CATHOLIC HEALTH CARE LEADERSHIP ALLIANCE
CHRIST CENTERED CARE

September 30, 2022

**Re: RIN 0945-AA17**

To Whom it May Concern:

The Catholic Health Care Leadership Alliance (CHCLA) submits the following comment in opposition to the proposed rule, *Nondiscrimination in Health Programs and Activities*, which would revise Section 1557 of the Affordable Care Act (ACA) in a manner that unconstitutionally impacts the freedom of religion for Catholic health care professionals.



### Introduction

The U.S. Department of Health and Human Services' (hereinafter 'HHS' or the 'Department') proposed rule under Section 1557 of the Affordable Care Act (ACA) unlawfully and unconstitutionally requires health care professionals to provide services that violate the medical conscience and religious freedom rights of thousands of health care entities while creating an application based religious exemption process that unlawfully abrogates religious freedom protections guaranteed under the First Amendment and numerous federal statutes.[1] It is axiomatic that the Department has no authority to contravene existing federal statutes or to render impotent the Free Exercise Clause of the Constitution as it applies to almost one fifth of the United States economy.[2] The Department cannot assure that its application process for religious exemptions will be adequate when the proposed rule's framework leaves the basic constitutional and civil right of religious freedom subject to the Department's case by case determination. The Department does not have the authority to exclude robust religious exemptions from the proposed rule. To the contrary, the Department has a responsibility to uphold those conscience and religious freedom rights guaranteed by both the Constitution and federal statutes. The proposed rule violates them or undermines them by unlawfully attempting to rewrite the implementing statute. The proposed rule injects a new type of discrimination prohibition framework never contemplated by Congress and in excess of this agency's proscribed authority.


www.CatholicHealthAlliance.org
info@catholichealthalliance.org · 1-833-MY-CHCLA
P.O. Box 4323 · Ormond Beach, FL 32175

The Department's reliance on the Supreme Court's *Bostock* decision to expand the definition of sex to include gender identity, termination of pregnancy (i.e. abortion), and other characteristics is legally erroneous because the Supreme Court in *Bostock* expressly limited the scope of its decision to Title VII employment claims and ruled that its decision did not "sweep" to "other areas of federal or state laws prohibiting sex discrimination."[3] In seeking to unlawfully expand the definition of sex discrimination, the Department's proposed rule would transform Section 1557 into an unconstitutional unlawful weapon that mandates abortions and transgender procedures throughout the nation's health care system and virtually abolishes religious freedom in health care.

The Department's proposed rule would also undermine health care access for millions of underserved patients. The proposed rule's mandates of unethical and harmful procedures and the rule's shredding of religious freedom would push potentially thousands of religious health care entities and professionals out of their medical practice area or push them out of the practice of health care altogether, consequently depriving some of the most vulnerable patients of the medical care they deserve.

## I. Unconstitutional Conditions Doctrine

The proposed rule's expansion of sex discrimination in § 92.101 and § 92.206 seeks to use federal financial assistance as a hammer to coerce the performance of abortions, transgender procedures, and other unethical procedures that violate the religious freedom rights of hundreds of Catholic health care entities, thousands of Catholic health care professionals, and other religious health care entities and religious health care professionals of varied faith traditions that merely seek to care for the sick and suffering. "If there is any fixed star in our constitutional constellation," Justice Jackson once penned for the Court, "it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein."[4] Therefore, a public school may not compel a student to recite the pledge of allegiance; New Hampshire may not compel its citizens to advertise on license plates the State motto "live free or die," and employment discrimination laws may not compel a parochial school to retain a teacher against the religious institution's will. Beyond direct Government action that compels conduct, belief or expression, the Government also may not set conditions on receipt of federal funds to indirectly achieve what it could not otherwise directly achieve—the prescription and forced allegiance of a political orthodoxy, nationalism, religion or other matters of opinion. Unfortunately, the proposed rule in §§ 92.101 and 92.206 does exactly what the Constitution and federal statute forbids: conditioning participation in the health care system for an entire nation on whether a health care professional or health care entity is willing to violate deeply held medical, ethical, and religious beliefs about human dignity and sexuality.

