October 3, 2022

The Honorable Xavier Becerra
Secretary
U.S. Department of Health and Services
200 Independence Avenue, S.W.
Washington, DC 20201

Re: Non-Discrimination in Health Programs and Activities
[Docket ID: HHS-OS-2022-012]

Dear Secretary Becerra:

Christian Employers Alliance is a Christian membership ministry that exists to unite and serve Christian non-profit and for-profit employers who wish to live out their faith in every-day life, including their homes, schools, ministries, businesses, and communities. CEA's members do not check their faith at the door of their for-profit businesses and non-profit organizations. Every day, our members try to live out Saint Paul's admonition, "whether you eat or drink or whatever you do, do it all for the glory of God," I Corinthians 10:31, while they "take every thought captive to make it obedient to Christ," II Corinthians 10:5.

Relevant here, CEA's members are committed to following Christian teachings on sexuality. Echoing Christ's teaching in Matthew 19:4 that God "made them male and female," CEA's bylaws provide that "[m]ale and female are immutable realities defined by biological sex" and that "[g]ender reassignment surgery is contrary to Christian Values." CEA members believe that gender transition and reassignment constitute a marring of God's image in human beings. For our members to perform, refer, or otherwise facilitate would be a violation of Biblical conviction and conscience.

Under our organization's bylaws, CEA members also "commit to provide health care benefits consistent with Christian Ethical Convictions and to support the right and freedom of Christian employers to do so." While our members cannot, in good conscience, perform or otherwise refer for performance of gender transition procedures, CEA members also object to paying for or otherwise subsidizing these activities. CEA members have thus considered the "difficult and important question" of "the circumstances under which it is

wrong for a person to perform an act that is innocent in itself," i.e., paying health insurance premiums, "but that has the effect of enabling or facilitating the commission of an immoral act by another," *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778 (2014), and our members have concluded they cannot subsidize gender transitions without violating their sincerely-held Christian beliefs.

As we explain below, HHS' proposed Non-Discrimination in Health Programs and Activities rule (the "Proposed Rule"), if imposed on CEA's members, would impermissibly burden our members' religious faith. The Proposed Rule is also in excess of the statutory authority granted to HHS by Congress in section 1557 of the Affordable Care Act ("ACA").

The Proposed Rule Would Violate CEA Members' Rights Under the First Amendment and the Religious Freedom Restoration Act

Recently, as the Proposed Rule recognizes, a federal district court "enjoined the Department from enforcing Section 1557 against" CEA and its members "in a manner that would require them to perform or provide insurance coverage for gender transition services or restrict or compel their speech on gender identity issues." 87 Fed. Reg. 47824, 47826 (Aug. 4, 2022). In its decision, the district court found "[i]t is completely undisputed that" CEA's members, "compelled by fines and civil liability, must perform or provide coverage for gender transition procedures"—something the court described as a "substantial burden." *Christian Emps. All. v. United States Equal Opportunity Comm'n*, No. 1:21-CV-195, 2022 WL 1573689, at *8 (D.N.D. May 16, 2022). The court further noted that "[t]he Free Exercise Clause" in the First Amendment "does not permit a substantial burden on one's free exercise of religion." *Id.* The court rejected HHS' "case-by-case" approach to religious freedom because "[d]etermining on a case-by-case basis if a religious exemption should apply is certainly not the least restrictive means." *Id.*

The Proposed Rule resolves none of the problems the district court identified in the *Christian Employers Alliance* decision itself. The Proposed Rule, if applied to CEA's members, would mandate those who are doctors who participate in Federal Health Care programs to perform gender transition services. To take one example, "a gynecological surgeon may be in violation of the rule if she accepts a referral for a hysterectomy but later refuses to perform the surgery upon learning the patient is a transgender man." 87 Fed. Reg. at 47867. No clinical-based objection to this practice is allowed under the proposed rule, as HHS explains: "[A] provider's view that no gender transition or other gender-affirming care

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can ever be beneficial for such individuals (or its compliance with a state or local law that reflects a similar judgment) is not a sufficient basis for a judgment that a health service is not clinically appropriate." *Id.* Under HHS' Proposed Rule, if applied to CEA's members, the default rule for physicians is that they must perform the gender transition service.

