
IN GOOD CONSCIENCE

March 27, 2018

U.S. Department of Health and Human Services
Office of Civil Rights
Attn: Conscience NPRIM, RIN 0945-ZA03
Hubert H. Humphrey Building, Room 509F
200 Independence Ave., SW
Washington, DC 20201

VIA Regulations.gov

RE: Department of Health and Human Services, Office of Civil Rights RIN 0945-ZA03

Dear Director Severino:

On behalf of the majority of the more than 70 million Catholics in the United States, who as a matter of conscience, disagree with the Catholic hierarchy on issues related to reproductive health and rights, we submit this public comment to express our deep concern regarding the new regulation that the Department of Health & Human Services (“HHS” or “the Department”) has proposed, which expands the scope and reach of religious exemptions in HHS programs and activities under the auspices of the new Division of the Office of Civil Rights.

Catholics for Choice is an international nongovernment organization that shapes and advances sexual and reproductive health ethics that are based on justice and reflect a commitment to wellbeing for all individuals. We represent the lived reality of everyday Catholics and offer our expertise, rooted in the foundational Catholic teaching that every individual must follow his or her own conscience and respect others’ right to do the same. Our Catholic tradition requires us to respect conscience-based decisions, advocate for the poor and marginalized and respect pluralism and religious freedom. We firmly believe that HHS should advance policies and regulations that promote principles of social justice, protect moral autonomy for every individual and ensure true religious liberty for all in matters of healthcare and other public social service provision.

As a faith-based organization, we have a strong and deeply-rooted conviction on the importance of protecting conscience and conscience-based decisions in healthcare. It is our informed view that conscience indeed must be protected in the provision of healthcare. However, those conscience protections need to extend to provider and patient alike. The personal beliefs of any provider should never impede the care the patient is able to receive or the services the beneficiary may access. This view is shared by the seven in 10 Catholics in the United States who believe that companies and other institutions should not be allowed to use religious beliefs as a reason to deny services to employees, customers or patients.¹ That is why we strongly oppose the Department’s proposed rule (“Proposed Rule”), which seeks to permit discrimination in all aspects of healthcare,¹ based solely on the principle of protecting the conscience only for those who object to certain services or aspects of care.

(more)

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The Proposed Rule seeks to dramatically expand refusals, which limit access to healthcare and promote an unbalanced interpretation of conscience protection by protecting only those individuals who wish to refuse to participate in healthcare or social service delivery. Moreover, the Proposed Rule attempts to create new refusals, which broadly expand the entities that may refuse care and the range of services, treatment and indirect support they may refuse to provide – all based on a false notion of what conscience is and where it lies. Institutions (and entities) do not have consciences; individuals do.

By issuing the Proposed Rule and creating new division within the OCR—the “Conscience and Religious Freedom Division” (“the Division”)—the Department seeks to inappropriately use OCR’s limited resources in order to affirmatively allow institutions, insurance companies and almost any entity along the spectrum of patient care to use false conscience claims and/or the individual personal beliefs of the leader of the institution to deny people the care they need. Catholics for Choice calls on the Department and OCR to withdraw the Proposed Rule in its entirety.

Reverence for Individual Conscience

Respect for individual conscience is at the core of Catholic teaching. Our faith compels us to listen to our own consciences in matters of moral decision-making and to respect the rights of others to do the same. Our intellectual tradition emphasizes that conscience can be guided, but not forced, in any direction. This deference for the primacy of conscience extends to all men and women and to their personal decisions about moral issues, including reproductive healthcare decisions.

Catholicism also requires deference to the conscience of others in making one’s own decisions. Allowing institutions to dictate the medical care and social services available to their patients and clients, according to one particular set of beliefs, would severely encroach on the professional expertise and ability of those responsible for providing care to make the best decisions and provide care consistent with their own consciences. In focusing exclusively on those with objections who wish to deny patients the care they seek, the Proposed Rule constitutes a refusal clause, rather than a protection clause. By ignoring protection for the conscience-based decisions of providers who wish to provide comprehensive care based on medical best practice, or the needs of the patients who seek that care, this rule constitutes state-sponsored discrimination against those whose beliefs differ from the party seeking to refuse.