"At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving expression, consideration and adherence."[5]

Nonetheless, Congress' power to "lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States" certainly includes the power to establish programs and parameters for the responsible administration of federal funding.[6] "The First Amendment," Justice Scalia opined, "does not mandate a view-point neutral government. Government must choose between rival ideas and adopt some as its own: competition over cartels, solar energy over coal…and so forth."[7] "The Government needs flexibility to pursue goals the people set for it;" at the same time, Government programs "may not [grant or] deny a benefit to a person on a basis that infringes his constitutional rights."[8] To that end, conditions on federal funds cannot "be so coercive as to pass the point at which 'pressure turns into compulsion.'"[9]

"As a general matter, the federal government may not condition receipt of a federal grant or contract on the effective relinquishment of a religious organization's hiring exemptions or attributes of its religious character."[10] "Religious organizations are entitled to compete on equal footing for federal financial assistance used to support government programs. Such organizations generally may not be required to alter their religious character to participate in a government program, nor to cease engaging in explicitly religious activities outside the program, nor effectively to relinquish their federal statutory protections for religious hiring decisions."[11] The proposed rule conditions a Catholic health care entity's compliance with this federal nondiscrimination regulation and thereby that entity's eligibility for receiving Medicare or Medicaid on participation in gender transition procedures, directly implicating this doctrine and unconstitutionally requiring the relinquishment of the Catholic Church's right to governance and the Catholic health care professional's right to orient its ministry in accord with such governance.

### A. <u>This rule converts federal funding into ideological weaponry</u>

Hinging receipt of federal funding on a health care professional's delivery of services that are in contradiction to the professional's religious beliefs monetizes a fundamental liberty and effectively strips the professional of the liberty to practice medicine in accord with their beliefs. Today, virtually all funding of a Catholic hospital comes primarily from government funds and private insurance.[12] Many explain the tax-exempt status and reception of federal aid that Catholic hospitals enjoy as connected to the public good they provide to the community. The American tradition ensconces the Catholic hospital within federal aid, underscoring the mutual dependency and long-established reliance between the nation and the Catholic hospital, on one hand, and the Catholic hospital and federal funding on the other hand. Conditioning a professional's participation in federal health care programs (and thereby conditioning the availability of federal dollars) on a health care professional's performance of gender transition procedures is unconstitutionally coercive, because federal health care programs (FHCP), such as Medicare, exceed a merely "minor federal program."

Justices Scalia and Thomas in the dissenting opinion for <u>NFIB v. Sebelius</u>, argued that in order to amount to an unconstitutional status, the implicated condition must be overtly coercive, with some indicia of paradigmatic coercion: (1) the program exceeds a merely "minor federal

program" and/or (2) the government discriminates arbitrarily against positions it disfavors.[13] When concluding that the Medicaid expansion of the individual mandate established an unconstitutional condition—by its threatening to rescind existing Medicaid funding from any State that failed to expand Medicaid coverage— Justice Scalia cited the sheer financial burden that such denial of funding wielded (21.8% of all state expenditures combined).[14] In other words, by denying nonconsenting States all Medicaid funding, the Government used the regulation of commerce to indirectly "do whatever will help achieve the ends Congress seeks," and it directly violated the sovereignty of the States.[15] Chief Justice Roberts similarly articulated in *NFIB's* majority opinion, regarding the Medicaid expansion condition, that the significant penalty (losing all Medicaid funding) functioned as "a weapon of coercion," denying the State any legitimate choice in the matter. "When the State has no choice," the Chief Justice summarized, "the federal government can achieve its objective without accountability."[16] The unconstitutional conditions doctrine, thus, at least, operates to prevent the dilution of liberty as understood in the volitional sense.

The doctrine's test for coercion shifts, however, in cases where the benefit or its denial does not amount to the gravity of a State's *complete* denial of Medicaid eligibility (or any other major federal program) but where the implicated liberty is constitutionally secured as a fundamental liberty. In these cases, the Court conducts a certain balancing test of the liberty being coercively relinquished measured against the policy justifications of the federal program. Here, the Court has articulated a simple point: "the dilution of private liberty creates public externalities," such that an impingement on a fundamental private liberty, however small, may, nonetheless, sufficiently trigger the doctrine's protection against the Government's monetization of liberty and the resulting "aggregate diminution of liberty."[17] The relevant question in these cases is not whether the individual has no choice but whether the governmental program places substantial pressure on an individual to relinquish his or her fundamental liberty in exchange for a federal grant of benefit. For example, the government may not condition a veteran's tax exemption status upon his or her declared national allegiance because of the coercive effect the condition would have on free speech,[18] nor may the government condition receipt of an important benefit upon conduct proscribed by a religious faith.[19] In fact, when a program impinges upon fundamental liberties, even in the face of such a compelling State interest as an individual's participation in the federal government's collection of social security, the Court acknowledged a constitutional concern if the social security program actually "compel[s] anyone to accept benefits."[20] The Government may not monetize a fundamental liberty, even in the face of a party's apparent acceptance of its exchange for benefits.

