Exhibit 1

March 16, 2018

Submitted Electronically

Department of Health and Human Services
Office for Civil Rights
Attention: Conscience NPRM
RIN 0945-ZA03
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue SW
Washington, DC 20201

Subj: Protecting Statutory Conscience Rights in Health Care, Dep't of Health & Human Services, Office for Civil Rights, RIN 0945-ZA03

Dear Sir or Madam:

On behalf of the United States Conference of Catholic Bishops ("USCCB"), National Association of Evangelicals, Southern Baptist Ethics & Religious Liberty Commission, Catholic Medical Association, Christian Legal Society, and Family Research Council, we submit the following comments on the proposed rule to protect conscience rights in health care. 83 Fed. Reg. 3880 (Jan. 26, 2018).

We strongly commend the Department for publishing these proposed regulations and we urge their adoption. For over four decades, through enactments such as the Church Amendment (42 U.S.C. § 300a-7), Congress has sought to ensure that health care institutions and professionals will not have to choose between abandoning medicine and violating their conscience, particularly with respect to abortion and sterilization. The proposed regulations will implement these and other longstanding federal statutory protections, and thereby help guarantee that health care institutions and professionals are not pushed into this Hobson's choice.

1. **The Proposed Regulations Are Much Needed and Long Overdue.**

The preamble provides ample documentation of the record of violations of the federal conscience statutes in the United States. 83 Fed. Reg. at 3887-89. Sadly, hostility to conscience rights in health care is not only continuing, but increasing, as demonstrated by the rise in the rate of complaint filings. *Id*. at 3887 (noting 34 complaints between November 2016 and mid-January 2018, compared to 1.25 complaints per year from 2008 until November 2016); *see also* Jessie Hellmann, *New HHS Office that Enforces Health Workers' Religious Rights Received 300 Complaints in a Month*, THE HILL, Feb. 20, 2018 (noting that "[m]ore than 300 individuals filed a complaint with [HHS] over the last month"), http://thehill.com/policy/healthcare/374725-hhs-new-office-that-enforces-religious-moral-rights-of-health-workers.

Some states and local governments and advocacy groups seem to have grown more determined in their opposition to federal conscience laws. Ironically, many of these groups speak of "choice" and non-discrimination, but their objective is precisely the opposite, the elimination of choice and the imposition of rules that force people to participate in these procedures, as well as the targeted exclusion of those whose religious convictions impel and shape their provision of medical care. Many advocates speak as if the conscience laws were the invention of the current administration. They are not. Three of the most important protections—the Church, Coats-Snowe, and Weldon amendments—go back to 1973, 1996, and 2004, respectively.

Though these laws have been on the books for years, legislators and advocates are becoming more emboldened to violate them. There are reports this year of efforts to pass a bill in Maine "that would require all nurse practitioners to provide the abortion pill to patients upon request" in violation of the Church and Weldon amendments. Jessie Hellmann, *Planned Parenthood Announces Nationwide Push for Abortion, Birth Control Legislation*, THE HILL (Feb. 13, 2018), http://thehill.com/policy/ healthcare/373619-planned-parenthood-announces-nationwide-push-or-abortion-birth-control. Washington State legislators have passed a bill that would require health plans to cover abortion if they cover maternity care, in violation of the Weldon amendment. Washington State Substitute Sen. Bill 6219 (Mar. 3, 2018), http://lawfilesext.leg.wa.gov/biennium/2017-18/Pdf/Bills/Senate%20Passed%20Legislature/6219-S.PL.pdf#page=1.

We commend the Department for proposing these regulations, which are much needed and long overdue.

2. The Proposed Regulations' Broad Interpretation of Conscience Laws Is Consistent with the Remedial Purpose of the Statutes They Enforce.

Proposed section 88.1 states that "[c]onsistent with their objective to comprehensively protect the conscience and associated anti-discrimination rights of persons, entities, and health care entities, the statutory provisions and the regulatory provisions contained in this part are to be interpreted and implemented broadly to effectuate their protective purposes." 83 Fed. Reg. at 3923. Similarly, proposed section 88.9 states that the regulations "shall be construed in favor of a broad protection of free exercise of religious beliefs and moral convictions, to the maximum extent permitted by the terms of the Federal health care conscience and associated antidiscrimination statutes implemented by the Constitution." *Id.* at 3931.

We agree with HHS that such a broad construction is warranted. Courts and administrative agencies have long recognized that non-discrimination laws should be construed broadly to give full effect to their remedial purposes. *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (it is a "familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes"); *see*, *e.g.*, *Disabled in Action v. Southeastern Pa. Transp. Auth.*, 539 F.3d 199, 208 (3d Cir. 2008) (the Americans with Disabilities Act "'is a remedial statute, designed to eliminate discrimination against the disabled in all facets of society,' and as such, 'it must be broadly construed to effectuate its purposes'"). It is entirely appropriate, therefore, that HHS adopt a broad construction here.

Consistent with rules of construction referenced in sections 88.1 and 88.9, the proposed regulations define particular statutory terms with commendable breadth. To take a few examples, in proposed section 88.2, the Department defines the phrase "assist in the performance" to include any "articulable connection to a procedure, health service, health program, or research activity…." 83 Fed. Reg. at 3923. In the same section, "refer" is defined to mean the provision of "any information … by any method" pertaining to a health care service, activity, or procedure. *Id.* at 3924. The term "discrimination" is defined in terms of any action having any adverse effect, including the withholding or revocation of funds. *Id.* at 3923-24. These and other definitions in section 88.2 are helpfully detailed and will provide much needed guidance as to the meaning of the conscience statutes.

Regarding the proposed regulations' definitions, we have one remaining comment. We are aware of at least one instance in which a State agency declined to follow the Weldon amendment because that particular agency was not a direct recipient of federal funds, even though the State was a recipient of such funds. HHS should make clear in the regulations that when federal law forbids discrimination by a State that receives federal funds (as in the case of the Weldon amendment), and a particular State receives such funds, then *all* government agencies and offices of that State are obliged to follow the non-discrimination rule. Otherwise States, contrary to Congress's intent, could avoid federal nondiscrimination laws simply by creating separate agencies and offices that do not directly receive federal funds, which thereafter could violate conscience protection laws with impunity.

Subject to this recommendation, we urge HHS to adopt the proposed sections 88.1, 88.2, and 88.9 in the final rule.

3. The Proposed Regulatory Requirements Correctly Mirror the Requirements of the Statutes They Enforce.

Proposed section 88.3 sets out the requirements of the conscience statutes. This provision closely tracks, and often borrows verbatim from, the statutes they are designed to enforce. We commend HHS for its careful attention and adherence to the statutory text, and we urge the Department to adopt the proposed section 88.3 in the final rule.

4. The Proposed Regulations Properly Require Assurances and Certifications of Compliance.

Assurances and certifications are a long-established means of ensuring knowledge of, and compliance with, federal funding requirements. We agree that those requirements are properly imposed here because, as the Department notes, it will help ensure that funded entities understand and recognize that they must abide by the conscience laws and regulations. 83 Fed. Reg. at 3928-29, proposing 45 C.F.R. § 88.4. Posting and notice requirements are a common regulatory feature of nondiscrimination statutes. We agree with the proposed notice and compliance requirements here. 83 Fed. Reg. at 3929-30, proposing 45 C.F.R. §§ 88.5, 88.6.

We urge HHS to adopt the proposed sections 88.4, 88.5, and 88.6 in the final rule.

5. The Proposed Regulations Provide Critical Enforcement Mechanisms.

Proposed section 88.7 is perhaps the most important part of the proposed regulation because it provides means of enforcing the conscience laws and regulations. Section 88.7(j)(3) is particularly helpful in spelling out the various means by which OCR will enforce the conscience regulations, to include withholding funds, referring the matter to the Attorney General, or taking other remedies that may be legally available.

It is noteworthy and laudatory that the Department has delegated to OCR "full enforcement authority over a significantly larger universe of Federal statutes" than was previously the case. 83 Fed. Reg. at 3891. We commend the Department for this more inclusive approach.

We urge HHS to adopt the proposed section 88.7 in the final rule.

