refuse to provide "*any* lawful health service . . . based on religious beliefs or moral convictions."[1]

In addition, the Proposed Rule violates statutory authority by attempting to expand the refusal-of-care laws to allow an overly broad range of individuals to refuse to provide services. It does so by stretching and misconstruing several definitions that exist in current law, including "health care entity," "assist in the performance," and "referral."

Under the Coats-Snowe and Weldon Amendments, "health care entity" is defined to encompass a limited and specific range of individuals and entities. The Proposed Rule, however, includes a far broader definition. It even includes a plan sponsor "not primarily engaged in the business of health care." This definition could allow an employer acting as a third-party administrator or insurance plan sponsor to qualify as a "health care entity" and deny insurance coverage to its employees.

The definition of "assist in the performance" includes "making arrangements for the procedure" and participation "in activity with an articulable connection" to the service. This twists the meaning of "assist in the performance" to include anyone with even a tenuous connection to the procedure and expands the types of services that can be refused. For example, a receptionist in a physician's office could refuse to schedule appointments, the hospital room scheduler could refuse to schedule procedures, the technician charged with cleaning surgical instruments could refuse to do so, or an ambulance driver could refuse to transport a woman who needs care for a miscarriage. The Proposed Rule creates the potential for a wide range of workers to interfere with and interrupt the delivery of healthcare.

The Proposed Rule's definition of "referral" similarly goes beyond any understanding of the term. The Proposed Rule would allow a provider to refuse to provide any information to a patient seeking care, including where that patient could go to get the care they need.

Finally, it should be noted that under the Proposed Rule, the Department is attempting to use the Office for Civil Rights to affirmatively allow a host of institutions and individuals to use religion to deny patients healthcare and to disregard the nondiscrimination laws that OCR is charged with enforcing. The Department has appropriated language from civil rights statutes and regulations that were intended to improve access to healthcare and is using it to create a regulatory scheme that is harmful and would instead protect those who seek to discriminate.

[1] Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 83 Fed. Reg. 3880, 3882 (proposed Jan. 26, 2018).

The Proposed Rule's Attempt to Allow Broad Refusals of Care Threatens the Health and Well-Being of Patients

The Proposed Rule would allow institutions and individuals—ranging from hospitals and insurance companies to providers and support staff—to refuse to provide care to patients in need. At the same time, it fails to account for the increased discrimination and flat-out denials of care that some of the most vulnerable members of our communities could face if it were implemented. The Proposed Rule's broad scope could potentially affect patients who need services and information in a wide range of areas. Most clearly, it would exacerbate barriers to care that already exist for women, people of color, LGBTQ people, people with disabilities, immigrants, and people who live in rural areas. It could also make getting care for HIV/AIDS, drug addiction, infertility, vaccinations, mental illness, sexually transmitted infections, and end-of-life care, for example, difficult for patients.

Women

The Proposed Rule seeks to allow providers and healthcare entities to discriminate against women and deny them the care and information they need. Religious beliefs have already been used to deny access to services most often needed by women, such as abortion, sterilization, certain infertility treatments, and miscarriage management. The Proposed Rule, however, would go even further, seeking to allow a broader range of providers to deny women a broader range of services.

Existing refusals already have serious health consequences for women and can result in infertility, infection, and even death. This discrimination disproportionately affects women of color who already face additional barriers to accessing reproductive healthcare. For example:

> When she was 18 weeks pregnant and her water broke, Tamesha Means rushed to her local hospital (which was religiously affiliated and the only one in her county). The hospital did not tell Tamesha that her pregnancy was not viable and that the safest course of action for her would be to end it. Instead, the hospital gave her two Tylenol and sent her home. Tamesha returned to the hospital the next day because she was severely bleeding. Despite showing signs of infection, the hospital sent her home again. Returning a third time in excruciating pain, the hospital was about to send Tamesha home when she began to deliver. The baby died within hours.[2]

Unfortunately, Tamesha is not the only woman who has been refused full information about her condition and treatment options. Other women experiencing miscarriages have also been refused treatment and left in the dark about their options, sometimes for several weeks. As a result, women have experienced grave medical problems such as sepsis, even resulting in stays in the ICU and acute kidney injury, and hemorrhaging requiring blood transfusions.[3]