### B. <u>This Proposed Rule is Overtly Coercive and Unconstitutionally Burdensome on a Health Care Professional's Religious Liberty</u>

The threat of a State's losing all Medicaid funding for noncompliance with Medicaid expansion parallels the threat a religious health care professional faces of losing FHCP eligibility for adherence to religious beliefs; both threats operate as "a weapon of coercion," because, "when conditions take the form of threats to terminate significant…grants, the conditions are properly

viewed as a means of pressuring the [party] to accept policy changes."[21] NFIB found that the financial inducement was "so coercive as to pass the point at which pressure turns into compulsion."[22] For a hospital, especially a nonprofit hospital, to lose FHCP payments, it effectively condemns that hospital to financial ruin, which amounts to "economic dragooning that leaves the [hospitals] with no real option but to acquiesce in the [rule's] expansion" to include performance of gender transition procedures.[23] In fact, Thomas v. Review Board recognizes that where a federal benefit program is sufficiently important, the conditional receipt of that "important benefit upon conduct proscribed by a religious faith" puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs," such that "a burden upon religion exists."[24]

The penalties that will be levied against hospitals for not complying with the proposed rule's gender-identity affirmance policy will be so substantial and financially threatening as to amount to an overtly coercive condition upon religious health care professionals. In addition to satisfying the overt coercion test, the conduct that the Act's implementing regulations will require also directly and invidiously impacts religious beliefs. President Biden's campaign platform promised to rescind religious protections from compliance with LGBTQ+ policies, underscoring this proposed rule's express and invidious intention to directly compel religious institutions receiving federal funding to "pledge allegiance" to a policy inimical to certain religions.[25] In requiring health care professionals to engage in "gender-affirming" procedures, the conduct required also implicates free speech rights, where an affirmance is a communication. The Act's implementing regulations, therefore, would not only directly compel belief but they also directly compel speech.

Even if the Act's implementing regulations were to affect a penalty upon noncompliant Catholic Hospitals as to harm but not break the hospital, such that the penalty would not rise to coercion, even still, the threatened penalty need only impinge upon the hospital, as the Act has directly implicated fundamental liberties and satisfied the fundamental liberty test for the doctrine. Using FHCP eligibility as a tool to coerce Catholic hospital compliance with a gender affirmation policy in order to compel participation in gender-transition procedures is unconstitutionally coercive, enabling the government to achieve by bribery what it otherwise could not achieve by legislation. Furthermore, no matter the burden effectuated, the Proposed Rule directly implicates and impinges upon religious liberty in a manner that enables the fundamental liberty test of the doctrine, making forced gender-transition procedures simultaneously overtly coercive and invidiously prohibitive of the Catholic practice of medicine.

## II. RFRA

The agency misunderstands the Religious Freedom Restoration Act; while it is a defensive measure for grieved parties to invoke when their religious practice is substantially burdened by federal law, it is also a prophylactic one. The agency is "obligated to" implement federal law "in a manner that complies with RFRA."[26] This proposed rule violates RFRA and the agency's responsibility to follow it.

RFRA forbids the government to "substantially burden a person's exercise of religion" unless the burden (1) "is in furtherance of a compelling governmental interest" and (2) "is the least restrictive means of furthering that compelling interest."[27] "[L]aws [that are] 'neutral' toward religion," Congress found, "may burden religious exercise as surely as laws intended to interfere with religious exercise."[28] RFRA broadly defines "exercise of religion" as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."[29] Religious beliefs for Catholic health care professionals regarding human sexuality and procreation prevent them from facilitating gender transitions through either medical services or insurance coverage. Noncompliance would have substantial adverse consequences for Catholic and Christian health care professionals. Under the prevailing interpretations of Section 1557 and Title VII, refusal to perform or cover gender-transition procedures would result in the Catholic Plaintiffs losing millions of dollars in federal health care funding and incurring civil and criminal liability. An "imposition of significant monetary penalties" indisputably qualifies as a substantial burden.[30]

As to the first part of the second prong, where the agency bears the burden that this proposed rule is the least restrictive means to achieving its compelling interest, the agency would fail under this test. The agency must show that its policies are the only feasible means to achieve its compelling interest. If a less restrictive means is available for the government to achieve its goal, the government must use this means. Under RFRA, "a regulation may constitute the least restrictive means of furthering the government's compelling interest if 'no alternative forms of regulation' would accomplish those interests without infringing on a claimant's religious-exercise rights."[31] If the government wishes to expand access to transition and abortion procedures, "[t]he most straightforward way of doing this would be for the government to assume the cost of providing the [procedures] at issue to any [individuals] who are unable to obtain them under their health-insurance policies due to their employers' religious objections."[32] The government could also assist transgender individuals in finding and paying for transition procedures available from the growing number of health care professionals who offer and specialize in those services.[33] Other options for incentivizing the health care professional in offering the relevant service and procedures also would include subsidies, reimbursements, tax credits or tax deductions to employees or health care professionals.