Further, the Proposed Rule recycles a discredited approach to religious freedom. HHS says it will "consider the application of Federal conscience and religious freedom laws," which would include the First Amendment and the Religious Freedom Restoration Act ("RFRA"), "where relevant." *Id.* But that misguided interpretation of a "case-by-case" approach is the same one the district court rejected in *Christian Employers Alliance*. 2022 WL 1573689, at *8. The Proposed Rule's inclusion of a "notification of views" provision, 87 Fed. Reg. at 47855, if applied to CEA's members would burden them without any countervailing showing that the government cannot achieve its objective through less restrictive means. In fact, the only reference in the Proposed Rules to "least restrictive means" is HHS' promise "to consider whether the application of any substantial burden on a person's exercise of religion is in furtherance of a compelling interest and is the least restrictive means of advancing that compelling interest" in the context of a "case-by-case approach." *Id.* at 47886. Again, the First Amendment and RFRA demand more.

HHS' Extension of the Proposed Rule Over the Health Insurance Industry is Not in Accordance with Law and Would Burdens CEA Members' Religious Freedom

In the Proposed Rule, HHS defines the term "health program or activity" "to include all of the operations of entities principally engaged in health services, health insurance coverage, or other health-related coverage." *Id.* at 47844. This means that the Proposed Rule applies "to health insurance issuers that receive financial support from the Federal Government." *Id.* at 47845. HHS approvingly cites the district court's decision in *Fain v. Crouch*, 545 F. Supp. 3d 338 (S.D.W. Va. 2021), that "a health plan was, 'by virtue of its acceptance of Federal assistance under its Medicare Advantage program,' required to comply with Section 1557 'under its entire portfolio'." *Id.* at 47844 n.255 (quoting *Fain*, 545 Supp. 3d at 343).

HHS' definition of "health program or activity," if applied to CEA's members, would have a significant impact. Under the Proposed Rule, a substantial portion of the private health insurance marketplace would be required to cover gender transition services, including

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mastectomies, hysterectomies, and penectomies under the rubric of gender-affirming healthcare. Further, because employers, including some of CEA's members, are required under the ACA to provide health insurance to their employees, our members could also be required to pay health insurance premiums to finance procedures to which they conscientiously object.

As a threshold matter, section 1557 does not authorize this kind of expansive authority over the health insurance industry. The statute includes a reference to "any health program or activity," 42 U.S.C. § 18116 (a), but health insurance plans are not "health programs." Further, the McCarran-Ferguson Act largely provides a framework for *state*, not federal, regulation of the insurance business. That statute provides, among other things, that "[t]he business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business." 15 U.S.C. § 1012(a); *see also id.* § 1012(b) (providing that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, *unless such Act specifically relates to the business of insurance*" (emphasis added)). Congress must "enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property." *United States Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1849–50 (2020). Section 1557 contains no such clear language. In fact, nowhere in the Proposed Rule does HHS consider the impact of the McCarran-Ferguson Act.

The burdens on religious exercise created by HHS' private health insurance mandate would also independently violate CEA members' rights under the First Amendment and RFRA, if applied to them, for the same reasons given above. The fact that the burden is arguably indirect is irrelevant. All RFRA requires is that "the burden results from a rule of general applicability," 42 U.S.C. § 2000bb-1(a), and this burden does.

The Proposed Rule Does Not Address the Fact that Congress Presumed a Binary Sex Construct in the ACA

Section 3509 of the ACA includes the statute's only express references to the term "sex." In that section, Congress created the Office of Women's Health within the FDA, and instructed the Director of the Office to provide "analysis of [clinical trial] data by sex,"

"analysis of data by sex in [Food and Drug] Administration priorities," and "estimates of funds needed to monitor clinical trials and analysis of data by sex." Pub. L. No. 111-148, 124 Stat. 119, 536-37 (Mar. 23, 2010).

In the very same section outlining the purposes of FDA's Office of Women's Health, Congress instructed the Office to "provide information to women and health care providers on those areas in which differences between men and women exist." *Id.* at 536. To be clear, the plain terms of the ACA expressly acknowledge "differences between men and women exist."