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[2] American Civil Liberties Union, *Health Care Denied: Patients & Physicians Speak Out About Catholic Hospitals & the Threat to Women's Health & Lives* (2016); Public Rights/Private Conscience Project, Columbia Law School, *Bearing Faith: The Limits of Catholic Health Care for Women of Color* (2018).
[3] *Health Care Denied.*

The Proposed Rule's expansion of these refusals will put women at even greater risk for harm. Information, counseling, referral and provision of contraceptive and abortion services are part of the standard of care for a range of common medical conditions including heart disease, diabetes, epilepsy, lupus, obesity, and cancer. Medical guidelines state that survivors of sexual assault should be provided emergency contraception subject to informed consent and that it should be immediately available where survivors are treated. For individuals with cancer, the standard of care includes education and informed consent around fertility preservation. Yet, the Proposed Rule seeks to allow even more institutions and individuals to deny women this vital information and services.

LGBTQ People

The Proposed Rule also seeks to allow providers and healthcare institutions to refuse care, including transition-related care, to LGBTQ patients. This ignores both the well-established consensus in the medical community that transition-related care is medically necessary and the reality that this care is often life-saving. The Proposed Rule's vague and sweeping language could encourage providers to refuse other care to LGBTQ patients as well. A provider could argue that it can refuse to administer an HIV test, prescribe PrEP, or screen a transgender man for a urinary tract infection. Moreover, the Proposed Rule could also encourage providers to deny any care to an LGBTQ patient simply because of the provider's personal disapproval of the patient's sexuality or gender identity.

People with Disabilities

Many people with disabilities rely on a case manager to coordinate necessary services, a transportation provider to drive them to appointments, or a personal care attendant to administer their medications and manage their daily activities. Under this Proposed Rule, any of these providers could believe they are entitled to object to providing any of these service covered. And if they did, they would not even have to tell the individual where they could obtain the service, how to find an alternative provider, or even whether the service is available to them. For example, a case manager might refuse to set up a routine gynecological appointment because contraception might be discussed, or a personal home health aide could refuse to administer a contraceptive drug. For people who require such assistance, a denial based on a case manager, driver, or attendant's religious beliefs could mean they lose access to vital healthcare altogether.

Patients in Immigrant and Rural Communities

The sheer distance to a healthcare facility can be a significant barrier to getting care. Immigrant patients often lack access to transportation or may need translation services and may have to travel great distances to get the care they need. Patients living in rural communities also face many barriers to care including cost of transportation, taking time from work, and other incidentals. For these patients, being turned away by a medical provider is not just an inconvenience: it often means being denied care entirely because there may be no other sources of health and life-preserving medical care.

The Proposed Rules Violates the Establishment Clause of the First Amendment

Religious freedom is a fundamental right, protected by our Constitution and federal law. It guarantees us all the right to believe (or not) as we see fit. But it doesn't give anyone the right to use religion to harm others.

The Proposed Rule seeks to allow a wide range of institutions and individuals to cite religious or moral objections to deny patients the care they need. As explained above, countless patients could face harm. This is not just bad policy—it also violates the Establishment Clause of the First Amendment of the U.S. Constitution.

The Establishment Clause requires the Department to "take adequate account of the burdens" that an exemption "may impose on nonbeneficiaries" and must ensure that any exemption is "measured so that it does not override other significant interests."[4] It prohibits the Department from granting religious and moral exemptions that would detrimentally affect any third party.[5]

For example, in *Estate of Thornton v. Caldor, Inc.*, the Supreme Court invalidated a statute that gave employees an unqualified right to take time off on the Sabbath day of their choosing.[6] The statute violated the Establishment Clause because it "would require the imposition of significant burdens on other employees required to work in place of the Sabbath observers."[7]

The Court acknowledged the limitations imposed by the Establishment Clause most recently in *Burwell v. Hobby Lobby Stores, Inc.*[8] In holding that the Religious Freedom Restoration Act (RFRA)[9] afforded certain employers an accommodation from the Affordable Care Act's contraceptive coverage requirement, the Court concluded that the accommodation's effect on women who work at those companies "would be precisely zero."[10] And in his concurrence, Justice Kennedy emphasized that a religious accommodations must not "unduly restrict other persons, such as employees, in protecting their own interests."[11]

The exemption in the Proposed Rule would clearly impose burdens on others: it seeks to allow providers to refuse care to patients and lacks any safeguards to ensure patients are able to obtain the care they need. Thus, the Proposed Rule runs afoul of the clear mandates of the Establishment Clause.

