



March 6, 2023

U.S. Department of Health and Human Services
Office for Civil Rights
Attention: Conscience NPRM, RIN 0945-AA18
Hubert H. Humphrey Building
200 Independence Avenue, SW
Washington, DC 20201
Submitted via Regulations.gov

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

To Whom It May Concern:

Americans United for Separation of Church and State submits the following comments to the Notice of Proposed Rulemaking by the Department of Health and Human Services, “Safeguarding the Rights of Conscience as Protected by Federal Statutes,” which was published on January 5, 2023.

Americans United is a nonpartisan, not-for-profit educational and advocacy organization dedicated to preserving and advancing the foundational American principle of church-state separation. The U.S. Constitution guarantees everyone the right to believe as they choose—so long as they do not use their religious beliefs to harm others. Our rights, freedom, and equality depend on the separation of church and state.

We write in support of the Proposed Rule, which largely rescinds the unlawful rule finalized in 2019, “Protecting Statutory Conscience Rights in Health Care; Delegations of Authority.” The 2019 Rule exceeded the Department’s authority, conflicted with existing laws, threatened the health and well-being of patients, undermined healthcare providers’ ability to deliver care, and violated the Constitution.

By making it easier for institutions and individuals to refuse to provide healthcare because of their personal beliefs, the 2019 Rule endangered the health and lives of people across the country, especially women and LGBTQ people. Religious freedom is fundamental, but our laws should never allow the religious beliefs of a healthcare provider to come before what is best for the patient. A patient’s healthcare should always come first.

We are grateful the Department has proposed rescinding the unlawful and dangerous aspects of the 2019 Rule.

The 2019 Rule Exceeded the Department’s Authority by Impermissibly Expanding Refusal-of-Care Laws, and Conflicted with Other Laws

The 2019 Rule sought to allow a broad swath of healthcare providers and other individuals—from clinicians to receptionists to ambulance drivers—to use religious beliefs to determine a patient’s access to care. This sweeping religious exemption extended far beyond any statutory

authority. In particular, the 2019 Rule stretched and misconstrued several definitions that exist in current law, effectively using the rulemaking process to rewrite the underlying law.

The 2019 Rule also conflicted with several important federal, state, and local laws, including those that establish emergency care safeguards, protect against discrimination, and govern informed consent requirements.

First, the 2019 Rule failed to clarify that healthcare entities still had to comply with the Emergency Medical Treatment and Labor Act (EMTALA), which is the federal law that protects patients in emergency situations. Because the 2019 Rule did not mention EMTALA or contain an explicit exception for emergencies, some institutions may have believed they are not bound by EMTALA's requirements. This could have resulted in patients not receiving necessary, life-saving care—care to which they are entitled by law—when facing a medical emergency.

Second, the 2019 Rule conflicts with the long-standing balancing framework under Title VII of the Civil Rights Act. When healthcare workers request an accommodation, Title VII ensures that employers can consider the effect an accommodation would have on coworkers, customers, and patients, as well as factors like public safety, patient health, and other legal obligations. But the 2019 Rule instead required healthcare employers to provide absolute accommodation to individuals who refuse to provide certain information and services to patients even if there were significant costs imposed on the employer, or most importantly, patients.

Finally, the 2019 Rule would have even allowed providers to refuse to inform a patient about treatment options that they find objectionable—violating principles of medical ethics and informed consent—and to refuse to refer the patient to a medical professional who has no such objection to providing the patient with needed care.

We appreciate that the proposed rule addresses these issues by deleting the definitions in the 2019 Rule.

The 2019 Rule Attempted to Allow Broad Refusals of Care that Would Have Threatened the Health and Well-Being of Patients

The 2019 Rule would have allowed institutions and individuals—ranging from hospitals and insurance companies to providers and support staff—to refuse to provide care to patients in need. At the same time, it failed to account for the increased discrimination and flat-out denials of care that some of the most vulnerable members of our communities could face if it would have been implemented. The 2019 Rule's broad scope could have affected patients who need services and information in a wide range of areas. Most clearly, it would have exacerbated barriers to care that already exist for women, people of color, LGBTQ people, people with disabilities, immigrants, and people who live in rural areas. It also could have made getting care for reproductive healthcare, transition-related care, end-of-life care, HIV/AIDS, substance use disorder, vaccinations, and mental health conditions, for example, difficult for patients.