As to the second part of the second prong, where the agency bears the burden in showing that this proposed rule satisfies an interest of the highest order, the agency, here, too, fails. When it comes to identifying a compelling interest, the Supreme Court has instructed the government that it must look beyond broadly formulated interests.[34] "Combatting discrimination in health care" or other broadly generalized interests do not suffice. The type of interest necessary, instead, must be one that explains the "asserted harm of granting specific exemptions to particular religious claimants and to look to the marginal interest in enforcing the challenged government action in that particular context."[35] This proposed rule fails to "articulate how granting specific exemptions for the Catholic Plaintiffs will harm the asserted interests in preventing discrimination."[36]

The rule fails to satisfy RFRA safeguards; presuming RFRA remains as a safeguard, when the agency blatantly and boldly undermines it, places an extra burden on the aggrieved religious health care professionals, requiring them to fight for their religious beliefs, if and only if, they want to continue to practice them in medicine. This is inimical to the constitutional and statutory protections for religion, and, what's more, Congress never granted the agency this authority to interpret its section 1557 discrimination prohibitions in such a manner as to buck the agency's own responsibility in upholding the Constitution and RFRA.

## III. Congress Did Not Grant the Agency Authority to Exclude A Religious Exemption from Section 1557

When Congress delegates regulatory functions to an administrative agency, that agency's ability to act is governed by the statutes that authorize it to carry out these delegated tasks. Accordingly, in the course of its work, an agency must interpret these statutory authorizations to determine what it is required to do and to ascertain the limits of its authority. Under §706(2)(A) of the APA, a court shall find unlawful and set aside agency action that exceeds its statutory jurisdiction, authority or limitations. When a court reviews an agency's interpretation of the statute, "first, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[37] Therefore, while courts generally defer to an agency's interpretation of a statute, an agency interpretation is not entitled deference when the agency derogates from the meaning of the statute.[38]

The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. Before concluding that a rule is genuinely ambiguous, a court must exhaust all the traditional tools of construction.[39] Only when that legal toolkit is empty, and the interpretive question still has no single right answer can a judge conclude that it is more one of policy than law. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect. If intent of Congress is clear, that is the end of the matter.[40]

Once one departs from strict interpretation of the text (or the actual meaning of the text) for a policy-driven interpretation, fidelity to the intent of Congress is a chancy thing; all we know for certain is that both Houses of Congress (and the President, if he signed the legislation) agreed upon the text.[41] However, there is no reason why the court must confine itself to the statutory text, if other tools of statutory construction provide better evidence of congressional intent with respect to the precise point at issue.[42] The intent of congress necessarily includes the purpose of congress; therefore, ascertaining the plain meaning of the statute necessarily includes examining the statute's background and basic purposes.[43] In interpreting a statute, a court should (1) Decide what purpose ought to be attributed to any subordinate provision of it which may be involved and then (2) interpret the words of the statute immediately in question so as to

carry out the purpose as best it can, making sure that it does not give the words a meaning they will not bear or a meaning which would violate any established policy of clear statement.

### A. Section 1557 of the ACA incorporates already existing prohibitions against discrimination into health care

While §1557 presents a new opportunity to explore the boundaries between lawful and unlawful health care discrimination, it did not create new boundaries of discrimination; rather, it inserted health care into the existing parameters already drawn by Title VI, Title IX, §505 of the Rehabilitation Act of 1973 and the Age Discrimination Act of 1975. Section 1557 provides that no individual shall be barred from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity, any part of which receives federal financial assistance.

First, it is useful to briefly consider what discrimination means in the context of health insurance. A major challenge of discussing health insurance discrimination from a civil rights perspective is that discrimination is endemic in all health care: cuts will often be necessary. Limits on health insurance benefits can occur at several levels: enrollment (who is allowed to enroll), rate-setting (how much the covered party pays in premiums and in cost-sharing systems such as copays, deductibles, and coinsurance), the level of benefits (which benefits are covered, for whom, and at what level of cost-sharing), and at the micro-level (decisions about whether to cover an individual claim). Limits in any of these categories and in either public or private insurance can be seen as discriminatory even if they are arguably necessary. Therefore, Section 1557's purpose is not to eliminate discrimination entirely from health care, but to eliminate the type of discrimination that is unlawful.

Therefore, clarifying between lawful and unlawful discrimination in the health care setting, Section 1557 articulates that "an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amend- ments of 1972 (20 U.S.C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 794 of title 29, be excluded from participation in, be denied the benefits of, or be subjected to discrimination."[44] Section 1557 only prohibits the type of discrimination that is prohibited under the enumerated statutes.