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[4] *Cutter v. Wilkinson*, 544 U.S. 544, 720, 722 (2005); *see also Estate of Thornton v. Caldor, Inc.* 472 U.S. 703, 709-10 (1985).
[5] *E.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 n.37 (2014) (citing *Cutter*, 544 U.S. at 720); *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring); *Cutter*, 544 U.S. at 726 (may not "impose unjustified burdens on other[s]"); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (may not "impose substantial burdens on nonbeneficiaries").
[6] *Caldor*, 472 U.S. at 705–08.
[7] *Id.* at 710.
[8] 134 S. Ct. 2751 (2014).
[9] 42 U.S.C. §§ 2000bb–2000bb-4.
[10] *Hobby Lobby*, 134 S. Ct. at 2760. Indeed, every member of the Court reaffirmed that the burdens on third parties must be considered. *See id.*; *id.* at 2786-87 (Kennedy, J., concurring); *id.* at 2790 & n.8 (Ginsburg, J., joined by Breyer, Kagan, and Sotomayor, JJ., dissenting).
[11] *Id.* at 2786-87 (Kennedy, J., concurring).

There Are No Exceptions to this Rule that Are Relevant to the Proposed Rule

There have been only two situations in which the Supreme Court has upheld religious exemptions that had the effect of burdening third parties in any meaningful way. In both, the Court has held that the Free Exercise Clause warranted the exemptions in order to protect the autonomy and ecclesiastical authority of religious institutions, such as a church's selection of clergy.[12]

The Supreme Court has also occasionally permitted accommodations when the potential consequences for third parties would be so diffuse and amorphous as to have no meaningful effect on any particular individual.[13]

Neither exception is applicable here. Allowing institutions and individuals throughout the healthcare system to deny care to patients has nothing to do with how a church selects its minister, for example. Moreover, these refusals of care will meaningfully and concretely harm countless patients who seek care with hospitals, insurance companies, providers, and support staff that may use the exemption.

The Proposed Rule Conflicts with Federal, State, and Local Laws

The Propose Rule conflict with several important federal, state, and local laws, including those that govern informed consent requirements, establish emergency care safeguards, and protect against discrimination.

First, the Proposed Rule conflicts with informed consent requirements. Federal and state laws require providers to inform patients of medically accurate information about treatment choices and alternatives. This allows patients to competently and voluntarily make decisions about their medical treatment or refuse treatment altogether. Existing refusal-of-care laws already interfere with this ethical and legal principle. And under the Proposed Rule, the problem will only grow worse—more healthcare entities will limit the type of care they are willing to provide or discuss with patients. A patient may never know about the range of treatment options, including what may be the standard of care for the particular circumstance the patient is facing. This will deter open conversations between providers and patients and take away patients' ability to make decisions about their care.

Second, the Proposed Rule fails to address potential conflicts with emergency care requirements. Under the Emergency Medical Treatment and Active Labor Act (EMTALA), a hospital receiving government funds and providing emergency services is required also to provide medical screening and stabilizing treatment to a patient who has an emergency

[12] In *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171, 196 (2012), the Court held that the Americans with Disabilities Act could not be enforced against a church in a way that would interfere with the church's selection of its ministers. And in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 337-39 (1987), the Court upheld, under Title VII's limited religious exemption, a church's firing of an employee who was not in religious good standing.

[13] In *Walz v. Tax Commission*, 397 U.S. 664, 673 (1970), the Court held that the government may exempt houses of worship from property taxes as part of a broad exemption for nonprofit entities, because the public as a whole bore the incidence of the forgone tax revenues—and did so only in the most abstract way—while also sharing in the social benefits of a system that encouraged all nonprofits to flourish.

medical condition (including severe pain or labor).[14] All hospitals, even religiously affiliated ones, have to comply with EMTALA.[15] Because the Proposed Rule does not mention EMTALA or contain an explicit exception for emergencies, some institutions may believe they are not bound by EMTALA's requirements. This could result in patients not receiving necessary, life-saving care—care to which they are entitled by law—when facing a medical emergency.