We call upon the Department to uphold the dignity of all people to live according their own moral compass, including those who believe that providing and receiving comprehensive, medically appropriate care or compassionate social services is an act of affirming our shared humanity.

Conscience Protections and Religious Liberty Are Meant for Individuals, Not Entities.

The Department seeks comments on whether the Proposed Rule’s definition of “entity” and “healthcare entity” “...clearly and accurately reflect the intent and scope of each of those statutes.”ⁱⁱⁱ We feel strongly that they do not. Granting entire institutions the rights of conscience that should be left to individuals is an affront to the Catholic ideals of conscience, workers’ rights, social justice and religious freedom. The rule substantially expands the definition of entities and suggests these have religious, moral or ethical conscience rights—including states, government organizations and programs (like Medicare, Medicaid and other public insurance plans).

In doing so, HHS suggests that a “healthcare entity” or other service provider’s religious objections should be permitted to trump the beliefs of the very real people they care for. The proper role of government is to protect the freedom of conscience for all Americans, no matter what their beliefs may be. By directing

taxpayer dollars to institutions that engage in such discriminatory activity—for instance, refusing to provide an abortion for a woman in an acute medical crisis,^{iv} firing an employee for having a same-sex partner^v or overriding patient preferences for end-of-life care^{vi}—OCR and the Division will be in the business of interfering in the religious and moral decision making of patients, beneficiaries and social service recipients. This is not protecting conscience.

Granting entire institutions the right of conscience that should be left to individuals is an affront to the Catholic ideals of conscience, workers' rights, social justice and religious freedom. Neither the freedom of conscience nor the freedom from religion should be misconstrued as extending these protections to institutions. To do so, would ignore the moral agency of the many individuals served by HHS programs who may not share the same beliefs espoused by their healthcare or service provider. Moreover, good practice should also compel any entity whose mission is to deliver services to make sure that the consciences of both the healthcare (or social services) provider and the patient (or client) are accommodated by having policies in place that enable individuals to receive whatever medications they are prescribed, procedures they require or services they seek.

Yet, throughout the Proposed Rule, the beliefs and moral convictions of the individuals who receive care and services through HHS programs receive no mention, though they are the ones who stand to suffer when their personal autonomy is compromised. We find the Department's focus on entities, to the detriment of patients, beneficiaries and recipients, shocking and wrong. As Catholics, we cannot and do not presume to tell others how best to listen to their own consciences as they make important decisions.

Our Catholic tradition calls on us to celebrate religious liberty, which honors individuals' rights to both the freedom of religion and the freedom from being forced to live by another's beliefs. Religious freedom, at its base, is an expansive rather than a restrictive idea. It is not about telling people what they can and cannot believe or practice but giving people the ability to follow their own conscience in what they believe or practice. These protections extend to one's personal religious beliefs and practices, but they do not give entire institutions or individuals license to obstruct or coerce the exercise of another's conscience.

We urge the Department to desist from perpetuating the misconception that an entity has conscience rights equivalent to individuals. Instead, OCR should remain true to its mission of ensuring that all people are treated equally in the provision of healthcare and related services.

The Proposed Rule Carries Severe Consequences for Providers, Undermines the Provider-Patient Relationship, and Ignores the Conscience of Those Practitioners Who Seek to Provide the Best Medical Care for Their Patients

Existing refusals based on personal 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 provide comprehensive care based on their individual consciences. When hospital systems across the country speciously claim religious beliefs as a pretext to prevent their employees from treating patients regardless of the professional, ethical or moral convictions of these providers, they abuse the notion of conscience, which can only properly belong to the individual.^{vii} The Proposed Rule would exacerbate these problems by emboldening healthcare entities and institutions, including foreign and international organizations, to bind the hands, stymie the conscience of providers and attempt to limit the types of care they can provide.