6. The Administration Has Taken an Important Step in Correcting an Earlier Misinterpretation of the Weldon Amendment.

We agree with, and commend, the Department for acknowledging that its interpretation of the Weldon amendment under the previous administration was incorrect. The Department now correctly acknowledges that the text of the Weldon amendment is controlling, and that there

is nothing in the text of the amendment that would limit its enforcement to insurers or only to those with religious or moral objections. 83 Fed. Reg. at 3890-91.

Conclusion

We strongly commend the Department for taking these necessary steps to implement and enforce the federal conscience laws in health care.

Sincerely,

Leith Anderson
President
National Association of Evangelicals

Anthony R. Picarello, Jr.
Associate General Secretary &
General Counsel
U.S. Conference of Catholic Bishops

Galen Carey
Vice President, Government Relations
National Association of Evangelicals

Michael F. Moses
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Russell Moore
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Travis Weber, J.D., LL.M.
Director of the Center for Religious Liberty
Family Research Council

Exhibit 2

ALLIANCE DEFENDING FREEDOM
FOR FAITH. FOR JUSTICE.

March 26, 2018

VIA Federal eRulemaking Portal

U.S. Department of Health and Human Services
Office for Civil Rights RIN 0945-ZA03/
Docket ID No. HHS-OCR-2018-0002

RE: Proposed Rule on Protecting Statutory Conscience Rights in Health Care

Dear Secretary Azar:

On behalf of Alliance Defending Freedom ("ADF"), we offer the following comments on the Department of Health and Human Services's ("HHS") proposed rule to protect the statutory conscience rights of those involved in the healthcare industry. 83 Fed. Reg. 3880 (Jan. 26, 2018).

INTRODUCTION

ADF is a national and international nonprofit legal organization that litigates cases implicating religious freedom, marriage and the family, and the sanctity of human life. A necessary and integral part of this work involves defending the right to conscience of business owners, creative professionals, university students and employees, religious entities, nonprofit organizations, and most notable here, medical practitioners and allied healthcare professionals. We have extensive experience defending clients whose lives have been thrown into turmoil—and whose right to conscience has been subverted—by those who are either unaware or willfully dismissive of the full panoply of extant federal conscience protections. This combination of ignorance and repudiation has unfortunately caused many conscientious medical practitioners to needlessly suffer threats to their livelihoods and affronts to their religious beliefs and practices. Moreover, these ordeals have only

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been made worse by the fact that heretofore there has been very little recourse available to these medical practitioners to remedy these violations. Indeed, for far too long, the many federal conscience protections available to medical practitioners have been treated as aspirational at best, and sometimes even as dead letters. ADF therefore offers the following comments in strong support for HHS's proposed regulations, which seek to not only raise awareness of conscience rights but to put some real teeth into federal protections for those rights, by providing for vigorous enforcement against offending entities and individuals.

I. Because the Right to Conscience is Imperiled Now More Than Ever Before, It is Critical That These Proposed Regulations—In Their Fullest Form—Be Enacted As Soon as Practicable.[1]

The right to conscience was central to the founding of the American Republic.[2] James Madison deemed it an "unalienable right,"[3] "the most sacred of all property,"[4] and Thomas Jefferson concurred, noting that conscience "could not [be] submit[ted]" to governmental oversight or authority.[5] This same right of conscience has also been essential to the practice of medicine for millennia, as evidenced by the Hippocratic Oath[6] and medicine's status as an autonomous profession concerned with doing right and avoiding wrong.[7]

It is therefore not surprising that soon after the United States Supreme Court announced a right to elective abortion, Congress and the vast majority of state

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[1] A comprehensive treatment of issues surrounding conscience and the medical practitioner, including the historical and philosophical underpinnings for the right, contemporary threats to conscience, the many reasons it should and must be protected, and suggested ways to protect conscience, can be found in ADF's recently published article, Kevin Theriot & Ken Connelly, *Free to Do No Harm: Conscience Protections for Healthcare Professionals*, 49 Ariz. St. L.J. 549 (2017).

[2] Lynn D. Wardle, "*Conscience Exemptions,"* 14 Engage: J. Federalist Soc'y Prac. Groups 77, 78-79 (2013) (explaining that protecting "conscience was one of the essential purposes for the founding of the United States of America and one of the great motivations for the drafting of the Bill of Rights").

[3] James Madison, Memorial and Remonstrance Against Religious Assessments (1785), in Selected Writings of James Madison 21-27 (Ralph Ketcham ed. 2006).

[4] James Madison, Property (1792), in Madison supra, note 2, at 223.

[5] Thomas Jefferson, Notes on the State of Virginia 265 (1782).

[6] *See* Alliance Defending Freedom, *Legal Guide For Medical Professionals—Conscience Protections for People of Faith* 1 (2016), available at https://adflegal.org/HealthcareGuide (describing the genesis of the Oath and its importance in moving medicine toward a profession that "reverence[s] human life").

[7] Edmund D. Pellegrino, *Toward a Reconstruction of Medical Morality*, The American Journal of Bioethics, 6(2): 65–71, 2006 (stating that "[m]edicine is a moral enterprise . . . conducted in accordance with a definite set of beliefs about what is right and wrong").

legislatures saw fit to provide explicit protections for conscience.[8] In fact, the Supreme Court itself indicated in *Roe v. Wade*, and its companion case *Doe v. Bolton*, that the right to be free from governmental interference in procuring an elective abortion did not entail the power to compel another to provide that procedure against his or her will.[9]

Yet despite its unquestionable pedigree as a paramount right, conscience today is under siege, tolerated by many in the political and cultural ascendancy only when the reason for its exercise "conforms to their own agenda."[10] Opponents to conscience in medicine, for instance, claim that its assertion "obstruct[s] access to goods and services," [11] and constitutes an abdication of the medical practitioner's duty.[12] Some have argued, for instance, that physicians with moral objections to certain procedures should simply avoid practicing in a field that implicates their objections.[13] Others have concluded that "health care professionals should be admonished that conscientious objections based on personal beliefs, as opposed to professional ethics, will entail consequences."[14] A group of philosophers and bioethicists recently expounded upon this pronouncement by proposing that those medical practitioners who exercise a right to conscience "should be required to compensate society and the health system for their failure to fulfil their professional obligations." [15] Still others have gone so far as to claim that "[a] doctor's conscience has little place in the delivery of modern medical care." [16]

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[8] *See Legal Guide For Medical Professionals* at 6 (describing the legislative "flurry" in the wake of *Roe*).
[9] *See Roe v. Wade*, 410 U.S. 113, 144 n.38 (1973) (quoting AMA resolutions confirming that "no party to the procedure [abortion] should be required to violate personally held moral principles"); *Doe v. Bolton*, 410 U.S. 179, 197–98 (1973) (noting that under the challenged law that "a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure").
[10] Stephen J. Genuis & Chris Lipp, *Ethical Diversity and the Role of Conscience in Clinical Medicine* at 6, International Journal of Family Medicine, Volume 2013 (Article ID 587541), available at https://www.hindawi.com/journals/ijfm/2013/587541/.
[11] Douglas Nejaime, Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 Yale L.J. 2516, 2566 (2015).
[12] *See, e.g.*, Julian Savalescu, *Conscientious Objection in Medicine*, BMJ 294, 294 (2006) (arguing that "[c]onscience . . . can be an excuse . . . invoked to avoid doing one's duty").
[13] Julie Cantor, *Conscientious Objection Gone Awry — Restoring Selfless Professionalism in Medicine*, 360 NEW ENG. J. MED. 1484, 1485 (2009) ("Qualms about abortion, sterilization, and birth control? Do not practice women's health.").
[14] Martha S. Swartz, "*Conscience Clauses*", 6 YALE J. HEALTH POL'Y, L. & ETHICS at 277.
[15] *Consensus Statement on Conscientious Objection in Healthcare*, PRACTICAL ETHICS (Aug. 29, 2016), http://blog.practicalethics.ox.ac.uk/2016/08/consensus-statement-on-conscientious-objection-in-healthcare/.
[16] Julian Savalescu, *Conscientious Objection in Medicine*, BMJ 294, 294 (2006).