Third, the proposed regulation conflicts with Title VII of the Civil Rights Act.[16] Title VII is the preeminent federal law that addresses employment discrimination. It requires employers to reasonably accommodate employees' religion unless doing so would impose an undue hardship on employers.[17] For decades, Title VII has established the legal framework for religious accommodations in the workplace. When healthcare workers request an accommodation, Title VII ensures that employers can consider the effect an accommodation would have on coworkers, customers, and patients, as well as factors like public safety, patient health, and other legal obligations. Introducing another standard under the proposed regulation would clearly create confusion for healthcare employers that would still be subject to Title VII. When similar regulations were proposed in the past, the U.S. Equal Employment Opportunity Commission, the agency responsible for enforcing Title VII, raised concerns and stated that Title VII should remain the relevant legal standard.[18]

Finally, the Proposed Rule claims to supersede laws passed by state and local governments to ensure patients' access to healthcare and prevent discrimination against individuals seeking care. Thus, the Proposed Rule would have a substantial and direct effect on states, clearly implicating federalism concerns.[19] Moreover, the Proposed Rule invites states to expand refusals of care by making clear that this expansive rule is a floor, not a ceiling.

The Proposed Rule Will Undermine Healthcare Providers' Ability to Serve Patients

The Proposed Rule ignores the many providers with deeply held professional, ethical, religious, or moral convictions that affirmatively motivate them to provide patients with a full-range of healthcare options, including abortion, transition-related care, and end-of-life care.

Existing refusals of care based on religious beliefs already undermine open communication between providers and patients, interfere with providers' ability to provide care according to medical standards, and ignore the reality that many providers want to offer their patients comprehensive care.[20] Hospital systems across the country use religious beliefs to prevent their employees from treating patients regardless of what the providers believe they are ethically and morally obligated to do. The Proposed Rule would exacerbate these problems

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[14] 42 U.S.C. § 1295dd(a)-(c).
[15] *See, e.g.*, *Shelton v. Univ. of Med. & Dentistry*, 223 F.3d 220 (3d Cir. 2000); *In re Baby K*, 16 F.3d 590 (4th Cir. 1994); *Nonsen v. Med. Staffing Network, Inc.*, 2006 WL 1529664 (W.D. Wis.).
[16] 42 U.S.C. §2000e *et seq.*
[17] 42 U.S.C. § 2000e(j).
[18] Letter from Reed L. Russell, Legal Counsel, EEOC to Dep't of Health & Human Servs., regarding "Provider Conscience Regulation (Sept. 24, 2008).
[19] *See* Exec. Order 13132, 64 Fed. Reg. 43255 (Aug. 10, 1999).
[20] Providers have disclosed that they could not provide the standard of care for managing miscarriages at Catholic hospitals, and as a result, women were delayed care or transferred to other facilities at great risk to their health. Lori R. Freedman, Uta Landy, & Jodi Steinauer, *When There's a Heartbeat: Miscarriage Management in Catholic-Owned Hospitals*, Am. J. Pub. Health (2008).

by emboldening healthcare entities and institutions to bind the hands of providers and attempt to limit the types of care they can provide.

The Proposed Rule does not provide any protections for healthcare professionals who want to provide, counsel, or refer for healthcare services that the rule implicates.

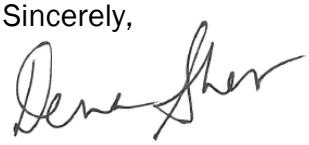
Here are just two examples of what providers told us. An emergency physician who provided care 24/7 to all comers for 30 years said: "I feel that any rule that would allow providers to pick and choose what care to provide and to whom to provide it based on their personal religious beliefs is morally and ethically reprehensible and bad medicine." Another person who worked in medicine for 20 years told us: "We didn't judge patients on any criteria other than what help they needed. That is all that a patient should ever be judged by."

Conclusion

Religious freedom should be a shield that protects people from discrimination—never a tool to cause harm or deny basic medical care to any American. The Proposed Rule violates this fundamental principle. Because patients' health needs must come first and no one should lose access to critical healthcare because of a doctor's or a hospital's religious beliefs, we urge the Department to withdraw the Proposed Rule.

Thank you for the opportunity to provide comments. If you should have further questions, please contact Dena Sher, (202) 466-3234 or sher@au.org.

Sincerely,



Dena Sher
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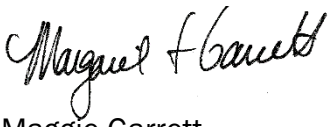

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