The Proposed Rule threatens informed consent, a necessary principle of patient-centered decision-making intended to help balance the power dynamics between health providers and patients and ensure patient-centered decision-making.^{viii} Informed consent requires providers disclose relevant and medically accurate information about treatment choices and alternatives so that patients can competently and voluntarily make decisions about their medical treatment or refuse treatment altogether.^{ix} By allowing providers, including hospital and healthcare institutions, to refuse to provide patients with information, the Proposed Rule makes it impossible for patients to have full information regarding treatment options. While the Department claims the Proposed Rule improves communication between patients and providers, in truth it will deter open, honest conversations that are vital to ensuring that a patient can control their medical circumstances.^x

The Proposed Rule also disregards standards of care established by the medical community by allowing providers to opt out of providing medical care. Medical practice guidelines and standards of care establish the boundaries of medical services that patients can expect to receive and that providers should be expected to deliver. Yet, the Proposed Rule seeks to allow providers and institutions to ignore the standards of care, particularly surrounding reproductive and sexual health.

Information, counseling, referral and provision of contraceptive and abortion services are part of the standard of care for a range of common medical conditions. Individuals seeking reproductive healthcare, regardless of their reasons for needing these services, should be treated with dignity and respect. Allowing providers to flout established medical guidelines and deny medically accurate, evidence-based care to patients harms them and impairs their ability to make the healthcare decisions that are right for them. This constitutes a fundamental violation of patients' conscience and autonomy.

Faith-Based Organizations Are an Integral Part of the Social Safety Net, but That Does Not Entitle Them to Special Treatment.

Faith-based providers play a substantial role in the provision of health and human services across the country, often serving as pillars of the community, trusted to provide necessary care and essential services to underserved groups. Faith-based groups provide services to people of all backgrounds when they are most in need and, through their extensive networks and infrastructure, can play a pivotal role in improving patients' health and wellbeing. At the same time, some faith-based providers use conservative interpretations of religious teachings to deny access to critical services, including family planning, abortion, gender affirming care and HIV & AIDS prevention. This has obvious implications for women and girls in relation to sexual and reproductive rights and health.

Faith-based providers also may use their religious interpretation to discriminate against populations that need particular care and support, including LGBT individuals, unaccompanied minors in need of reproductive healthcare services and immigrants and refugees seeking shelter and sanctuary. Denying individuals these services based on religious objections undermines the very purpose of the taxpayer-funded services and programs meant to help those in need.

Expanding religious exemptions for faith-based entities will fall hardest on those who already face barriers to accessing care and services. Women have been charged more for healthcare on the basis of sex and have continually been denied health insurance coverage for services that only women need.^{xi} Religiously affiliated organizations that receive federal grants to care for unaccompanied immigrant minors, many of whom are sexually assaulted before they reach HHS custody, have argued they are entitled to refuse to provide them critical reproductive healthcare, including access to or even referrals

for abortion and contraception, as required by law.^{xii} Far too many LGBT people are denied the care they need because of their sexual orientation or gender identity.

HHS grantees and contractors should not be allowed to discriminate against those they serve or employ who do not act in accordance with particular religious beliefs—this could include someone who does not regularly attend religious services, is married to a person of the same sex, gets divorced, uses birth control or is pregnant and unmarried. Requiring all HHS grantees, faith-based or not, to comply with federal civil rights law and the highest medical standards does not infringe on anyone’s conscience, demand that anyone change her or his religious beliefs, discriminate against any woman or man, put any additional economic burden on the poor, interfere with any person’s medical decisions or compromise anyone’s health.

No person should experience judgment, shame or discrimination when seeking care or services, nor should employees working to deliver those services—especially from a provider that administers a government-funded program. Faith-based entities that engage in these practices should not receive greater deference from HHS simply because they claim a right to special treatment based on their religiously based objections. Further accommodation of religious entities threatens to increase discrimination against these communities and thereby worsen healthcare disparities that the Department should be working to reduce, increase barriers to care and services for the most vulnerable and threaten the freedom of conscience of patients, beneficiaries and individuals in their employ.

American Catholics Reject the Existing Religious Exemptions that Discriminate or Otherwise Harm Those Seeking Healthcare.