Perhaps most alarming, even professional medical associations now question the role of conscience in the provision of medical care. The Committee on Ethics of the American College of Obstetricians and Gynecologists (ACOG), for instance, has opined that physicians have a duty to either refer for abortion and other related procedures or, in the alternative, when such referral is not feasible, "provide medically indicated and requested care regardless of the provider's personal moral objections," up to and including abortion.[17] Additionally, after the Bush Administration sought to bolster federal conscience protections in 2008 (as discussed in HHS's proposed regulations), the American Medical Association, along with the American Psychological Association, the American Nurses Association, and the American Society of Pediatrics submitted comments in opposition, claiming that "[d]octors who follow their consciences might violate their 'paramount responsibility and commitment to serving the needs of their patients.'"[18]

States too have proven less than solicitous of protecting the conscience rights of medical practitioners. In response to the aforementioned Bush Administration attempts to shore up federal conscience protections, thirteen state attorneys general signed a letter denouncing the regulations,[19] and seven states later filed suit to block them.[20] More recently, Illinois—which otherwise had provided broad protection for medical conscience—amended its Healthcare Right of Conscience Act to require medical practitioners and institutions to provide abortion referrals.[21] Vermont medical regulatory agencies attempted to construe Act 39, the state's recently enacted assisted suicide law, to require medical professionals to counsel (or refer for counseling) their terminal patients for physician-assisted suicide.[22] And California passed AB 775, which requires licensed medical centers offering free, pro-life

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[17] AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, COMMITTEE ON ETHICS, THE LIMITS OF CONSCIENTIOUS REFUSAL IN REPRODUCTIVE MEDICINE 5 (2007).

[18] William L. Saunders & Michael A. Fragoso, *Conscience Protection in Health and Human Services*, 10 Engage: J. Federalist Soc'y Prac. Groups, July 2009, at 117 (quoting AMA comments, available at http://www.plannedparenthood.org/files/AMA_et__al__ Comments.pdf).

[19] *See* Saunders and Fragoso, *Conscience Protection* at 117 (citing Press Release, Terry Goddard Urges Proposed Abortion Rule Be Withdrawn (Sept. 24, 2008), available at https://www.azag.gov/press-release/terry-goddard-urges-proposed-abortion-rule-be-withdrawn) ("The proposed regulation completely obliterates the rights of patients to legal and medically necessary health care services in favor of a single-minded focus on protecting a health care provider's right to claim a personal moral or religious belief.").

[20] *Id.* (describing complaint allegations)

[21] *See* Complaint, *Pregnancy Care Center of Rockford v. Rauner*, Circuit Court of the Seventeenth Judicial Circuit (Winnebago Cty., Ill.), Case No. 2016MR000741 (August 5, 2016).

[22] *See* Complaint, *Vermont Alliance for Ethical Healthcare v. Hoser*, No. 16-cv-00205 (Dkt. No. 1, Jul. 19, 2016, D. Vt.).

assistance to pregnant women to post a disclosure informing those women that California provides free or low-cost abortion and contraception services, along with a phone number for those services.[23]

The scope and depth of these attacks on conscience emanates from a crabbed and myopic conception of the medical practitioner as a sort of public utility who must dole out any demanded service regardless of any moral qualms he or she may have, and regardless of any concerns based on his or her professional judgment.[24] Unfortunately, in our experience, extant federal conscience protections have proven incapable of combatting this pernicious trend to date, principally because they lack meaningful enforcement mechanisms, frequently cover only a limited range of procedures and healthcare personnel, and often garner little respect from courts in any event.[25] The travails of our clients prove that federal conscience protections, although many in number and often long on the statute books, have heretofore been relatively incapable of protecting the very rights to conscience they were crafted to vindicate.

Cathy Cenzon-DeCarlo

Cathy Cenzon-DeCarlo is a devout Catholic who works as a surgical nurse at Mt. Sinai Hospital in New York City.[26] Because it is her religious belief that abortion is the unwarranted taking of a human life, she explicitly expressed to the hospital her unwillingness to participate in abortion and completed paperwork to that effect upon beginning her tenure there. That agreement was willfully ignored by hospital officials

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[23] *See* Appellant's Opening Brief at 10-16, *National Institute of Family and Life Advocates v. Harris*, No. 16-55249 (9th Cir., Mar. 17, 2016).

[24] *See* R. Alta Charo, *The Celestial Fire of Conscience--Refusing to Deliver Medical Care*, 352 New Eng. J. Med., 2471, 2473 (2005) (comparing the practice of medicine to "a kind of public utility" where exercising the right to conscience constitutes "an abuse of the public trust"); Martha S. Swartz, "*Conscience Clauses" or "Unconscionable Clauses": Personal Beliefs Versus Professional Responsibilities*, 6 YALE J. HEALTH POL'Y, L. & ETHICS 269, 277 (2006) (arguing that the "monopolistic nature of health care professionals' state-granted licenses" obliges them "to provide requested medical care that is not medically contraindicated, is not outside generally accepted medical or professional ethics, and is not illegal").

[25] *See* Lynn D. Wardle, *Protection of Health-Care Providers' Rights of Conscience in American Law: Present, Past, and Future*, 9 Ave Maria L. Rev. 1, 27-28, 44 (2010) (discussing the narrow focus of many conscience protections and pointing out that "private individuals in health-care professions have little means for vindicating and redressing violations of their personal rights of conscience," and "current legislative conscience clauses provide very few meaningful mechanisms for ascertaining compliance").

[26] *See* Complaint, *Cenzon-DeCarlo v. Mt. Sinai Hospital*, No. 09-cv-3120 (Dkt. No 1, Jul. 21, 2009, E.D.N.Y.).

when they compelled Cathy to assist in the abortion of a 22-week old preborn baby on Saturday, May 24, 2009. Rather than accommodate Cathy, hospital officials threatened her with charges of "insubordination and patient abandonment" if she did not immediately assist in the abortion, despite the fact that the case did not even involve emergency circumstances.[27] Unfortunately, despite the existence of federal protections which were designed precisely to protect her in this situation, most notably the Church Amendment, Cathy was unable to prevail upon her supervisors to relent. She was compelled to assist in the abortion because she was unable to sustain the loss of her job or her nursing license. When she later filed suit against the hospital in federal court, the action was dismissed because the court found that she had no private right of action, and thus no right to bring the action in the first place, a ruling which was affirmed by the Second Circuit Court of Appeals.[28] Cathy was instead beholden to the federal bureaucracy to pursue the complaint her attorneys filed with HHS, which finally investigated the incident after a delay but did not ultimately resolve it. Although Mt. Sinai eventually revised its policies to respect conscience rights, Cathy's ordeal inflicted upon her emotional and psychological trauma that have left lasting scars to this day. Her ordeal also shows that federal conscience protections—even when they are clearly applicable to the situation at hand—will do little to actually prevent egregious abuses without meaningful enforcement mechanisms and a knowledge on the part of healthcare facilities that HHS will enforce the regulations swiftly and consistently.

The Stormans Family and Ralph's Thriftway

The Stormans family owns and operates Ralph's Thriftway, a fourth-generation grocery store and pharmacy in Olympia, Washington.[29] As Christians they object to participating in the destruction of human life. They refrain from stocking or dispensing Plan B or ella in their pharmacy, as the FDA has confirmed that both medications can prevent implantation and therefore destroy a human embryo. If they receive a request for these types of medications, they commonly refer customers to one of the more than 30 nearby pharmacies that regularly stocks and dispenses them. Unsurprisingly, because these pharmacies are all within five miles of Ralph's, no one has ever been denied timely access to these medications. Moreover, referrals are a commonplace of the pharmacy practice and are supported by the American Pharmacists Association and more than 30 other medical and pharmacy associations. Referral is also legal in every state—except Washington.

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[27] *Id.* at ¶¶ 97-123.
[28] *Cenzon-DeCarlo v. Mount Sinai Hosp.*, 626 F.3d 695, 698-99 (2d Cir. 2010).
[29] *See Stormans, Inc. et al., v Selecky*, Findings of Fact and Conclusions of Law at ¶ 1-2, 11-12 (W.D. Wa. 07-cv-05374 RBL, Feb. 22, 2012).

