March 7, 2023

The Honorable Xavier Becerra
Secretary of U.S. Department of Health and Human Services
Office for Civil Rights
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue, SW
Washington, DC 20201

Attn: Conscience NPRM
RIN: 0945-AA18

Re: Comment of Protect the First Foundation Seeking Withdrawal of Proposed Conscience Recission Rulemaking

Dear Mr. Secretary:

In the healthcare context, Congress has acted to protect religious freedoms with particular force through numerous statutes—including the Church Amendments of 1970, the Coats-Snowe Amendment of 1996, and the Weldon Amendment, originally enacted in 2005 and incorporated by reference in each subsequent legislative measure appropriating funds to the Department.[1] Seeking to allay confusion regarding the applicability of these statutes, the Department of Health and Human Services (the Department) issued a final rule on May 21, 2019, that established enforcement provisions for addressing allegations of religious discrimination in the healthcare context. Now the Department seeks to rescind the 2019 rule and replace it with a new, weakened version. But the Department's proposed rule leaves our constitutional right to religious freedom without adequate protection. Moreover, by eliminating protections for religious freedoms, the proposed rule unjustifiably and substantially burdens those whose religious convictions lead them to abstain from participating in certain medical procedures. And because it does so without any compelling government interest and is not narrowly tailored, the proposed rule violates the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb, *et seq.* (RFRA).[2]

[1] *See*, *e.g.*, Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, § 507(d)(1), 136 Stat. 49, 495–501 (General Provisions).

[2] That statute prohibits any "branch, department, agency, instrumentality, and official . . . of the United States" from "'substantially burden[ing]' a person's exercise of religion even if the burden results from a rule

This threatened reduction in religious freedom is of particular concern to Protect the First Foundation (PT1), a nonprofit, nonpartisan organization that advocates for First Amendment rights in all applicable arenas. Indeed, PT1 advocates on behalf of people from across the ideological spectrum, people of all religions and no religion, and people who may not even agree with the organization's views. As an organization committed to protecting the ability of all religious believers to abide by their religious convictions in the workplace without fear of retaliation, PT1 strongly opposes the proposed rule and submits these comments to highlight specific problems with the notice of proposed rulemaking entitled "Safeguarding the Rights of Conscience as Protected by Federal Statutes," set forth at 88 Federal Register 820 (Jan. 5, 2023) (the proposed rule).

PT1 believes the Department's proposed rule is fundamentally flawed. By eliminating necessary protections for religious freedom in healthcare, the Department knowingly increases the likelihood that discrimination will occur against individuals who would otherwise wish to abstain for religious reasons from performing certain procedures. This elimination of protections itself constitutes a substantial burden on the practice of religion. Moreover, because the Department's proposed rule fails to accomplish its stated objectives, it cannot be the least restrictive means of furthering a compelling governmental interest. The Department's proposed rule thus violates RFRA and should be withdrawn.

I. Dramatically Increasing the Likelihood of Religious Discrimination in the Workplace Constitutes a Substantial Burden on the Exercise of Religion.

RFRA's statutory purpose is to "restore the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)." 42 U.S.C. § 2000bb(b)(1). *Sherbert* and *Yoder* thus provide non-exhaustive guidance for determining what constitutes a substantial burden on religion.[3] A Federal law substantially burdens the exercise of religion when it pressures or otherwise coerces an individual into foregoing the practice of their religion. *Sherbert*, 374 U.S. at 403; *Yoder*,

---

of general applicability unless the government can demonstrate the burden '(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.'" *City of Boerne v. Flores*, 521 U.S. 507, 515–16 (1997) (quoting 42 U.S.C. §§ 2000bb-1, -2(1)).

[3] We do not argue that the definition of a substantial burden under RFRA is limited to the factual contexts of these two cases, rather that they provide examples of what may be considered a substantial burden.