Faith-based organizations have a long and successful history of partnership with HHS, playing an important role in delivering health and social services to communities in need. Yet some faith-based organizations have also used HHS funds to discriminate and withhold needed services and the Proposed Rule would allow this practice to happen more often. Religion has been invoked in countless ways to deny individuals access to healthcare, including birth control, sterilization, certain infertility treatments, abortion,^{xiii} transition-related medical care for transgender patients,^{xiv} reproductive healthcare for trafficking victims^{xv} and end of life care.^{xvi}

American Catholics overwhelmingly agree that an employer’s beliefs should not determine the job an employee can do, nor should a healthcare provider’s religious beliefs determine the care a patient receives, nor should the services available to beneficiaries be determined by a provider’s beliefs. Seven in 10 US Catholics believe that companies and institutions should not be allowed to use the owners’ religious beliefs as a reason to deny services to employees or customers.^{xvii} Ninety percent of US Catholics disapprove of a company firing an unmarried employee who is pregnant based on the owner’s religious beliefs, and 86 percent disapprove of a counselor refusing to counsel a gay student based on the counselor’s beliefs. Seventy-seven percent of US Catholic voters oppose hospitals and clinics that take taxpayer dollars refusing to provide certain procedures or medications; 76 percent oppose permitting pharmacists to withhold prescriptions; 68 percent oppose a religiously affiliated hospital refusing to perform an abortion necessary to protect a woman’s health;^{xviii} and eighty-six percent of Catholic voters disapprove of counselors refusing to counsel gay students.^{xix}

This support for the full range of comprehensive health and social services without discrimination is unsurprising, as religiously based restrictions affect Catholics just as often as non-Catholics. In fact, 99 percent of sexually active Catholics have used a modern form of contraception that the Catholic hierarchy prohibits.^{xx} More than half a million individuals of all faiths work in religiously affiliated healthcare

facilities; many Catholics serve and work in entities that deliver social services to communities in need. While faith-based organizations may argue that their employees, patients or program beneficiaries hold the same religious convictions that their leadership espouses, this is simply inconsistent with the beliefs and lived practices of the individuals they employ, treat and serve.

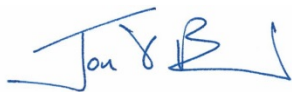
The Catholic faith holds conscience to be the final arbiter in moral decision making, including in deeply personal healthcare choices. Our faith also demands respect for real religious liberty, ensuring that each person can follow their conscience according to their own beliefs. In keeping with these ideals, we ask that HHS and OCR focus on protecting individual decision-making and prohibit discrimination in the delivery of healthcare and the provision of human services through government-funded contracts, rather than prioritizing the religiously-based objections above the conscience protections of employees, patients or program beneficiaries.

Conclusion

Having failed to convince Catholics in the pews, the United States Conference of Catholic Bishops (USCCB) and other conservative Catholic organizations are now attempting to impose their personal beliefs on all people by seeking special protection for their “conscience rights,” and they are enlisting HHS and OCR to help them do so. Though, the USCCB and its allies claim to represent all those with religious beliefs, in truth, theirs is the minority view. Some of the concerns raised in these comments illustrate the problem with the bishops’ intrusion into medical decisions and demand for more and ever wider “protections” from HHS. Yet it is the individuals served by HHS whose personal, professional and religious freedom to make healthcare decisions is being threatened by these expansive refusal clauses. The exemptions that the USCCB and other conservative entities are demanding do not offer any more protection for religious freedom, but rather impede the religious freedom of millions.

We call on the Department and OCR to withdraw the Proposed Rule in its entirety. HHS must not prioritize the agenda of certain institutions and entities that wish to have religious fiat over the lives of Americans. Instead we implore HHS to recommit to policies, objectives and regulations that protect the conscience rights of all people and improve the health and wellbeing of individuals and families across the country no matter their beliefs.

Respectfully submitted,

A handwritten signature in blue ink that reads "Jon O'Brien". The signature is stylized with a large "J" and "O", and a distinct "B".

Jon O'Brien
President
Catholics for Choice

ⁱ Beldon Russonello Strategists, LLC, *2016 National Survey of Catholic Likely Voters*, Conducted for Catholics for Choice, September 2016.