That is because in 2007—after Governor Christine Gregoire and Planned Parenthood had restocked the Washington State Pharmacy Commission with their supporters—the Commission enacted a rule prohibiting conscience-based referrals. As a result, the Stormans had to bring suit to protect their right to conscience, and after years of litigation, a federal district court ruled that the new regulations—which permitted referrals for almost every conceivable reason save for conscience—violated the Free Exercise Clause of the First Amendment to the United States Constitution.[30] Unfortunately, the Ninth Circuit Court of Appeals eventually reversed the trial court, and the United States Supreme Court declined to hear the appeal, making Washington the only state that currently bans conscience referrals for pharmacists.[31]

This case stands as a sign that states, along with advocacy groups and even certain medical associations themselves, will often sacrifice conscience in exchange for what they consider to be political gain. This case also signals that to the extent existing federal protections do not protect such abuses, they should be accordingly expanded. Although this may not be the prerogative of HHS's proposed regulations, it bears mentioning here that the current regulations not only need to be vigorously enforced, as suggested by HHS, but also expanded.[32]

Trinity Health

Trinity Health operates 93 hospitals and 120 continuing care facilities throughout the U.S., and is particularly dedicated to serving impoverished communities. [33] It provides healthcare in accordance with Roman Catholic teaching, hewing to the Ethical and Religious Directives issued by the United States Conference of Catholic Bishops.[34] Those directives state that "[a]bortion (that is, the directly intended termination of pregnancy before viability or the directly intended destruction of a viable fetus) is never permitted."[35] These same directives, however, permit Catholic hospitals like those in Trinity Health's network to take steps to save the life

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[30] *Stormans, Inc. v. Selecky*, 524 F. Supp. 2d 1245 (W.D. Wash. 2007), *vacated and remanded,* 586 F.3d 1109 (9th Cir. 2009).

[31] *See Stormans v. Wiesman*, 794 F.3d 1064 (9th Cir. 2015); *Stormans v. Wiesman*, 136 S. Ct. 2433 (June 28, 2016) (J. Alito, dissenting) (stating that the case "is an ominous sign" because "[i]f this is . . . how religious liberty claims will be treated in the years ahead, those who value religious freedom have cause for great concern").

[32] For an example of a model conscience act that would do just that, *see Free to Do No Harm*, 49 Ariz. St. L.J. at 601-05.

[33] http://www.trinity-health.org/about-us.

[34] *Id.*

[35] See Ethical and Religious Directives for Catholic Health Care Services at ¶ 45, available at http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services-fifth-edition-2009.pdf.

of the mother, even if such steps may unintentionally and indirectly result in harm to her unborn baby.[36]

Despite these protections, the ACLU sued Trinity Health in October 2015, claiming that its convictions presented a threat to women who might—for "health reasons"—need an abortion and might only have access to Trinity Health's hospital network. The ACLU specifically alleged that Trinity Health's refusal to intentionally perform abortions violated the Emergency Medical Treatment and Active Labor Act and the Rehabilitation Act.[37] But in essence what the ACLU really wanted was to compel Trinity Health to reject its Catholic beliefs and commit abortions.[38] A federal district court eventually dismissed the case for lack of standing, but attacks on institutions like Trinity Health will likely continue unabated without more vigorous enforcement of extant federal conscience protections. It is much to be hoped that such enforcement, to include penalties for noncompliance, will prevent such frivolous claims from detracting from the saving work of these institutions going forward.

Julea Ward

Julea Ward was enrolled as a student in a graduate counseling program at Eastern Michigan University ("EMU"). As part of her practicum course, Julea was assigned a potential client seeking assistance for a same-sex relationship. Julea knew that she could not affirm the client's relationship without violating her religious beliefs about extramarital sexual relationships, so she asked her supervisor how to handle the matter. Consistent with ethical and professional standards regarding counselor referrals, Julea's supervisor advised her to refer the potential client to a different counselor. Julea followed that advice and the client received the requested counseling

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[36] *Id.* at ¶ 47.

[37] *See* Amended Complaint, *ACLU v. Trinity Health Corporation*, No. 15-CV-12611 (GAD-RSW) (E.D. Mich. Oct. 1, 2015).

[38] Indeed, in another recent case, the ACLU sued Dignity Health—the nation's fifth largest health care provider, which operates Catholic hospitals in California, Nevada, and Arizona — because one of its hospitals, Mercy Medical Center, refused to perform a requested tubal ligation on a patient following a C-section delivery, which procedure is not in keeping with the dictates of Catholic doctrine. *See* www.dignityhealth.org/about-us (providing information regarding Dignity Health); www.nbcnews.com/news/us-news/fight-over-tubal-ligation-heads-court-california-n496516 (detailing ACLU's suit against Dignity Health and Mercy Medical Center). Notwithstanding the sincerity and longstanding clarity of Catholic doctrine on this point, and notwithstanding the great cost—the ACLU still seeks to compel Mercy Medical Center to violate its conscience, and characterizes the expansion of "Catholic hospital chains" as "interference with the doctor-patient relationship" which "presents a real threat to women's ability to access basic healthcare across the country." ACLU of Northern California, *Chamorro v. Dignity Health*, available at www.aclunc.org/our-work/legal-docket/chamorro-v-dignity-health-religious-refusals.

without incident—indeed, the client was not in the least negatively impacted, and never even knew of the referral.

Notwithstanding these facts, EMU informed Julea soon thereafter that her referral violated the American Psychological Association's nondiscrimination policy. EMU also told Julea that the only way she could stay in the counseling program would be if she agreed to undergo a "remediation" program, the purpose of which was to help her "see the error of her ways" and change her "belief system" as it related to providing counseling for same-sex relationships. Julea was unwilling to violate or change her religious beliefs as a condition of getting her degree, and therefore she refused "remediation." At a subsequent disciplinary hearing, EMU faculty denigrated Julea's Christian views and asked several uncomfortably intrusive questions about her religious beliefs. Among other things, one EMU faculty member asked Julea whether she viewed her "brand" of Christianity as superior to that of other Christians, and another engaged Julea in a "theological bout" designed to show her the error of her religious thinking. Following this hearing, in March 2009, EMU formally expelled Julea from the program, basing its decision on the APA's nondiscrimination policy.

Julea filed suit against EMU officials and eventually won a unanimous victory from the Sixth Circuit Court of Appeals. Despite that ultimate victory, however, Julea should never have been put through the humiliation and trouble she received at the hands of school administrators. But neither compliance with applicable professional standards nor federal conscience protections were able to protect her against the arbitrary and punitive measures inflicted upon her by school administrators. They clearly had no trepidation that any untoward consequences would flow from their actions. HHS has asked for comments regarding "[c]onscience protections for objections to counseling and referral for certain services in Medicaid or Medicare Advantage." While the substantive objection at issue in Julea's case may or may not be covered by Medicare or Medicare Advantage, it is not difficult to predict that situations may arise in which counselors are indeed asked to counsel for the very things to which they morally object which are covered under those rubrics, and absent meaningful enforcement of federal conscience protections, counselors will be left to endure the very type of abuses Julea did, for no good reason. HHS's dedication to expanding the awareness of those protections, and its avowed intention to finally enforce them with vigor, is therefore a very welcome sign.

Foothill Church

Foothill Church, Shepherd of the Hills, Calvary Chapel Chino Hills, and Skyline Wesleyan Church are nonprofit, Christian churches located in California. They believe and teach that elective abortion violates the Bible's command against the intentional destruction of human life, and their religious beliefs prohibit them from participating in or supporting elective abortion in any way. Although the churches previously could structure their employee health insurance coverage consistent with their religious beliefs about life, that all changed on August 22, 2014, when the California Department of Managed Health Care ("DMHC") mandated health care plans cover all legal abortions.

DMHC sent letters to private health insurers in the state, informing them that a 40-plus-year-old state law—specifically, the Knox-Keene Health Care Service Plan Act and its requirement that health care plans cover "basic health care services"—mandates coverage for all legal abortions, including elective ones. This new interpretation and application of the Knox-Keene Act, which was issued without advance notice or opportunity to comment, followed meetings and conversations with abortion advocates who were upset that two religious universities—Loyola Marymount University and Santa Clara University—had removed elective abortion coverage from their employee health care plans.

In imposing the new abortion-coverage requirement, DMHC claimed that it had reviewed plan documents and determined that language limiting or excluding coverage for abortion was present in products "covering a very small fraction of California health plan enrollees." That survey of plan documents, however, showed that health plans restricting abortion coverage were offered only to religious organizations. Because DMHC made the abortion-coverage requirement effective immediately, and did not include any religious exemption, unrestricted abortion coverage was injected into the employee health care plans of churches and religious organizations all across California.