406 U.S. at 218. *Sherbert* explains that the pressure exerted by the government may not always be direct. 374 U.S. at 403. Rather "(i)f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect." *Id.* at 404 (quoting *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961)). Here, the Department's proposed rule will surely "impede the observance of" of many "religions" and thus is constitutionally invalid.

First, the Department's decision to revoke regulatory provisions dealing with the enforcement of federal religious freedoms imposes a litigation burden on individuals who wish to exercise their religious freedoms. By rescinding the Department's ability to independently initiate compliance reviews of systemic offenders and limiting the Department's administrative remedies to "informal means," the proposed rule effectively shifts the burden of enforcing federal religious freedoms to the injured individuals.[4] The Department is not only aware of this effect, it openly favors it. The Department has recently stated that it has a "strong interest" in foregoing regulatory religious exemptions in favor of "a case-by-case approach" to RFRA claims.[5] But the deliberate imposition of high litigation costs on any party wishing to exercise and defend their religious freedoms is itself a burden on religion as it will discourage parties from vindicating their religious rights.

The burdensome effects of the Department's proposed rule, however, do not stop with the shifting of the enforcement burden. The Department's proposed recission of compliance and notice provisions will also increase the incidence of acts of religious discrimination. For example, the Department's removal of all compliance requirements will likely result in more discriminatory local laws and healthcare policies as employers and states will be less familiar with their obligations to protect religious freedoms. Current laws and policies already reveal a widespread confusion regarding the extent of constitutional religious freedoms in healthcare.[6] Such confusion will continue and likely

[4] Safeguarding the Rights of Conscience as Protected by Federal Statutes, 88 Fed. Reg. 820, 830 (Jan. 5, 2023) (§ 88.2(d)(2). Complaint handling and investigation, Resolution of matters) (hereinafter "Safeguarding the Rights of Conscience").

[5] Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. 47824, 47886 (Aug. 4, 2022).

[6] For example, some states have enacted legislation requiring health care providers offering pregnancy resources as an alternative to abortion to post notices related to abortion. *See Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2377–78 (2018) (holding that California's statute requiring pregnancy-related clinics to disseminate notice of publicly funded family-planning services, including abortion, violated free speech rights). Others have passed laws requiring health care professionals to counsel terminal patients

increase in response to the Department's proposed new rule. The clearly delineated compliance requirements of the 2019 rule, in contrast, would eliminate this confusion and prevent discriminatory policies and employment practices from ever occurring.

In addition, the risk of increased discrimination is even higher considering the additional regulations recently proposed by the Department. In August 2022, just five months before the proposed rule at issue here was announced, the Department issued an additional Notice of Proposed Rulemaking delineating a new interpretation of the Affordable Care Act (ACA)'s Section 1557 nondiscrimination clause.[7] The Department's proposed interpretation of Section 1557 would require medical providers to perform gender transition surgeries and provide other gender-affirming care without any religious exemption. Revoking Departmental regulations protecting religious freedoms contemporaneously with the Department's new interpretation of the ACA's nondiscrimination provision will thus predictably cause an increase in local policies and laws that pressure religious adherents to engage in conduct that violates their religious beliefs. Some may even think that they must make the "impossible choice" between "remain[ing] faithful" and "put[ting] food on the table." *Sambrano v. United Airlines, Inc.*, No. 21-11159, 2022 WL 486610, at *9 (5th Cir. Feb. 17, 2022) (unpublished), *reh'g denied,* 45 F.4th 877 (2022) (mem.).

In short, the effect of the Department's proposed rule is predictable and problematic. The Department is knowingly shifting the burden of protecting and defending religious freedoms onto the most vulnerable parties. The stifling effect that will have on the exercise of religious freedoms is compounded by the fact that the Department is simultaneously seeking to promulgate regulations that may require healthcare personnel to provide medical procedures that contradict their religious principles. As the Supreme Court

