

Congress of the United States
House of Representatives
Washington, D.C. 20515

March 7, 2023

The Honorable Xavier Becerra
Secretary
U.S. Department of Health and Human Services
200 Independence Ave., SW
Washington, DC 20201

RE: Safeguarding the Rights of Conscience as Protected by Federal Statutes, RIN
0945-AA18, Document Number 2022-28505

Dear Secretary Becerra:

We write to express our support for the U.S. Department of Health and Human Services' (HHS or Department) Office for Civil Rights' (OCR) proposed rule, *Safeguarding the Rights of Conscience as Protected by Federal Statutes* (2023 NPRM).¹ This proposed rule would rescind detrimental provisions within the Trump Administration's 2019 final rule titled, *Protecting Statutory Conscience Rights in Health Care; Delegations of Authority* (2019 Rule) and we are pleased OCR is proposing these changes.²

Among other responsibilities, HHS' OCR works to ensure compliance with our nation's "civil rights, conscience and religious freedom, and health information privacy and security laws."³ These responsibilities require OCR to ensure that individuals have access to comprehensive health care services, free from discrimination, while also enforcing provisions intended to allow certain individuals and entities in the health care industry to refuse to provide certain types of health care services. The 2019 Rule not only failed to achieve this balance, but, in practice, would have exacerbated long standing inequities in our health care system should the rule have taken effect. However, as noted in the 2023 NPRM, multiple federal courts concluded that the 2019 Rule was "defective in several respects" and therefore vacated the Rule on a nationwide basis.⁴

Because health care is a fundamental aspect of everyday life, individuals of all backgrounds should have unimpeded access to the health care services they need. Therefore, we

¹ 88 Fed. Reg. 820 (Jan. 5, 2023) (to be codified at 45 CFR 88), <https://www.federalregister.gov/documents/2023/01/05/2022-28505/safeguarding-the-rights-of-conscience-as-protected-by-federal-statutes>.

² 84 Fed. Reg. 23170 (May 21, 2019), <https://www.federalregister.gov/documents/2019/05/21/2019-09667/protecting-statutory-conscience-rights-in-health-care-delegations-of-authority>.

³ U.S. Dep't of Health and Human Servs., Off. for Civil Rights, *OCR Mission & Vision*, <https://www.hhs.gov/ocr/about-us/mission-vision/index.html> (last visited Mar. 1, 2023).

⁴ 88 Fed. Reg. at 824.

support the 2023 NPRM that will rescind provisions of the 2019 Rule that would have led to more discrimination and would have further impeded access to health care services, including abortion and gender-affirming care.

2019 Conscience Rule’s Impact on Access to Health Care Services

In the 2023 NPRM, OCR requested “[i]nformation . . . supporting or refuting allegations that the 2019 [Conscience] Rule hindered, or would hinder, access to information and health care services, particularly sexual and reproductive health care and other preventive services.”⁵ One of the primary criticisms of the 2019 Rule was that its adoption of expansive definitions in the rule would undermine individuals’ access to health care services.⁶

In a March 2018 letter from Ranking Members Scott and Pallone to former HHS Secretary Alex Azar, the letter noted that the rule broadly redefined terms such as “assist in performance,” “articulable connection,” and “entity” in ways that went “beyond what Congress intended [in the existing refusal of care laws] and would weaken patient access to care.”⁷ In addition, the letter cited examples of how these changes would have real world consequences such as “a hospital or individual provider . . . refus[ing] to offer . . . reproductive health services or gender reassignment surgery” or “a pharmacy or pharmacist . . . refus[ing] to fill prescriptions for birth control or emergency contraception.”⁸ Moreover, the letter noted that the definitions in the rule broadened the scope of individuals who could deny or refuse to provide services based on their religious beliefs, including those “individuals [who are] only tangentially involved in patient care, such as hospital room schedulers, individuals providing transportation services, or laboratory technicians.”⁹ These concerns were not unfounded despite the 2019 Rule never taking effect.¹⁰

For example, in recent years, several hospitals have cited religious-based objections for their refusal to perform procedures related to gender-affirming care.¹¹ Such refusals not only

⁵ 88 Fed. Reg. at 826.

⁶ See e.g., Letter from Frank Pallone, Jr., Ranking Member, Cmte. on Energy and Commerce and Robert C. “Bobby” Scott, Ranking Member, Cmte. on Education and the Workforce, to Alex Azar, Sec’y of the U.S. Dep’t of Health and Human Servs., p. 2 (Mar. 27, 2018) (on file) [hereinafter Letter to HHS].

⁷ *Id.* See also *New York v. HHS*, 414 F. Supp. 3d 475, 523-526 (S.D.N.Y. 2019) (stating that based on the court’s review of four of the 2019 Conscience Rule’s definitions—“discriminate or discrimination,” “assist in the performance,” “health care entity,” and “referral or refer for”—“they do not inexorably follow from the spare terms used in the Conscience Provisions” and “impose . . . unrecognized duties on funding recipients in connection with objections to medical procedures”).