FDA's website currently proclaims that the Office of Women's Health "achieves its mission through the foundational principle that Sex as a Biological Variable (SABV) should be factored into the research design, analysis, reporting and education." FDA, *Office of Women's Health*, https://www.fda.gov/about-fda/office-commissioner/office-womens-health (last updated Dec. 2, 2019). The Office also "promote[s] and conduct[s] research initiatives that facilitate FDA regulatory decision-making, and advance the understanding of sex differences and health conditions unique to women." *Id.*

The text of the ACA includes other language indicating Congress legislated using a binary sex construct. The statute is replete with references to "women," "mothers," and variants of the same. There are one hundred thirty-seven references to "women," twelve references to "woman," eight references to "mother" and "mothers," and ten references to "maternal." *See, e.g.*, 124 Stat. at 551 (referring to "pregnant women"); *id.* at 577 (providing reasonable break time for nursing mothers).

The ACA also incorporates a binary sex construct into its definition of the term "primary care provider" for purposes outlining the "Primary Care Extension Program." There, Congress defined a primary care provider as "a clinician" responsible for "providing preventative and health promotion services for men, women, and children of all ages." *Id.* at 650. Here again, Congress could have, but did not use the terms "trans-man" or "trans-woman."

Congress also acknowledged the biologically binary nuclear family in the ACA. Section 2951 of the ACA is titled "Maternal, Infant, and Early Childhood Home Visitation

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Programs." *Id.* at 334. In that section, Congress defined the term "eligible family" to include "a woman who is pregnant, and the father of the child if the father is available." *Id.* at 343.

The ACA also features the use of binary, gendered pronouns. The ACA's amendment to the Fair Labor Standards Act provides "a reasonable break time for an employee to express breast milk for *her* nursing child." 124 Stat. at 577 (emphasis added). A trans-man who has not undergone a mastectomy can also express breast milk, but here Congress chose to attach the pronoun "her" as opposed to "his," "zhis," "zher," or "they" to such a person.

The ACA uses the sex binary "his or her" at least seven different times, by:

a. barring certain "discrimination against any employee with respect to *his or her*" employment, *id.* at 261 (emphasis added);

b. providing, for purposes of calculating clinical time, "up to 50 percent of time spent teaching by such member may be counted toward *his or her* service obligation," *id.* at 670 (emphasis added); *see also id.* at 1003 (same);

c. providing "[n]othing in this subtitle shall be construed to interfere with or abridge an elder's right to practice *his or her* religion," *id.* at 785 (emphasis added);

d. requiring "the representative [to] inform[] the reference product sponsor . . . of *his or her* agreement to be subject to the confidentiality provisions set forth in this paragraph," *id.* at 809 (emphasis added);

e. providing for "[c]ash benefits paid into a Life Independence Account of an eligible beneficiary shall be used to purchase nonmedical services and supports that the beneficiary needs to maintain *his or her* independence," *id.* at 873 (emphasis added); and

f. allowing a "physician or other eligible professional . . . to review *his or her* individual results before they are made public," *id.* at 966 (emphasis added).

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Congress enacted a provision barring certain health insurance plans for requiring a referral for obstetrics and gynecological care. That provision applies to a "*female* participant, beneficiary, or enrollee" who seeks such care. *Id.* at 890 (emphasis added). Congress did not use the term "cis-female" to identify the participant.

Nowhere in the statute does the ACA contemplate concepts such as gender fluidity or intersexuality. Congress plainly presumed a binary gender construct and legislated accordingly. "[A]n agency cannot ignore evidence that undercuts its judgment; and it may not minimize such evidence without adequate explanation." *Genuine Parts Co. v. EPA*, 890 F.3d 304, 346 (D.C. Cir. 2018). That is what HHS has done here. The Proposed Rule does not contend with this language or explain how it informs HHS' position on section 1557.

Conclusion

The above is not intended to be an exhaustive statement of all of CEA's objections to the Proposed Rule or HHS' enforcement of section 1557 of the ACA, but for the reasons above, CEA asks that HHS withdraw the Proposed Rule.

Respectfully,

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