ⁱⁱ Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 83 Fed. Reg. No. 18, p. 3880 (proposed Jan. 26, 2018) [*hereinafter* Rule].

ⁱⁱⁱ See Rule, pg. 3883.

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- ^{iv} American Civil Liberties Union, *Health Care Denied* (May 2016), https://www.aclu.org/sites/default/files/field_document/healthcaredenied.pdf.
- ^v Francis DeBernardo, "Fired for Being Gay: Turning Catholics Away from Our Church," *Conscience*, Vol. 36, No. 2 (2014).
- ^{vi} U.S. Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Care Services* (5th ed. 2009) (Directive 24 denies respect for advance medical directives.), <http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services-fifth-edition-2009.pdf>.
- ^{vii} See Julia Kaye, et al., *Health Care Denied*, AM. CIVIL LIBERTIES UNION 1, 12 (2016), https://www.aclu.org/sites/default/files/field_document/healthcaredenied.pdf.
- ^{viii} See TOM BEAUCHAMP & JAMES CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* (4th ed. 1994); CHARLES LIDZ ET AL., *INFORMED CONSENT: A STUDY OF DECISIONMAKING IN PSYCHIATRY* (1984).
- ^{ix} See *id.*
- ^x See Rule *supra* note 1, at 150-151.
- ^{xi} Nat'l Women's Law Center, *Turning to Fairness: Insurance Discrimination Against Women Today and the Affordable Care Act* (March 2012), <https://nwlc.org/resources/turning-fairness-insurance-discrimination-against-women-today-and-affordable-care-act/>.
- ^{xii} Anna Merlan, *Religious Aid Groups: Raped Migrant Kids Should Not Get Plan B*, *Jezebel* (March 5, 2015), <https://jezebel.com/religious-aid-groups-raped-migrant-kids-should-not-get-1689602157>. See also, American Civil Liberties Union, *Religious Organizations Obstruct Reproductive Health Care For Unaccompanied Immigrant Minors* (April 3, 2015), <https://www.aclu.org/news/religious-organizations-obstruct-reproductive-health-care-unaccompanied-immigrant-minors>.
- ^{xiii} Nat'l Women's Law Ctr., *Health Care Refusals Harm Patients: The Threat to Reproductive Health Care* (May 2014), http://www.nwlc.org/sites/default/files/pdfs/refusals_harm_patients_repro_factsheet_5-30-14.pdf.
- ^{xiv} Nat'l Women's Law Ctr., *Health Care Refusals Harm Patients: The Threat to LGBT People and Individuals Living with HIV/AIDS* (May 2014), <https://nwlc.org/resources/health-care-refusals-harm-patients-threat-lgbt-people-and-individuals-living-HIVAIDS>.
- ^{xv} *ACLU of Mass. v. Sebelius*, 821 F. Supp. 2d 474 (D. Mass. 2012), *vacated as moot sub nom., ACLU of Mass. v. U.S. Conference of Catholic Bishops*, 705 F.3d 44 (1st Cir. 2013).
- ^{xvi} U.S. Conference of Catholic Bishops, *supra* note x.
- ^{xvii} Beldon Russonello Strategits, LLC, *2016 National Survey of Catholic Likely Voters*, Conducted for Catholics for Choice, September 2016.
- ^{xviii} Beldon Russonello Strategits, LLC, *Catholic Voters and Religious Exemption: A National Opinion Survey for Catholics for Choice, Call to Action, DignityUSA and Women's Alliance for Theology, Ethics and Ritual (WATER)*, October 2014.
- ^{xix} Belden Russonello Strategits, *Catholic Voters and Religious Exemption Policies*, October 2014.
- ^{xx} Kimberly Daniels; William D. Mosher and Jo Jones, *Contraceptive Methods Women Have Ever Used: United States, 1982–2010*, Nat'l Health Statistics Reports, Vol. 62 (Feb. 14, 2013), <https://www.cdc.gov/nchs/data/nhsr/nhsr062.pdf>.