### B. Section 1557 permits the denial of health care benefits and services on other grounds not enumerated in the statute.

Section 1557 does not bar all health care denials and acts of discrimination, but only those prohibited on the grounds of those statutes already named. This means that other reasons for discrimination not prohibited by those statutes are also not prohibited by §1557. In Section 1557, Congress, excludes Title VII of the Civil Rights Act of 1964 from its prohibited reasons for denying health care benefits; nonetheless, it incorporates almost all of the types of discrimination that Title VII prohibits: race, color, religion, sex and national origin. Religion is noticeably missing from

Section 1557's list of prohibited grounds for denying the benefits of health care services or for being subjected to discrimination in a health care setting. In other words, Section 1557 does not protect a person from being denied health care for religious reasons.

In the United States, there is a nontheistic religion called "Church of Body Modification." The religion has approximately 3500 members. In its statement of belief, the religion believes that "it is [the member's] right to explore the world, both physical and supernatural, through spiritual body modification."[56] Among the religion's listed means for body modifications include reconstructive and cosmetic surgery, and its website states that "anything that pushes the flesh to its limits can be included in their list of rituals."[57] Under §1557, a man of this religion could not affirmatively require a health care professional to perform an orchiectomy on him, no matter how much the desired procedure would support his religious beliefs and practices. Likewise, a man cannot affirmatively require a health care professional to perform an orchiectomy on him for purposes of transitioning genders, when the health care professional's reason for denying the procedure is religiously grounded: §1557 does not prohibit religious discrimination from influencing the denial of health care.

Christians do not just believe that God created us according to a specific sex—male or female, expressed by the body in His design; but Christians believe, also, that the flesh is holy[58] because the Son of God took on flesh and became man.[59] Because of Christ, the body now has saving characteristics, because the Son of God ascended into heaven with His body, making the body at once human and divine, on earth and in heaven.[60] What's more, each person's particular body, given by God, is intentional and is not a mistake.[61] Therefore, for Christians, the body's organicity mirrors that of the Triune God: though Three Divine Persons, God is One; though comprised of many parts, the body is one.[62] Body parts belong to the body, no matter the confusion a part may inflict on the body:

> *If a foot should say, "Because I am not a hand I do not belong to the body," it does not for this reason belong any less to the body. Or if an ear should say, "Because I am not an eye I do not belong to the body," it does not for this reason belong any less to the body… But as it is, God placed the parts, each one of them, in the body as he intended.**[63]***

Participation in transition services could be viewed by many Christian health care professionals as contrary to their religious beliefs, never even taking into account one sex-based reason. A Christian health care professional may refuse to mutilate, harm or remove properly functioning body parts for religious reasons, without ever considering the gender identity or sexual preferences of the individual. The refusal is fundamentally a religious one: *what God has joined together, no human being must separate.**[64]*** This reference fundamentally pertains to the unity of the body, which the Lord then uses to show the unity of spouses who become one flesh. Therefore, fundamentally, it expresses the Lord's basic understanding of the body: it is joined together by God, and human beings may not disintegrate its unitive whole. The body is God's creation, and to remove, impede or interrupt functioning body parts that are effectively

participating in the biological unity of the body, according to their physiological purposes, would be to blaspheme God as the supreme Artist, Creator and sanctifier of the flesh. A Christian health care professional, therefore, would refuse to assist a man in removing his functioning and healthy arm just as much as he would refuse to assist him in removing his functioning and healthy sexual members— such refusal is not grounded in sex discrimination. In fact, the refusal has nothing to do with gender identity or sex-based ideology; it is an entirely religious refusal, grounded in the health care professional's reverence for God and His creation of the body: *what God has joined together, no one may separate*.[65]

In order to surpass Section 1557's silence over religious discrimination in the provision of health care benefits, the agency conflates all denials of gender transition procedures into sex-based discrimination[66]; however, this will require the complete restructuring of the discrimination framework. Section 1557 does not prohibit all discrimination in health care, but only the type of discrimination that is prohibited on the grounds of Title IX, Title VI of the 1964 Civil Rights Act or the Age Discrimination Act of 1975. Noticeably missing from the list of prohibited discriminations is religion. What defines the type of discrimination in an act is the motivation underlying the discriminator's conduct. It does not matter what motivated the requesting party to seek out the benefit; all that matters is what motivated the health care professional of the benefit to deny it of the requesting party. The crucial question in sex discrimination health care denials is: was the denial *because of* sex? Section 1557 would prohibit the denial of health care benefits on the basis of sex; but it does not prohibit the denial of benefits on the basis of religion.