---

regarding legalized assisted suicide. *See Vermont All. for Ethical Health Care, Inc. v. Hoser*, 274 F. Supp. 3d 227, 232 (D. Vt. 2017) (alleging that state defendants had adopted an "expansive" reading of a statue requiring all healthcare professionals to counsel for assisted suicide). There has also been an increase in lawsuits against health care providing entities alleging discriminatory policies that require individuals to provide care to which they have a religious or conscience-based objection. *See*, *e.g.*, *Cenzon-DeCarlo v. Mount Sinai Hosp.*, 626 F.3d 695, 698 (2d Cir. 2010) (alleging that a hospital required a nurse to assist with a late-term abortion despite a registered religious objection); *Hellwege v. Tampa Fam. Health Ctrs.*, 103 F. Supp. 3d 1303, 1305–06 (M.D. Fla. 2015) (alleging that a nurse-midwife in Florida was denied the opportunity to apply for a position at a federally qualified health center because she objected to prescribing hormonal contraceptives).

[7] Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. 47824 (Aug. 4, 2022).

explained in *Sherbert*, because the "effect of [the] law is to impede the observance of . . . religion[,]" the law "is constitutionally invalid." 374 U.S. at 403.

All of this leads to our first set of requests:

Please determine how many states currently have laws in place requiring doctors to perform medical procedures despite religious objections.

Please investigate and estimate how the recission of regulatory protections for religious freedoms will affect the incidence of religious discrimination in healthcare.

Please explain how the Department's proposed rule, in conjunction with its proposed rulemaking interpreting Section 1557 of the Affordable Care Act, will affect doctors with religious objections to performing gender-changing procedures.

Please explain how the Department will enforce religious antidiscrimination laws if all of the enforcement regulations are rescinded.

II. The Proposed Rule is Not the Least Restrictive Means of Furthering a Compelling Government Interest.

Nor is the proposed rule the least restrictive means of furthering a compelling governmental interest. As you know, under RFRA, federal laws and regulations that substantially burden the exercise of religion are permissible *only* when they are the least restrictive means of accomplishing such an interest. 42 U.S.C. § 2000bb-1(b). Thus, even where the government interest is compelling, strict scrutiny requires that the means adopted by the government actually accomplish the stated purpose in the narrowest way possible. In other words, courts look to "the tightness of the fit between the regulation and the purported interest." *Republican Party of Minn. v. White*, 416 F.3d 738, 750 (8th Cir. 2005). If the means adopted by the government sweep too broadly or, conversely, fail to accomplish the purported interest, the law is not appropriately tailored and is thus impermissible under RFRA.

Here, the Department's stated purpose behind its proposed new rule is to simultaneously "safeguard[] conscience rights" while also "protecting access to health

care."[8] Regardless of whether the Department's stated interests are compelling, the Department's proposed new rule is not permissible under RFRA because the means adopted by the Department will not accomplish either of the Department's stated purposes.

First, the Department's proposed new rule will not adequately safeguard religious freedoms and rights of conscience. Indeed, the proposed rule is inherently flawed because it lacks measures such as an assurance and certification, recordkeeping, or cooperation requirement to prophylactically prevent religious discrimination. Proactively educating entities that receive Federal funding about their responsibility to avoid bias and discrimination based on conscience would greatly aid in preventing such occurrences, and revoking those existing protections will obviously *decrease*, not increase, the level of protection for conscience rights.

A second major deficiency of the proposed rule is that its (weakened) enforcement provisions are insufficient to adequately vindicate religious freedom. The proposed rule would limit administrative remedies to merely resolving an instance of discrimination "by informal means."[9] This recission would severely hamper the Department's ability to address cases where an entity's policies cause systemic discrimination. Finally, the regulation's notice provisions fail to remedy the lack of awareness or confusion that exists concerning religious freedoms in healthcare because the Department's proposed notice model is too deficient to ensure actual knowledge of Federal conscience rights.

