

March 6, 2023

PUBLIC COMMENT OF THE CHRIST MEDICUS FOUNDATION AND LIFE LEGAL DEFENSE FOUNDATION REGARDING THE U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES' PROPOSED RULE ENTITLED, "SAFEGUARDING THE RIGHTS OF CONSCIENCE AS PROTECTED BY FEDERAL STATUTES," A PROPOSED RULE OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES OFFICE OF CIVIL RIGHTS

INTRODUCTION

The Christ Medicus Foundation and Life Legal Defense Foundation are concerned that the U.S. Department of Health and Human Services' proposed Rule entitled "Safeguarding the Rights of Conscience as Protected by Federal Statutes" will not accomplish the purpose it purports to accomplish, that is, that it will not actually safeguard the rights of conscience and religious freedom. The reasons for this are summarily discussed in this comment.

I. OCR's PROPOSED RULE DOES NOT CONSIDER THE HARM TO CONSCIENCE AND RELIGIOUS FREEDOM FROM THE LACK OF A PRIVATE RIGHT OF ACTION FOR ALLEGED VIOLATIONS OF CONSCIENCE

In 2019, the HHS Office for Civil Rights (OCR) liberally defined the scope of conscience and religious freedom in the 2019 Final Rule because the federal statutory protections for healthcare providers (hereinafter the 'the federal medical conscience laws' including the federal Church Amendment, the Coates-Snow Amendment, and the Weldon Amendment) had not been adequately enforced by the prior presidential administration and the cases of discrimination against those who raised medical conscience objections were increasing at an alarming rate. In 2018, for example, [over 300 individuals filed such complaints in one month](#). In 2019, OCR was attempting to address this serious problem of non-enforcement of the basic rights of conscience and religious freedom firmly grounded in the First Amendment of the U.S. Constitution.

Because there is a lack of a federal private right of action for health care professionals and

entities discriminated against due to violations of their conscience, in 2019 HHS recognized the need to “give teeth” to the federal medical conscience laws. Before 2019, the prior presidential administration’s failure to enforce those laws significantly blocked those laws from having the practical effect they should have.

By way of example, the 2019 Final Conscience Rule’s mandatory notice requirement was part of an HHS commitment to ensure respect for conscience and religious freedom. By reverting back to the framework of the 2011 Rule, HHS would effectively “remove the teeth” from the federal medical conscience laws that Congress has obligated HHS to enforce.

II. IT IS NECESSARY FOR OCR’S PROPOSED RULE TO PRECISELY AND LIBERALLY DEFINE AMBIGUOUS TERMS IN FEDERAL STATUTORY LAW PROTECTING CONSCIENCE AND RELIGIOUS FREEDOM

The position of the 2019 Final Rule, which the Christ Medicus Foundation and Life Legal Defense Foundation fully support, is that it is necessary for HHS to precisely and liberally define the meaning of vague terms that hinder the effectiveness of federal statutory laws protecting conscience and religious freedom. Without such clarification, healthcare professionals who object to the provision of abortion, contraception, and sex-reassignment surgery may be forced to refer for these services. The 2019 Final Rule defined “assist in the performance” as “participating in any program or activity with an articulable connection to a given procedure or service.” The definition includes “counseling, referral, training, and other arrangements for the procedure, health service, or research activity.” This is extremely helpful and necessary for the enforcement of the right to religious freedom and conscience because otherwise, referrals, for example, would be excluded from the definition and health professionals would be forced to refer for objectionable services in violation of their conscience and religious freedom rights that federal statutory law is

supposed to protect, and which are further safeguarded by the First Amendment of the U.S. Constitution.

Indeed, the comment of the American Medical Association to HHS regarding the 2019 Final Rule suggests that they believe that providers can be forced to refer patients for abortion, contraception, and sex-reassignment procedures. For example, a Catholic medical professional, who objects to assisting with abortion, contraception, and sex-reassignment procedures because the procedures violate Catholic teaching will also object to referring for such procedures. Referral is absolutely a form of cooperation protected under the umbrella of First Amendment respect for conscience and religious freedom, and it was certainly contemplated as such by various Federal statutory laws in furtherance of the First Amendment. HHS has a moral obligation to protect healthcare providers from having to refer for objectionable services. If HHS refuses to protect those health care professionals and health care entities, those health care professionals and entities discriminated against for religious and conscience reasons will leave healthcare and exacerbate the shortage of providers in an already stretched healthcare system. Research already shows a shortage of 100,000 doctors by 2030 ([Research Shows Shortage of More than 100,000 Doctors by 2030 | AAMC](#)).

CONCLUSION

The Christ Medicus Foundation and Life Legal Defense Foundation urge OCR to stand behind the 2019 Final Rule or propose significant changes to the framework of the 2011 Rule that would “put teeth” into the federal medical conscience and religious freedom laws that HHS is charged to enforce. At the very minimum, HHS needs to precisely and liberally define the scope of ambiguous terminology so that people clearly know their rights under Federal law. Furthermore, OCR should require the posting of a model notice identical to or similar to the model

notice included in the 2019 Final Rule. Without such a notice requirement, people do not know their rights and the protections Congress passed will be ineffective.

Respectfully Submitted,

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