A health care professional who is governed by Christian tenets, may deny a man from receiving an elective limb amputation or other elective body modification surgery without ever considering a sex-based binary conception of the human person. For the health care professional and the Church governing the health care professional, there is a strict command to reverence the body and to do no direct harm to the body as a whole or to its functional members as integrative parts of that whole, because God placed the parts, each one of them, in the body as he intended, and, because, the body is a temple of the Holy Spirit through which God expects to be glorified. Therefore, just as the Triune God is three Persons, One God, so a Christian health care professional views the significance and importance of the entire body, made in the image and likeness of God: it is many parts but one body. Denials of transition services are not all sex-related (therefore, not even triggering the mixed motive test of Price Waterhouse). Where a health care professional's motivation for denying the health care services is on the basis of religion, never even taking into account sex, section 1557 does not, and so the Rule cannot, prohibit this type of discrimination. In order to avoid this analysis, HHS cannot shift the defining motivation for discrimination to be what motivated the requestor to seek the health care benefit.

### C. <u>This agency's exclusion of religious exemptions from the proposed rule violates an express Congressional intent</u>

An agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear. Whether a change is minor or major depends to some extent

upon the importance of the item changed to the whole. Loss of an entire toenail is insignificant; loss of an entire arm tragic.[67] Denying the religious exception from Title IX's application to section 1557 severs the entire left side of Title IX's from its definitional body: it is right to hold that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that," when it is not right, such as when the proscription conflicts with religious tenets.[68] Congress has never passed an Act prohibiting sex discrimination without recognizing a religious exemption to the prohibition, and section 1557's inclusion of Title IX's prohibition hardly signals a new regime.[69]

In Franciscan Alliance v. Burwell, the United States District Court for the Northern District of Texas applied a Chevron analysis for whether Congress had a specific intention for the applicability of Title IX religious exemptions in section 1557. It began its analysis with the familiar two-step procedure laid out in Chevron.[70] At step one, it evaluated whether Congressional intent regarding the meaning of the text in question is clear from the statute's plain language. The Texas court never made it past step one, finding no ambiguity in Section 1557's incorporation of the Title IX framework.[71] Congress's intent in enacting Section 1557 is clear because the statute explicitly incorporates Title IX's prohibition of sex discrimination,[72] and Title IX does not apply to covered entities controlled by a religious organization if its application would be inconsistent with the religious tenets of such organization.[73] Admittedly, this agency defends its choice to partially implement Title IX's framework because, purportedly, Section 1557 is accomplishing a new work, since it pertains to health care and not to education. However, Congress expressly articulated the opposite viewpoint: it simply was applying existent frameworks to another setting.

The text of Section 1557 prohibits discrimination "on the ground prohibited under . . . [T]itle IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.) . . . ." 42 U.S.C. § 18116(a). Congress specifically included in the text of Section 1557 "20 U.S.C. 1681 et seq." That Congress included the signal "et seq.," which means "and the following," after the citation to Title IX can only mean Congress intended to incorporate the entire statutory structure, including the abortion and religious exemptions. Title IX prohibits discrimination on the basis of sex, but exempts from this prohibition entities controlled by a religious organization when the proscription would be inconsistent with its religious tenets. Title IX also categorically exempts any application that would require a covered entity to provide abortion or abortion-related services. Therefore, a religious organization refusing to act inconsistent with its religious tenets on the basis of sex does not discriminate on the ground prohibited by Title IX. Failure to incorporate Title IX's religious and abortion exemptions nullifies Congress's specific direction to prohibit only the ground proscribed by Title IX. That is not permitted. By not including these exemptions, HHS expanded the "ground prohibited under" Title IX that Section 1557 explicitly incorporated. The Rule's failure to include Title IX's religious exemptions renders the Rule contrary to law. [74]

For good measure, the Franciscan Alliance court added that "a commonsense approach" is mandated by the Supreme Court in determining whether Congress delegated "policy decision[s] of such economic and political magnitude to an administrative agency."[75] The "major questions doctrine" holds that courts should not defer to agency statutory interpretations that concern questions of "vast economic or political significance." "The inquiry into whether Congress has directly spoken to the precise question at issue is shaped, at least in some measure, by the nature of the question presented."[76] Deference under Chevron to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps.[77] In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.[78] In King v. Burwell, the Supreme Court showed no deference to an Internal Revenue Service (IRS) regulation interpreting a key provision of the Patient Protection and Affordable Care Act because this was an "extraordinary case," implicating "a question of deep 'economic and political significance;" consequently, this was a case that resisted the usual Chevron framework.[79] King v. Burwell is the latest word on the major question exception. Read for all it is worth, the case marks a notable shift: the Court may now consider "majorness" as a threshold matter when deciding whether the Chevron framework applies in a given case.