The deficiencies in the means adopted by the Department to safeguard religious freedom are even more apparent when the Department's proposed rule is compared to the regulations implementing other civil rights statutes. For example, the regulation that implements Title VI of the Civil Rights Act of 1964 includes assurance requirements, provisions for periodic compliance reviews, hearing procedures, and various enforcement mechanisms to prevent discrimination based on race, color, or national origin. *See* 34 C.F.R. § 100 *et seq*. (1980). The regulation implementing Section 504 of the Rehabilitation Act, which prohibits discrimination based on disability, includes similar provisions as does the regulation implementing Title IX of the Education Amendments of 1972, which prohibit discrimination based on sex. *See* 34 C.F.R. § 104 *et seq*. (2017); 34 C.F.R. § 106 *et seq*. (2000). The pervasiveness of these provisions in other civil rights statutes provides sound evidence of their efficacy in protecting important constitutional freedoms. Nevertheless,

[8] Safeguarding the Rights of Conscience, 88 Fed. Reg. at 825.

[9] *Id.* at 830.

the Department's proposed rule here would eliminate all such provisions from the existing 2019 rule, leaving a bare-bones regulation that does not adequately safeguard religious freedoms.

Indeed, the Department's proposed new rule is so deficient as to appear half-hearted in its attempt to protect religious freedoms. The proposed rule makes the federal laws protecting the religious-freedom rights of healthcare workers outliers in the world of anti-discrimination statutes and thus discriminates against religion. This failure to accomplish its stated purpose of safeguarding religious freedom makes the Department's proposed rule impermissible under RFRA.

In addition to its failures to safeguard religious freedom, the Department's proposed rule will also fall short of its second stated purpose: to protect access to health care. The Department's current final conscience rule, issued in 2019, noted that "[t]ens of thousands of comments . . . expressed concern that, without robust enforcement of Federal conscience and anti-discrimination laws, individuals with conscientious objections simply would not enter the health care field, or would leave the profession."[10] The Department went on to note that "[o]ne poll suggests that over 80% of religious health care providers in underserved communities would likely limit their scope of practice if they were required to participate in practices and procedures to which they have moral, ethical, or religious objections."[11] Thus, rescinding protection for religious freedoms and thereby driving religious providers out of the health care field will not fix problems of access to health care, but will actually leave communities even more underserved than before.

The Department's proposed new rule, therefore, cuts its own feet out from under it. For reasons just discussed, the revocation of Departmental regulations protecting religious freedoms will predictably cause an increase in local policies and laws that pressure religious adherents to engage in conduct that violates their religious beliefs. And such an effect constitutes a substantial burden on religious exercise. RFRA, moreover, prohibits the imposition of such a burden because the Department's new rule utterly fails to accomplish its stated purposes: Rather than safeguarding religious freedoms, the new rule severely limits the Department's ability to enforce religious antidiscrimination laws. And the Department's failure to adequately protect religious freedoms will likely drive health

[10] Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23170, 23175–76 (May 21, 2019).

[11] *Id.* at 23181.

care providers from the field, thereby hampering, rather than improving, access to healthcare. Because the Department's proposed rule would not pass muster under RFRA, the Department should withdraw the proposed rulemaking and leave the 2019 final rule in place.

All of this leads to our second set of requests:

Please explain how rescinding the majority of the 2019 final rule will improve protection of religious freedoms.

Please explain why, in the Department's view, religious freedoms do not warrant protective regulatory provisions similar to those protecting other civil rights.

Please estimate how many doctors will likely leave the medical profession if they are required to perform medical procedures to which they are religiously opposed.

Please estimate the effect on underserved communities if religious hospitals and other entities choose to shut down rather than perform procedures to which they are religiously opposed.

Please estimate the rate at which patients will be unable to obtain what the Department considers healthcare if the 2019 final rule is largely rescinded.

* * *

For all these reasons, Protect the First Foundation respectfully requests that the Department withdraw the proposed rule.

Gene C. Schaerr
Erik S. Jaffe
Annika Boone Barkdull
Megan Shoell
SCHAERR | JAFFE LLP
1717 K Street NW, Suite 900
Washington, DC 20006
(202) 787-1060
gschaerr@schaerr-jaffe.com