To vindicate their rights of conscience and free exercise of religion, the churches filed a complaint with HHS-OCR on October 9, 2014, alleging that DMHC's abortion-coverage requirement violates the Weldon Amendment. On June 21, 2016, however, HHS-OCR closed its investigation without taking further action. Having been told that the Weldon Amendment offers them no real protection, the churches have been forced to engage in time-consuming and arduous litigation over

the constitutionality of DMHC's actions.[39] This litigation is ongoing, and the churches' prospect of obtaining a lasting remedy still remains uncertain. But it is possible and even probable that HHS's proposed regulations would have obviated the need for such litigation.

II. The Regulations Should—Consistent With Applicable Law—Define as Broadly as Possible the Range of Medical Practitioners/Allied Health Professionals and Medical Procedures Covered by Extant Federal Conscience Protections.

Joseph Story, one of our nation's earliest and most prominent Supreme Court justices, said that the "rights of conscience are . . . beyond the just reach of any human power. They . . . [must] not be encroached upon by human authority."[40] Consistent with this vision, the right to conscience should take a back seat to no one's ideological agenda or social imperative. That is why the model of the medical practitioner as mere public utility or vending machine is unsustainable—it is inconsistent with the traditional Hippocratic practice of medicine, benefits neither practitioners nor society in general, and is an affront to the very idea of the inviolability of conscience that animated the founding of the nation. If conscience is to mean anything, it must be guarded closely under all circumstances, regardless of whether the reason for a conscience objection meets with the favor of the regnant worldview.

The unfortunate travails of our clients and the patent hostility increasingly shown toward conscience by certain doctors, philosophers, bioethicists, professional organizations, and even states indicates that the task of protecting medical conscience is an urgent one. HHS has, commendably, recognized this in its proposed regulations. ADF believes that HHS's plan to "more effectively and comprehensively enforce Federal health care conscience and associated anti-discrimination laws" will go a long way toward remedying many of the infirmities present in the current system. 83 Fed. Reg. at 3881. In ADF's experience, far too often in the past medical practitioners had no idea that they are protected by federal laws; healthcare facilities were either unaware, or willfully dismissive of, their obligations to protect conscience; and HHS itself has often been hamstrung in its ability to effectively enforce these regulations. The new proposed regulations, by providing for "outreach and . . . technical assistance," requiring the maintenance of compliance records, compelling cooperation

[39] Given ADF's experience in the *Foothill* case, HHS is rightly concerned that absent more expansive interpretations of federal conscience protections, including the Weldon Amendment, many may be "dissuaded from complaining about religious discrimination in the health care setting to OCR." 83 Fed. Reg. at 3891.

[40] Joseph Story, Commentaries on the Constitution of the United States § 1870 (1833).

with the Office for Civil Rights's "investigations, reviews, or enforcement actions," and requiring that federal funding recipients provide notice to individuals and entities regarding extant conscience protections and "associated anti-discrimination rights," are just what is needed to effectuate the intent behind these conscience protections. *Id.* ADF further believes that HHS's greatly increased—and comprehensive—enforcement mechanisms, which propose to "use enforcement tools otherwise available in civil rights law," places the right to conscience where it properly belongs, given its historical pedigree as a right central to the founding of our nation and central to the proper practice of medicine for millennia. *Id.* at 3880.

Put simply, then, ADF believes that HHS's new proposed regulations represent an excellent regulatory blueprint for achieving the goal of finally protecting the right to conscience of medical professionals, at least as to those statutory conscience protections currently on the books.[41] With this general approbation in mind, ADF offers two modest suggestions in closing. Because increasing advances in science and medical capabilities almost certainly guarantee that conflicts of conscience will continue to grow in frequency, more healthcare personnel and more medical procedures will be implicated in the present or the very near future.[42] HHS should therefore resist any attempt by prospective commenters to dilute the expansive definitions advanced in its proposed regulations—those definitions should include

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[41] Of course, as detailed in its *Free to Do No Harm: Conscience Protections for Healthcare Professionals*, 49 Ariz. St. L.J. 549, 601-605 (2017), ADF strongly believes that extant federal conscience protections need to be greatly expanded to cover more practitioners and assistants and more medical procedures or services, given the ever-increasing universe of potentially problematic medical procedures and services we are seeing in our day-to-day practice. For instance, ADF believes that Congress should modify existing statutory protections to provide for a private right of action for aggrieved individuals, along with greatly expanding the range of individuals and medical procedures covered in law. ADF realizes that that it is not the province of a regulatory agency like HHS to unilaterally impose such changes in its proposed regulations, but mentions the need for such changes here in the hopes that HHS's proposed regulations will prove to be a precursor for the necessary changes and expansions to come. *See* supra at n. 32.

[42] *See* Wardle, *Present, Past, and Future*, 9 Ave Maria L. Rev. at 2–3 (2010) (listing a panoply of modern medical procedures and medications that may implicate conscience objections, including "human stem cell research; cloning; genetic engineering (including gender pre-selection); DNA screening and medical treatment for various genetic disorders; surgical abortion (by a variety of procedures including so-called "partial-birth abortion"); pharmaceutical abortion (by such pills as RU-486 and the "morning after pill" (MAP)); sterilization; capital punishment; assisted suicide; sex-change procedures; provision of contraceptives to minors; and provision of assisted reproduction technologies"); Edmund D. Pellegrino, *The Physician's Conscience, Conscience Clauses, and Religious Belief: A Catholic Perspective*, 30 Fordham Urb. L.J. 221, 244 (2002) (predicting that "[a]s medical technology endows humans with ever greater power . . . crises of conscience will surely increase for those who hold religious beliefs about human life, its creation, and ending").

each and every category of practitioner and allied health professional (including institutions), along with every medical procedure or healthcare service, that are conceivably encompassed by extant federal conscience protections. HHS should also resist any attempts to render its proposed notice provisions, enforcement mechanisms, and available penalties less effective—the trend toward viewing conscience as an acceptable right only when it comports with one's worldview is ultimately unsustainable and must be rejected in favor of a system that steadfastly enforces conscience as a paramount right

CONCLUSION

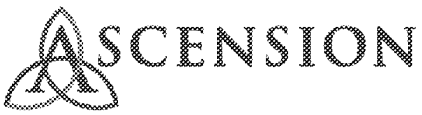
ADF commends HHS for promulgating these proposed regulations, and appreciates its recognition that it is long past due that the federal statutory protections for conscience be widely broadcast and properly enforced. The comprehensive regulations proposed by HHS are in ADF's estimation an excellent start toward reviving the primacy of conscience, not only in medicine, but more broadly as a right worth protecting in all spheres of life. ADF expects that by robustly protecting the conscience of the medical practitioner and allied health professionals, HHS will illustrate that conscience and the practice of medicine are not part of a zero sum game—indeed, it is possible to both protect this paramount right and at the same time ensure that the medical needs of all patients are met with skill and all necessary speed.

Sincerely,

Kevin H. Theriot

Kevin Theriot
Sr. Counsel, Vice President of
Center for Life
ALLIANCE DEFENDING FREEDOM
480-444-0020
ktheriot@ADFlegal.org

Exhibit 3



March 27, 2018

The Honorable Alex M. Azar II
U.S. Department of Health and Human Services
Office for Civil Rights
Attention: Conscience NPRM, RIN 0945-ZA03
Hubert H. Humphrey Building
Room 509F
200 Independence Avenue SW
Washington, DC 20201

Submitted electronically to: http://www.regulations.gov

RE: Docket HHS-OCR-2018-0002, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority

Dear Secretary Azar:

On behalf of Ascension, I welcome the opportunity to submit input on the proposed rule entitled, *Protecting Statutory Conscience Rights in Health Care; Delegations of Authority*[1], which seeks to ensure that no persons or entities in the practice of healthcare are subjected to practices or policies that violate conscience, coerce, or discriminate, in violation of applicable Federal laws. We applaud the Department of Health and Human Services (HHS) and the Office for Civil Rights (OCR) for taking steps to protect the religious freedoms of all Americans, especially when it comes to healthcare workers and organizations that are called by their faith to serve *all* persons, especially those who are poor and vulnerable.