⁸ Letter to HHS, *supra* note 6 at 2.

⁹ *Id.*

¹⁰ 88 Fed. Reg. at 823 (“Before the [2019 Conscience] rule took effect, the New York, California, and Washington district courts granted summary judgment to the respective plaintiffs and vacated the rule in its entirety and on a nationwide basis.”).

¹¹ See e.g., Evan Minton, *A Hospital Refused to Provide Medically Necessary Surgery Because I am Transgender*, ACLU (Feb. 27, 2020), <https://www.aclu.org/news/lgbtq-rights/a-hospital-refused-to-provide-medically-necessary-surgery-because-i-am-transgender> (describing how in August 2016, Dignity Health, the fifth largest health system in the country, cancelled an appointment for a patient’s gender-affirming care once they learned that the patient is transgender; the hospital argued that “religious doctrine permits them to prevent doctors from providing patients

cause chaos and distress for individuals seeking necessary medical treatment, but studies have shown that such refusals have a negative impact on the health outcomes of LGBTQ individuals.¹² “A 2020 survey of the LGBTQ community found that 15 percent of overall respondents, and 28 percent of transgender respondents, reported postponing or avoiding necessary medical care when they were sick or injured because of disrespectful or discriminatory experiences.”¹³ If the 2019 Rule had been in effect, it would have further expanded the ability of health care providers to deny gender-affirming care and other health care services to LGBTQ+ individuals, negatively impacting their health outcomes, especially for those individuals who face intersectional discrimination based disability, and/or race and ethnicity, among other factors.

Additionally, attacks on reproductive health care services have also been well documented. There are numerous reports in recent years documenting examples of pharmacists and other health care professionals refusing to fill prescriptions for birth control or emergency contraception because of their religious or moral beliefs.¹⁴ Such refusals undermine access to care and can cause other financial and logistical hardships for those seeking the services they need.¹⁵ Reports have also documented that some individuals who have sought such prescriptions in certain geographic areas had to travel long distances to gain access, and, in some cases, were denied the prescription and referrals to an alternative provider by more than one pharmacist.¹⁶

The availability of and access to reproductive health care services is particularly salient considering the Supreme Court’s 2022 devastating decision in *Dobbs v. Jackson Women’s Health Organization*, which overruled longstanding precedent to conclude that there is no federal constitutional right to abortion.¹⁷ Since the *Dobbs* decision, several state legislatures have enacted laws, or laws have automatically gone into effect, that significantly restrict access to or

with the care they need just because those patients are transgender”); Press Release, ACLU, Federal Court Rules in Favor of Transgender Man Denied Medical Care by UMMS Hospital (Jan. 6, 2023), <https://www.aclu.org/press-releases/federal-court-rules-favor-transgender-man-denied-medical-care-umms-hospital> (reporting that a week before a patient was scheduled to receive a medically necessary hysterectomy as part of his gender-affirming care plan, the medical center informed the patient that his surgery had to be canceled because it violated the medical center’s religious beliefs).

¹² Amy Chen and Hayley Penan, *Health Care Refusals & How They Undermine Standards of Care Part II: The Impact of Health Care Refusals, Discrimination, and Mistreatment on LGBTQ Patients and Families*, Nat’l Health Law Prog. (Jun 13, 2022), <https://healthlaw.org/health-care-refusals-how-they-undermine-standards-of-care-part-ii-the-impact-of-health-care-refusals-discrimination-and-mistreatment-on-lgbtq-patients-and-families/>.

¹³ *Id.*

¹⁴ Corey Siemaszko, *Minnesota pharmacist who refused to fill morning-after pill prescription did not discriminate, jury rules*, NBC News (Aug. 5, 2022), <https://www.nbcnews.com/news/us-news/minnesota-pharmacist-refused-fill-morning-pill-prescription-not-discrim-rcna41561>; Sara Edwards, *What to do if CVS, the nation’s largest pharmacy, refuses to fill your birth control*, USA Today (July 27, 2022), <https://www.usatoday.com/story/money/retail/2022/07/27/pharmacist-wont-fill-birth-control-because-faith/10154078002/>.

¹⁵ Siemaszko, *supra* note 14 (reporting that the woman who was refused emergency contraception by the pharmacist had to travel 100-miles to obtain the medication).

¹⁶ *Id.* (reporting that the woman sought emergency contraception in January 2019 at the only pharmacy in her hometown of 391 people).