The proposed rule deletes the dangerous definitions, which would have made existing barriers to care even worse for so many people.

People Seeking Reproductive Healthcare

The 2019 Rule targeted people seeking reproductive healthcare. Even before the 2019 Rule, people had used their religious beliefs to deny access to services most often needed by women,

such as abortion, sterilization, certain infertility treatments, and miscarriage management. The 2019 Rule would have exacerbated these problems.

For example, existing refusals have already led to serious negative health consequences and can result in infertility, infection, and even death. They disproportionately affect those who already face additional barriers to accessing reproductive healthcare. Tamesha Means story explains the dangers:

When she was 18 weeks pregnant and her water broke, Tamesha Means rushed to her local hospital (which was religiously affiliated and the only one in her county). The hospital did not tell Tamesha that her pregnancy was not viable and that the safest course of action for her would be to end it. Instead, the hospital gave her two Tylenol and sent her home. Tamesha returned to the hospital the next day because she was severely bleeding. Despite showing signs of infection, the hospital sent her home again. Returning a third time in excruciating pain, the hospital was about to send Tamesha home when she began to deliver. The baby died within hours.¹

Others experiencing miscarriages have also been refused treatment and left in the dark about their options, sometimes for several weeks. As a result, they have experienced grave medical problems such as sepsis, even resulting in stays in the ICU and acute kidney injury, and hemorrhaging requiring blood transfusions.²

The 2019 Rule's expansion of these refusals would have put people seeking reproductive healthcare at even greater risk for harm. Information, counseling, referral, and provision of contraceptive and abortion services are part of the standard of care for a range of common medical conditions including heart disease, diabetes, epilepsy, lupus, obesity, and cancer. Medical guidelines state that survivors of sexual assault should be provided emergency contraception subject to informed consent and that it should be immediately available where survivors are treated. Yet, the 2019 Rule sought to allow even more institutions and individuals to deny people this vital information and services.

LGBTQ People

The 2019 Rule also sought to allow providers and healthcare institutions to refuse care, including transition-related care, to LGBTQ patients. The 2019 Rule's vague and sweeping language would have encouraged providers to refuse to provide care to LGBTQ patients. For example, a provider could have argued that it can refuse to provide gender-affirming care, which is already under attack across the country; administer an HIV test; prescribe PrEP; or screen a transgender man for a urinary tract infection. Moreover, the 2019 Rule also could have encouraged providers to deny any care to an LGBTQ patient simply because of the provider's personal disapproval of the patient's sexuality or gender identity. As a result, the 2019 Rule would have exacerbated negative health outcomes among LGBTQ populations, including disparities in their physical and mental health when compared to their non-LGBTQ counterparts.

¹ American Civil Liberties Union, *Health Care Denied: Patients & Physicians Speak Out About Catholic Hospitals & the Threat to Women's Health & Lives* (2016); Public Rights/Private Conscience Project, Columbia Law School, *Bearing Faith: The Limits of Catholic Health Care for Women of Color* (2018).

² *Health Care Denied*.

People with Disabilities

Many people with disabilities rely on a case manager to coordinate necessary services, a transportation provider to drive them to appointments, or a personal care attendant to administer their medications and manage their daily activities. Under the 2019 Rule, any of these providers could have believed they are entitled to object to providing any of these services covered. And if they did, they would not even have had to tell the individual where they could obtain the service, how to find an alternative provider, or even whether the service is available to them. For example, a case manager might have refused to set up a routine gynecological appointment because contraception might be discussed. For people who require such assistance, a denial based on a case manager, driver, or attendant's religious beliefs would mean they lose access to vital healthcare altogether.

Patients in Immigrant and Rural Communities

The sheer distance to a healthcare facility can be a significant barrier to getting care. Immigrant patients often lack access to transportation or may need translation services and may have to travel great distances to get the care they need. Patients living in rural communities also face many barriers to care including cost of transportation, taking time from work, and other incidentals. For these patients, being turned away by a medical provider is not just an inconvenience: it often means being denied care entirely because there may be no other sources of health and life-preserving medical care.