Ascension is a faith-based healthcare organization dedicated to transformation through innovation across the continuum of care. As the largest non-profit health system in the U.S. and the world's largest Catholic health system, Ascension is committed to delivering compassionate, personalized care to all, with special attention to persons living in poverty and those most vulnerable. In FY2017, Ascension provided more than $1.8 billion in care of persons living in poverty and other community benefit programs. Ascension includes approximately 165,000 associates and 40,000 aligned providers. Ascension's Healthcare Division operates more than 2,600 sites of care – including 153 hospitals and more than 50 senior living facilities – in 22 states and the District of Columbia, while its Solutions Division provides a variety of services and solutions including physician practice management, venture capital investing, investment management, biomedical engineering, facilities management, clinical care management, information services, risk management, and contracting through Ascension's own group purchasing organization.

[1] OCR, *Protecting Statutory Conscience Rights in Health Care; Delegations of Authority*, 83 Fed. Reg. 3880 (Jan. 26, 2018).

Faith-based organizations are a crucial component of our nation's healthcare system, with one in six hospital patients being cared for in Catholic hospitals each year. We are not only ensuring access to care for those most in need – we are on the forefront of driving delivery system transformation toward value-based care and promoting healthy communities. Our providers and facilities serve all comers, most especially those persons who are vulnerable and at the margins of society.

To that end, Ascension's Mission has not changed since we were founded nearly 20 years ago:

> Rooted in the loving ministry of Jesus as healer, we commit ourselves to serving **all persons** with special attention to those who are poor and vulnerable. Our Catholic health ministry is dedicated to spiritually-centered, holistic care which sustains and improves the health of individuals and communities. We are advocates for a compassionate and just society through our actions and our words. (Emphasis added.)

We envision a strong, vibrant Catholic health ministry in the United States which will lead to the transformation of healthcare. We work daily to ensure service that is committed to health and well-being for our communities and that responds to the needs of individuals throughout the life cycle. Our core Values include service of the poor, integrity, wisdom, creativity, dedication, and reverence – which we define as respect and compassion for the dignity and diversity of life.

With our Mission, Vision, and Values always at the forefront of everything we do, we are committed to improving quality of care and addressing rising costs while improving patient and provider satisfaction. Upholding and enforcing the religious freedoms granted by law and our Constitution to both individuals and faith-based institutions will provide an important new protection for all mission-driven healthcare providers. Ensuring that providers can practice medicine and serve their communities in a manner consistent with their faith allows these individuals and organizations to continue providing high quality care for all persons, especially those living in poverty and the most vulnerable among us.

As a ministry of the Catholic Church, Ascension adheres to Catholic moral teaching and the *Ethical and Religious Directives for Catholic Health Care Services* (ERDs).[2] The ERDs recognize first and foremost that "The Catholic health care ministry is rooted in a commitment to promote and defend human dignity; this is the foundation of its concern to respect the sacredness of every human life from the moment of conception until death. The first right of the human person, the right to life, entails a right to the means for the proper development of life, **such as adequate health care**… [and a] just health care system will be concerned both with promoting equity of care—to assure that the right of each person to basic health care is respected—and with promoting the good health of all in the community."[3] This right inures to all persons and we treat all patients who come to our doors. However, the Federal healthcare

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[2] *See,* United States Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Care Services (Fifth Edition)*, 2009, Part One, n. 5. Available at: http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services-fifth-edition-2009.pdf

[3] *Ibid.* (Part One, Introduction).

provider conscience protection statutes have long recognized that there are certain procedures that do not and never will comply with our beliefs about human dignity and the common good or the ERDs.

We therefore appreciate that OCR has taken steps to streamline enforcement of the Federal healthcare provider conscience protection statutes and offer the following comments and recommendations for your consideration.

As a member of the Catholic Health Association (CHA), we associate ourselves closely with their comments. We think it important to emphasize our commitment to serve all by quoting specifically from CHA's comments, which state this commitment so well:

> Our members are committed to providing health care services to any person in need of care, without regard to race, color, national origin, sex, age, or disability, or any other category or status. Every individual seeking health care should always be treated with kindness and respect, and failure to do so because of discomfort with or animus against an individual on any basis is unacceptable.

Ascension wholeheartedly endorses this statement of inclusion.

Definitions

Consistent with CHA's comments, Ascension supports the proposed definition of health care entity. We believe the expansive definition and use of an illustrative, rather than exhaustive, list will allow Catholic healthcare entities to diversify if they so choose. In particular, we support inclusion of the term "plan sponsor" in this definition, which will ensure that faith based entities sponsoring a health plan are not put in the untenable position of funding services or procedures that otherwise violate their religious beliefs. We also support the proposed definition of "referral", which similarly ensures Catholic entities can maintain compliance with Catholic moral teaching and the ERDs that "Catholic health care institutions are not to provide abortion services, even based upon the principle of material cooperation."[4]

Assurance and Certification of Compliance Requirements

For the reasons noted above, we support application of existing assurance and certification requirements to the Federal health care conscience and associated anti-discrimination laws. We agree that this requirement – which is analogous to those that apply with respect to other civil rights laws – provides a demonstrable way of ensuring applicants for Federal funding know of, and attest that they will comply with, applicable Federal health care conscience and associated anti-discrimination laws.

While we support the acknowledgment by covered entities of their obligations, we strongly encourage HHS to ensure that the final rule does not increase administrative burden more than

[4] *Ibid.* (Part Four, n. 45).

a *de minimis* amount by leveraging existing approaches. We support building this requirement into the HHS-690 Form, which currently identifies several Federal civil rights statutes with which applicants and recipients must assure compliance. We believe adding the Federal health care conscience and associated anti-discrimination laws to the HHS-690 Form makes sense without adding undue burden.

Notice Requirement

Again, consistent with CHA's comments, we support the proposed requirement that the Department and each recipient must post the specified notice text on the Department's and recipient's website(s), and in a physical location of each Department and recipient establishment where notices to the public and notices to their workforce are customarily posted. We ask, however, that HHS clarify whether and to what extent such notice will be subject to translation requirements.

Compliance Requirements

While we do not oppose the proposed requirement that applicable entities maintain complete and accurate records evidencing compliance with Federal health care conscience and associated anti-discrimination laws, and afford OCR, upon request, reasonable access to such records and information in a timely manner, we would urge OCR to more clearly specify the parameters envisioned around document retention in order to support compliance. Specifically, OCR should provide clarification on how long such records should be maintained, in what form and manner OCR expects them to be retained, and any other specifics that might assist entities in providing OCR with the appropriate amount and kind of documentation desired.

In addition, we agree with the American Hospital Association's (AHA's) comment that it may be unnecessary to require recipients to report reviews, investigations, and complaints to any component of the Department from which it receives funding and to require recipients seeking new or renewed funding to report reviews, investigations, and complaints from the prior five years. OCR and other parts of HHS will already have access to the investigative history, and the goal of this regulation should be to maximize compliance while minimizing administrative cost and burden. Consistent with the Administration's commendable desire to provide regulatory relief to the private sector, we encourage the Department to achieve its and our goal of universal compliance by choosing the least burdensome method possible to encourage such compliance.

Enforcement Authority

Consistent with CHA's comments, we support the proposal to give OCR discretion to use a variety of different enforcement mechanisms with respect to the Federal health care conscience and associated anti-discrimination laws, up to and including restricting funds for noncompliant entities in whole or in part. We strongly believe OCR should have the authority to pursue intermediate sanctions as well, and the proposed rule would make that explicit. We believe any entity which is accused of a violation of the Federal health care conscience and associated anti-discrimination laws should have the opportunity to dispute such allegations before any action is

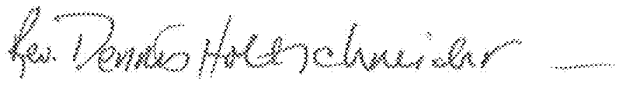
taken to suspend, terminate, or preclude future Federal funding – especially given that such funds are often used to care for poor and vulnerable populations.

In alignment with both CHA and AHA, Ascension similarly supports implementation of appropriate due process for those who are alleged to have violated conscience rights laws prior to the suspension, termination, or preclusion of Federal funding. Notice, hearing, and appeal procedures similar to those established for other civil rights laws, like Title VI, would be entirely appropriate.

Conclusion

Ascension thanks you for the opportunity to comment on the proposed regulatory revisions. If you have any questions, please contact Peter Leibold, Chief Advocacy Officer, at peter.leibold@ascension.org or 202.898.4680.