The major questions doctrine provides that Congress must "speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." Here, the new rule would impose such massive burdens on religious health care professionals with crippling financial ramifications that no one can say its interpretation is not of vast economic or political significance. In the standard version of the doctrine, represented by the Supreme Court's 2000 and 2014 decisions in FDA v. Brown & Williamson and Utility Air Regulatory Group v. EPA, statutory ambiguity on such questions requires a court to reject the agency's assertion of administrative power and leave the policy question to Congress to resolve in subsequent legislation. In King v. Burwell, the statutory ambiguity on major questions may empower courts to resolve the policy dispute; but one thing is certain: agencies may not resolve this dispute.

**Conclusion**

For these reasons, we strongly urge OCR to substantially revise this Rule to be in conformity with ACA Section 1557, ACA Section 1554, all federal and statutory laws protecting conscience, including the Religious Freedom and Restoration Act, and the First Amendment of the U.S. Constitution which requires the free exercise of religion in health care as in every other sector of American society.

Sincerely,

Steven White, M.D.
CHCLA President

[1] U.S. Constit. amend 1, § 1; Religious Freedom Restoration Act, 42 USC §§ 2000bb-2000bb4; The Church Amendment, 42 USC § 300a-7 et seq; Weldon Amendment, Section 508 of Pub. L. No. 111-117; and the Coats-Snowe Amendment, 42 USC § 238n.
[2] National Health Expenditure Accounts, Centers for Medicare and Medicaid Services, at https://www.cms.gov/Research-Statistics-Data-and-Systems/Statistics-Trends-and-Reports/NationalHealthExpendData/NationalHealthAccountsHistorical .
[3] "The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today. Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind. The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual "because of such individual's sex." Bostock v. Clayton County, 590 U.S. ____, 321 (2020).
[4] West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).
[5] *See* Agency for Intern. Development v. Alliance for Open Society, 570 U.S. 205, 213 (2013)
[6] U.S. Const. art I. §8, cl. 1
[7] *Agency for Intern. Development, supra* note 1 at 221, Scalia, J. dissenting
[8] Randy J. Kozel, *Leverage*, 124, 62 B.C.L. Rev. 109 (2021) (quoting *United States v. Am. Libr. Ass'n. Inc.*
[9] *South Dakota v. Dole,* 483 U.S. at 211 (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 590, 57 S.Ct. 883, 81 L.Ed. 1279 (1937)).
[10] See Federal Law Protections for Religious Liberty, 82 Fed. Reg. 49668 (Oct. 26, 2017).
[11] *Id.*
[12] Lois Uttley & Ronnie Pawelko, *Merger Watch, No Strings Attached: Public Funding of Religiously-Sponsored Hospitals in the United States*, 13, 15 (2002), at http://www.mergerwatch.org/storage/pdf-files/bp_no_strings.pdf [https://perma.cc/ET8E-V9P6]
[13] NFIB v. Sebelius, 567 U.S. 519, 684-685 (Scalia, J. and Thomas, J., dissenting) (2012) (While these factors the dissent uses in the negative as lacking in the relevant effects of the Leadership Act, they nonetheless underscore a litmus test by which Justices Scalia and Thomas may have found grounds to find an unconstitutional infringement by the Act.)
[14] *Id.*
[15] *Id.* at 653
[16] *Id.* at 578
[17] *See* Kozel, *supra* note 4 at 128
[18] Speiser v. Randall, 357 U.S. 513, 519 (1958)
[19] See, e.g. Sherbert v. Verner, 374 U.S. 398 (1963) and Thomas v. Review Bd. Of Indiana Employment Sec. Division, 450 U.S. 707 (1981)
[20] U.S. v. Lee, 455 U.S. 252, ft. note 12 (1982)
[21] *See* NFIB, *supra* note 9 at 580
[22] *Id.*
[23] *Id.* at 581
[24] Thomas v. Review Bd. Of Indiana Employment Sec. Division, 450 U.S. 707, 717 (1981)
[25] *See, e.g.* AID, supra note 1
[26] Little Sisters of the Poor, 140 S. Ct. at 2389 (Alito, J., concurring) (noting that HHS is "obligated to" implement federal law "in a manner that complies with RFRA").
[27] 42 U.S.C. § 2000bb-1(b).
[28] 42 U. S. C. §2000bb(a)(2); see also §2000bb(a)(4).