¹⁷ 142 S. Ct. 2228, 2284 (2022); Jon O. Shimabukuro, Cong. Rsch. Serv., LSB10768, Supreme Court Rules No Constitutional Right to Abortion in *Dobbs v. Jackson Women’s Health Organization* (2022), <https://crsreports.congress.gov/product/pdf/LSB/LSB10768>.

prohibit abortion.¹⁸ These restrictions have had a devastating impact on access to abortion throughout the United States and this is only compounded by a significant number of health care systems further limiting the availability of abortion and other reproductive health care services based on their religious doctrines.¹⁹ Thus, we are pleased that the 2023 NPRM recognizes that our health care systems must effectively deliver services to all who need them “in order to protect patients’ health and dignity.”²⁰

The 2019 Rule failed to achieve “the balance Congress struck between safeguarding conscience rights and protecting access to health care,” and would have disproportionately harmed vulnerable individuals who already have more limited access to health care services.²¹ We believe the 2023 NPRM better achieves Congress’s goal.

Additional Comments on Provisions Retained from 2019 Rule

Enforcement Provisions

As noted above, while we believe the 2023 NPRM strikes a more appropriate balance as compared to the 2019 Rule, additional clarity concerning the retention of certain enforcement provisions from the 2019 Rule may provide helpful guidance to ensure compliance and better coordination with relevant entities to resolve conscience and religious liberty complaints. Therefore, we urge OCR to consider additional clarifications of the enforcement provisions, such as how it will handle violations, but acknowledge that the 2023 NPRM reflects a significant improvement from the 2019 Rule’s draconian enforcement provisions.

Voluntary Notice Provision

In the 2023 NPRM, OCR requests “[c]omment on the proposal to retain a voluntary notice provision [about conscience protections and nondiscrimination laws], including comments on whether the notice should be mandatory, and what a model notice should include.”²² We agree with the proposal to retain a voluntary notice provision in the rule as it is consistent with

¹⁸ Laura Deal, Cong. Rsch. Serv., LSB10779, *State Laws Restricting or Prohibiting Abortion* (2022), <https://www.crs.gov/reports/pdf/LSB10779/LSB10779.pdf>.

¹⁹ Frances Stead Sellers and Meena Venkataramanan, *Spread of Catholic hospitals limits reproductive care across the U.S.*, *The Wash. Post* (Oct. 10, 2022), <https://www.washingtonpost.com/health/2022/10/10/abortion-catholic-hospitals-birth-control/> (For example, “Catholic systems now control about 1 in 7 U.S. hospital beds, requiring religious doctrine to guide treatment, often to the surprise of patients. . . .The Catholic health-care facilities follow directives from the United States Conference of Catholic Bishops that prohibit treatment it deems ‘immoral’: sterilization including vasectomies, postpartum tubal ligations and contraception, as well as abortion. Those policies can limit treatment options for obstetric care during miscarriages and ectopic pregnancies. . .”).

²⁰ 88 Fed. Reg. at 826.

²¹ *Id.* Also, the Supreme Court has concluded that constitutional principles require the consideration of “the burdens a requested [religious] accommodation may impose on nonbeneficiaries” and a determination that the accommodation is “measured so that it does not override other significant interests.” *Cutter v. Wilkinson*, 544 U.S. 544, 720, 722 (2005). Thus, the federal government—including government agencies such as HHS—should not grant religious or moral exemptions if they would “impose unjustified burdens on” third-parties. *Id.* at 726.

²² 88 Fed. Reg. at 827.

notice posting requirements for entities that must comply with other civil rights protections.²³ Should HHS decide that mandating the notice is consistent with their authority, we urge the Department to incorporate language in the model notice that encourages covered entities to inform individuals of its religious or conscience-based objections to providing certain health care services or information about certain health care services. This language will help to ensure that more individuals can make informed decisions about their health and ultimately access needed health care services.²⁴

In conclusion, we support HHS' partial rescission of the 2019 Rule, because it aims to restore the balance between enforcing conscience laws and ensuring that individuals have unimpeded access to comprehensive health care services. Having access to health care services is critical, especially for certain communities such as racial and ethnic minorities, women, and LGBTQ+ individuals who have historically faced barriers to access in our health care system, and often continue to face discrimination in access to care today. Therefore, we urge HHS to finalize the 2023 NPRM as expeditiously as possible.

Sincerely,



ROBERT C. "BOBBY" SCOTT
Ranking Member
Committee on Education and
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U.S. House of Representatives



FRANK PALLONE, JR.
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²³ See e.g., 42 U.S.C. § 2000e-10 (requiring employers, employment agencies, and labor organizations to post notices, in conspicuous places for applicants and employees, that summarize applicable equal employment opportunity protections); 41 C.F.R. § 60-1.35(c) (requiring federally funded contractors and subcontractors to disseminate the pay transparency nondiscrimination provision to their applicants and employees).

²⁴ Sellers, *supra* note 19 ("Catholic systems now control about 1 in 7 U.S. hospital beds, requiring religious doctrine to guide treatment, often to the surprise of patients.").