Sincerely,



Reverend Dennis H. Holtschneider, C.M.
Executive Vice President and Chief Operations Officer
Ascension

Exhibit 4

NATIONAL CATHOLIC BIOETHICS CENTER

FIRST LIBERTY

Thomas More SOCIETY

THEALLIANCE

Via Electronic Submission

March 27, 2018

U.S. Department of Health and Human Services
Office for Civil Rights
Attention: Conscience NPRM, RIN 0945-ZA03
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue, SW
Washington, DC 20201

RE: Public Comment Supporting Proposed Rule "Protecting Statutory Conscience Rights in Health Care," RIN 0945-ZA03

To Whom It May Concern:

On behalf of the National Catholic Bioethics Center, the National Association of Catholic Nurses, U.S.A., Thomas More Society, the Christian and Missionary Alliance, the Alliance Community for Retirement Living, Town and Country Manor, Shell Point Retirement Community, and Chapel Pointe, First Liberty Institute[1] submits the following comments in support of the proposed rule entitled "Protecting Statutory Conscience Rights in Health Care." 83 Fed. Reg. 3880 (Jan. 26, 2018). We are a diverse group of faith-based ministries supportive of religious and conscience rights in healthcare.

[1] First Liberty Institute is a non-profit law firm dedicated to defending and protecting religious freedom for all Americans.

We applaud the Department of Health and Human Services ("the Department") for creating its new Division on Conscience and Religious Freedom as well as for promulgating a proposed rule designed to protect conscience rights in healthcare. For the wellbeing of patients and the integrity of the profession, doctors, nurses, and other healthcare professionals must be free to practice medicine in accordance with their professional judgment and ethical beliefs. Without conscience protections such as this rule, healthcare professionals throughout the country risk discrimination for refusing to perform, facilitate, or refer for procedures that they believe are unethical.

The proposed rule is designed to implement twenty-five currently existing federal statutory conscience rights, including the Church Amendments[2], the Coats-Snow Amendment[3], the Weldon Amendment[4], and Section 1553 of the Affordable Care Act[5]. These statutes primarily provide conscience protections for those who hold religious or moral objections to abortion, sterilization, or euthanasia. The proposed rule ensures that presently existing laws protecting healthcare providers are implemented and enforced by the Department.

We write to emphasize the importance of this rule in preventing discrimination against healthcare professionals. We begin by explaining that it is the responsibility of the Department to ensure that existing conscience protections are enforced. We continue by exploring the constitutionality of the proposed rule. We conclude by documenting examples of violations against conscience rights in healthcare, indicating that the threat to conscience rights is rising.

I. The Department's Responsibility to Ensure Conscience Protections Are Implemented

Over the past five decades, twenty-five federal laws protecting conscience rights in healthcare have been enacted into law. These have been enacted by Democratic administrations and Republican administrations, and many have enjoyed bipartisan support.[6]

However, for the past several years, these statutes have not been vigorously enforced.[7] Perhaps due to a lack of enforcement, there has been a rise in intolerance toward individuals seeking to exercise their conscience rights and a general lack of awareness about the conscience rights of healthcare practitioners. The sharp increase in administrative complaints over the past

[2] 42 U.S.C. § 300a-7.
[3] 42 U.S.C. § 238n.
[4] *See, e.g.*, Consolidated Appropriations Act, 2017, Pub. L. 115-31, Div. H, sec. 507(d), 131 Stat. 135.
[5] 42 U.S.C. § 18113.
[6] For example, the Coats-Snowe Amendment was signed into law by President Clinton in 1996.
[7] For example, the previous administration proposed rescinding an administrative rule protecting conscience rights, 74 Fed Reg. 10207 (Mar. 10, 2009), and promulgated a final rule that struck most of the initial rulemaking. 76 Fed. Reg. 9968 (Feb. 23, 2011).

year shows that without an administrative enforcement mechanism, coercions of conscience may continue unchecked.

Administrative enforcement is necessary to ensure that existing conscience statutes carry the force of law. Some courts have held that certain conscience protections, such as the Church Amendments, lack a private right of action.[8] Thus, individuals whose conscience rights have been violated may not be able to seek redress in court. Instead, they are dependent upon agency enforcement of conscience rights.

Even in instances where there exist private rights of action, the burden of litigation and the fear of retaliation may deter many individuals from seeking to vindicate their rights in the court system. Administrative enforcement of conscience rights can help to assuage these concerns and encourage compliance with the law.

II. Constitutionality of the Proposed Rule

The proposed rule fully comports with the requirements of the First Amendment to the United States Constitution by ensuring that existing federal conscience protections are enforced. The First Amendment protects our freedom of conscience in addition to our freedom of religion.[9] In fact, the Supreme Court of the United States has stated that an "individual's freedom of conscience" is "the central liberty that unifies the various Clauses in the First Amendment."[10] The Court has recognized that it is important to "preserv[e] freedom of conscience to the full."[11]

Conscience protection laws are common, particularly in the realm of healthcare law. In the wake of *Roe v. Wade*, the federal government and state governments passed a number of laws respecting the right not to be compelled to facilitate abortions.[12] At the same time, the Supreme Court repeatedly recognized that the substantive due process requirements created in *Roe v. Wade* did not require objecting states or local governments to pay for or promote abortions.[13] Neither did the ruling require taxpayers pay for abortions.[14]

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[8] *See, e.g.*, *Cenzon-DeCarlo v. Mount Sinai Hosp.*, 626 F.3d 695 (2d Cir. 2010).
[9] The first draft of the First Amendment, other states' constitutions, and other founding documents refer to the sacred right of conscience as synonymous or closely related to the right of religious freedom. *See* Daniel L. Dreisbach & Mark David Hall, *The Sacred Rights of Conscience: Selected Readings on Religious Liberty and Church-State Relations in the American Founding*, Indianapolis, IN: Liberty Fund Press, 2009.
[10] *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 341 n.2 (1987) (Brennan, J., concurring) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 50 (1985)).
[11] *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 646 (1943).
[12] *See* Denise M. Burke & Anna Franzonello, *Healthcare Rights of Conscience: A Survey of Federal and State Law*, http://www.aul.org/wp-content/uploads/2012/04/survey-fed-state-law.pdf.
[13] *Beal v. Doe*, 432 U.S. 438, 445-46 (1977); *Maher v. Roe*, 432 U.S. 464, 477 (1977); *Poelker v. Doe*, 432 U.S. 519, 521 (1977).
[14] *See Harris v. McRae*, 448 U.S. 297, 326 (1980)

As with all other civil rights protected by federal law, religious and conscience rights are often protected through anti-discrimination regulations. For instance, the Department of Justice has promulgated regulations protecting individuals against race discrimination implementing the Title VI of the Civil Rights Act of 1964,[15] and the Department of Education has promulgated regulations protecting against sex discrimination implementing Title IX of the Education Amendments of 1972.[16] Statutes such as the Church Amendments operate in a similar way as other civil rights statutes, by protecting individuals against discrimination including coerced violations of deeply held beliefs against abortion. This proposed rule adopts the enforcement procedures for other civil rights laws and applies them to existing federal law respecting conscience rights.

III. Conscience Rights are Incompatible with Compelled "Referrals"

The provider, physician, or practitioner who refuses to perform an objectionable procedure for reasons of religious or moral conviction should never be compelled to "refer" the requesting person to an alternative provider, physician, or practitioner known or believed to provide the objectionable procedure.

Many healthcare professionals consider referrals for an objected-to procedure the moral equivalent of having done the objected-to procedure oneself. To them, it is tantamount to arranging for someone else to do what one considers to be immoral.[17]

Recently, healthcare professionals in Vermont brought a lawsuit in order to ensure that they were not compelled to refer suicide-seeking patients to physicians known to perform "assisted suicide"—in direct violation of their religious or moral conviction. After much effort, the Vermont physicians obtained a stipulated agreement that they would not have to refer for physician assisted suicide.[18] Retaining clear and strong prohibitions against required referrals eliminates the need for conscientious healthcare professionals to resort to litigation.