[29] 42 U.S.C. §§ 2000bb-2, 2000cc-5(7)(A).
[30] Sharpe Holdings Inc. v. U.S. DHHS, 801 F.3d at 937; see also *Priests for Life v. U.S. Dep't of Health & Human Servs.*, 808 F.3d 1, 16 n.3 (D.C. Cir. 2015) (Kavanaugh, J., dissenting from denial of reh'g en banc) ("There has never been a question that such a direct penalty imposes a substantial burden on the exercise of religion").
[31] Sherbert v. Verner, 374. U.S. 398, 407 (1963)
[32] Burwell v. Hobby Lobby, 134 S. Ct 2751, 2780 (2014)
[33] Franciscan All. v. Burwell, 227 F. Supp. 3d 660, 686-687 (N.D. Tex. 2016)
[34] EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 140 S.Ct. 1731 (2020)
[35] Holt v. Hobbs, 574 U.S. 352, 363 (2015)
[36] Religious Sisters of Mercy v. Azar, 513 F.Supp.3d 1113, 11148 (2021)
[37] Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984).
[38] MCI Telecommunications Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218 (1994).
[39] *See, generally,* Chevron U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984).
[40] *Id.*
[41] Zuni Public School Dist. No. 89 v. Department of Education, 550 US 117 (2007), Scalia, J., dissenting.
[42] *Id.* at 106, Stephens, J., concurring.
[43] *Id.* at 93.
[44] 42 U.S.C. §18116(a).
[45] 20 U.S.C. §1681.
[46] *Id.*
[47] North Haven Bd. Of Ed. v. Bell, 456 U.S. 512, 521 (1982).
[48] *Id.* at 526, emphasis mine.
[49] Nondiscrimination in Health Programs and Activities, Proposed Rule, https://www.federalregister.gov/documents/2022/08/04/2022-16217/nondiscrimination-in-health-programs-and-activities.
[50] Affordable Care Act.
[51] "The reviewing court shall hold unlawful and set aside agency actions, findings and conclusions arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law…[or] in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."
[52] MCI Telecommunications Corp. v. Am. Tel. & Tel. Co., 512 U.S. at 234.
[53] Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842 (1984).
[54] Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 121 (2000); City of Arlington, Tex. v. FCC, 133 S. Ct. 1863, 1874.
[55] 42 U.S.C. 18116(a).
[56] The Church of Body Modification Statement of Faith, http://uscobm.com/statement-of-faith/.
[57] *Id.*
[58] 1 Corinthians 6:19-20 (*Do you not know that your body is a temple of the holy Spirit within you, whom you have from God, and that you are not your own? For you have been purchased at a price. Therefore, glorify God in your body*).
[59] John 1:14 (*and the Word became flesh and made His dwelling among us*).
[60] CCC 665-666 (Christ's Ascension marks the definitive entrance of Jesus' humanity into God's heavenly domain, whence he will come again (cf. Acts 1:11); this humanity in the meantime hides him from the eyes of men (cf. Col 3:3). Jesus Christ, the head of the Church, precedes us into the Father's glorious kingdom so that we, the members of his Body, may live in the hope of one day being with him forever.)
[61] Jeremiah 1:5 (*before I formed you in the womb, I knew you*).
[62] 1 Corinthians 12:12 (*As a body is one though it has many parts, and all the parts of the body, though many, are one body, so also Christ*).

[63] 1 Corinthians 12:15-18
[64] Matthew 19:6
[65] *See, generally*, Ethical and Religious Directives for Catholic Health Care Services, n. 29 at https://www.usccb.org/about/doctrine/ethical-and-religious-directives/upload/ethical-religious-directives-catholic-health-service-sixth-edition-2016-06.pdf ("All persons served by Catholic health care have the right and duty to protect and preserve their bodily and functional integrity. The functional integrity of the person may be sacrificed to maintain the health or life of the person when no other morally permissible means is available.")
[66] Nondiscrimination in Health Programs and Activities, Proposed Rule, Equal Program Access on the Basis of Sex (§ 92.206), https://www.federalregister.gov/documents/2022/08/04/2022-16217/nondiscrimination-in-health-programs-and-activities.
[67] *See,* MCI Telecommunications Corp., *supra*, note 46
[68] 20 U.S.C. §1681.
[69] *see, e.g.,* Title IX (20 U.S.C. §1681), Title VII
[70] *see, generally*, Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)
[71] Franciscan All. v. Burwell, 227 F. Supp. 3d 660, 686-687 (N.D. Tex. 2016)
[72] *Id.*
[73] 20 U.S.C. § 1681(a)(3) (the "religious exemption").
[74] See Franciscan All., supra note 63
[75] *Id*. at 687 (quoting Food and Drug Administration v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000)).
[76] FDA v. Brown &Williamson Tobacco Corp., 529 U.S. 120, 159 (2000).
[77] *See, generally,* Chevron, *supra* note 62
[78] *Cf.* Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363, 370 (1986) ("A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration").
[79] King v. Burwell, 135 S. Ct. at 2487 (2015)