The 2019 Rule Violated the Establishment Clause of the First Amendment

Religious freedom is a fundamental right, protected by our Constitution and federal law. It guarantees us all the right to believe as we choose. But it doesn't give anyone the right to misuse religion to harm others.

The 2019 Rule sought to allow a wide range of institutions and individuals to cite religious or moral objections to deny patients the care they need. As explained above, countless patients would have faced harm. This is not just bad policy—it also violates the Establishment Clause of the First Amendment of the U.S. Constitution.

The government's ability to provide religious accommodations is not unlimited because it is obligated to remain neutral on matters of religion, which is the historic and traditional purpose of the Establishment Clause. Any accommodation "must be measured so that it does not override other significant interests"³ or "impose unjustified burdens on other[s]."⁴

The Establishment Clause bars the government from granting religious and moral exemptions that would detrimentally affect any third party,⁵ because doing so would impermissibly prefer

³ *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005); see also *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-10 (1985) ("unyielding weighting" of religious interests of those taking exemption "over all other interests" violates Constitution).

⁴ *Cutter*, 544 U.S. at 726. See also *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (religious accommodations may not impose "substantial burdens on nonbeneficiaries").

⁵ E.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 n.37 (2014) (citing *Cutter*, 544 U.S. at 720); *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring); *Cutter*, 544 U.S. at 726 (may not "impose unjustified burdens on other[s]"); *Texas Monthly*, 489 U.S. at, 18 n.8.

the religion of those who are benefited over the rights and interests of those who are burdened.⁶ For example, in *Estate of Thornton v. Caldor, Inc.*, the Supreme Court invalidated a statute that gave employees an unqualified right to take time off on the Sabbath day of their choosing.⁷ The statute violated the Establishment Clause because it “[took] no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath” and “would require the imposition of significant burdens on other employees required to work in place of the Sabbath observers,” thus impermissibly “command[ing] that . . . religious concerns automatically control over all secular interests at the workplace.”⁸

The exemption in the 2019 Rule clearly would have imposed burdens on others: it undermined providers’ ability to deliver care and endangered people’s ability to obtain the care they need. Thus, the 2019 Rule ran afoul of the clear mandates and historic protections of the Establishment Clause.

The NPRM Makes Critical Changes to Correct the Unlawful and Dangerous 2019 Rule

We appreciate the important changes to the 2019 Rule proposed by the Department. We are grateful that the NPRM would delete the definitions, change the extreme and coercive enforcement provisions, and modify the notice provisions.

We believe the Department could further strengthen the proposed rule by:

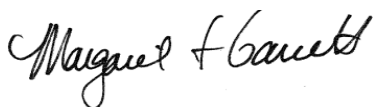
- clarifying how state agencies may be involved in the investigative process;
- defining the terms “relevant funding” and “appropriate action” when outlining potential consequences for violations of the rule; and
- changing the notice to include language so that a patient is aware of the ways their care may be impacted by providers or institutions that refuse to provide care.

Conclusion

Religious freedom should be a shield that protects people from discrimination—never a tool to cause harm or deny basic medical care to anyone. The proposed rule upholds this principle. Because patients’ health needs must come first and no one should lose access to critical healthcare because of a doctor’s or a hospital’s religious beliefs, we support the proposed rule.

Thank you for the opportunity to provide comments. If you should have further questions, please contact Dena Sher, sher@au.org.

Sincerely,



Maggie Garrett
Vice President for Public Policy



Dena Sher
Associate Vice President for Public Policy

⁶ See, e.g., *Texas Monthly*, 489 U.S. at 15.

⁷ *Caldor*, 472 U.S. at 705-08.

⁸ *Id.* at 709-10. In *Hobby Lobby*, every member of the Court reaffirmed that harmful effects on third parties must be considered in evaluating religious accommodations. 573 U.S. at 693, 729 n.37; *id.* at 739 (Kennedy, J., concurring); *id.* at 745-46 (Ginsburg, J., dissenting, joined by Breyer, Kagan, & Sotomayor, JJ.).