Because of the moral weight of referrals, the proposed rule gives an appropriately broad definition of the term "referral":

> *Referral* or *refer for* includes the provision of any information (including but not limited to name, address, phone number, email, website, instructions, or description) by any method (including but not limited to notices, books, disclaimers, or pamphlets, online or in print), pertaining to a health care service, activity, or procedure, including related to availability, location, training, information resources, private or public funding or financing, or directions that could provide any assistance in a person obtaining, assisting, training in, funding,

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[15] 42 U.S.C. § 2000d.
[16] 20 U.S.C. § 1681.
[17] *Transfer of Care vs. Referral: A Crucial Moral Distinction*, THE NATIONAL CATHOLIC BIOETHICS CENTER (May 1, 2015), https://www.ncbcenter.org/resources/news/transfer-care-vs-referral-crucial-moral-distinction/ (noting that a patient always retains the right to be transferred to an alternate provider of the patients selection).
[18] Consent Agreement and Stipulation, *Vermont Alliance for Ethical Healthcare, Inc. v. Hoser*, No. 5:16-cv-205 (D. Vt., May 3, 2017).

> financing, or performing a particular health care service, activity, or procedure, where the entity or health care entity making the referral sincerely understands that particular health care service, activity, or procedure to be a purpose or possible outcome of the referral.[19]

The current broad scope of referral should be maintained in order to allow healthcare professionals to best abide by their own professional and ethical judgment. No one should be forced to refer against their conscience.

IV. Examples of Widespread Discriminatory Conduct Violating Conscience Rights in Healthcare

The Department wrote that it is seeking information, including any facts, surveys, audits, or reports, about the occurrence or nature of coercion, discriminatory conduct, or other violations of the Federal health care conscience and associated anti-discrimination laws. We would like to provide the following examples of discrimination against religious health care practitioners in response to the Department's request.

First Liberty Institute has represented or advised multiple healthcare professionals or organizations seeking to freely exercise their religious conscience rights without discrimination:

- First Liberty represented Dr. Byron Calhoun, a medical doctor who was discriminated against because of his pro-life volunteer work. Dr. Calhoun is a West Virginia University School of Medicine Professor and Vice Chairman of the Department of Obstetrics and Gynecology at the West Virginia University Hospital's Charleston Division. He volunteered his personal time to act as a national medical advisor for the National Institute of Family and Life Advocates, a pro-life advocacy group, due to his religious convictions on the sanctity of life. After Dr. Calhoun's involvement received media attention, the university threatened him with a written, professional reprimand. However, after First Liberty intervened, the university withdrew its threat of reprimand for engaging in pro-life activities, and the university claimed it never officially filed the reprimand against Dr. Calhoun, despite having provided him with a copy.[20]

- First Liberty represented a Catholic health educator who was terminated after being previously granted a conscience protection in the form of a minor religious accommodation. The accommodation allowed her to focus on teaching about chronic health conditions and exempted her from personally teaching about contraceptive use. She was told to "put aside" her "personal beliefs" and teach the class or be terminated, even though other employees had volunteered to teach the birth control class. After First Liberty

[19] 83 Fed. Reg. 3880, 3924.
[20] For more information, *see* https://firstliberty.org/cases/calhoun/.

filed an EEOC charge, an amicable resolution was reached that respected free speech and religious liberty.[21]

- First Liberty Institute represented three faith-based pregnancy resource centers ("PRCs") and filed a lawsuit challenging a 2010 Austin law requiring PRCs that oppose abortion and certain forms of birth control to post false and misleading signs at their front entrances. A federal district court held that Austin's ordinance was unconstitutionally vague, and Austin was forced to pay almost a half-million dollars as a result of their violation of the PRCs' constitutional rights.[22]

- First Liberty protected multiple clients' conscience rights through litigation against the HHS Abortifacient Mandate (the "Mandate"). First Liberty sought and received injunctive relief from the Mandate's requirement that client churches and faith-based ministries facilitate the coverage and dispensation of abortifacients that violated the sincerely held religious beliefs of Insight for Living Ministries, The Christian and Missionary Alliance Foundation, Inc. d/b/a Shell Point Retirement Community, The Alliance Community for Retirement Living, Inc., The Alliance Home of Carlisle Pennsylvania d/b/a Chapel Pointe at Carlisle, Town and Country Manor of the Christian and Missionary Alliance, Simpson University, and Crown College.[23]

- First Liberty filed an amicus brief in support of the Stormans family, who operate Ralph's Thriftway in Olympia, Washington, and hold religious beliefs against dispensing abortion-causing drugs. The Ninth Circuit ordered the pharmacy to dispense these drugs. The Stormans appealed to the Supreme Court to protect their right to follow their conscience rather than be forced to be complicit in ending a human life. The amicus brief was signed by forty-three (43) members of Congress. The Supreme Court declined to hear the case.[24]

- First Liberty attorneys counseled a Texas physician who declined to refill the Viagra® and Levitra® prescriptions for an unmarried man based on sincerely held religious beliefs but immediately provided a referral to two urologists who would refill the prescription. After reviewing the patient's complaint, the evidence, the jurisprudence arising under the Texas Religious Freedom and Restoration Act, the Texas Medical Board determined that the allegations did not violate the Medical Practice Act.

[21] For more information, *see* https://firstliberty.org/cases/palma/.
[22] *Austin Lifecare, Inc. v. City of Austin*, No. A-11-CA-875-LY (W.D. Tex. June 23, 2014).
[23] For more information, *see* https://firstliberty.org/cases/hhs-mandate/.
[24] *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009).

- First Liberty attorneys have counseled myriad other healthcare practitioners, professionals, and organizations regarding rights of conscience vis-à-vis abortion, contraception, fertility treatments, hormone therapies, and end-of-life medical directives.

In addition to the cases and controversies cited above, the following examples evince the pervasive and growing discrimination and hostility against religious healthcare practitioners or conscience rights generally:

Abortion

- In 2018, Washington state legislature passed a bill (SB 6219) requiring insurance plans to provide coverage for abortions if they provide coverage for maternity care. It also requires coverage of sterilizations and contraceptives, including abortion-inducing drugs. The bill has not yet been signed by the governor.[25]

- Baltimore's city council passed an ordinance that compelled limited-service PRCs, such as those maintained by religious organizations, to post signs stating that they do not provide or make referrals for abortion or birth control services. Claiming the church's free speech, free exercise of religion, and equal protection rights were violated, the Roman Catholic Congregation, Inc., and the Greater Baltimore Center for Pregnancy Concerns, Inc., sued the city. In 2018, the Fourth Circuit affirmed a decision holding the law unconstitutional.[26]

- In 2016, Illinois amended its Health Care Right of Conscience Act to require doctors and other healthcare personnel to explain the benefits of abortions, contraceptives, and sterilizations, even if such procedures are contrary to his or her conscience. Several doctors and clinics in Illinois filed a lawsuit challenging the new law. A state judge and a federal judge have issued preliminary injunctions against the amendment.[27]

- The American Civil Liberties Union ("ACLU") sued Trinity Health Corp., a Catholic hospital group with eighty-six hospitals in twenty-one states, because the Catholic hospitals would not violate their religious beliefs by performing abortions. A federal judge dismissed the lawsuit, holding that the ACLU had no standing to sue the Catholic hospitals.[28]

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[25] *SB 6219*, WASHINGTON STATE LEGISLATURE (last viewed Mar. 26, 2018), available at http://app.leg.wa.gov/billsummary?BillNumber=6219&Year=2017.
[26] *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, No. 16-2325 (4th Cir. Jan. 5, 2018).
[27] *The Pregnancy Care Center of Rockford v. Rauner*, No. 2016-MR-741 (Ill. Ckt. Ct., Dec. 20, 2016); *Nat. Inst. of Family & Life Advocates v. Rauner*, No. 3:16-cv-50310 (N.D. Ill. July 19, 2017).
[28] *Am. Civil Liberties Union v. Trinity Health Corp.*, No. 15-cv-12611 (E.D. Mich., Apr. 11, 2016).

- In 2014, California issued a new interpretation of the Knox-Keene Act requiring all organizations, including churches with religious objections to abortion, to provide insurance coverage for abortion if they cover maternity services. Three churches filed a lawsuit against the California Department of Managed Health Care challenging the requirement that the churches violate their religious beliefs by providing coverage for abortions.[29]

- The University of Medicine and Dentistry of New Jersey adopted a policy that requires all nursing students to participate in abortion procedures, even if it is against their religious convictions. A group of nurses filed suit against the university in November 2011, alleging Fourteenth Amendment and medical personnel rights violations. The case settled, and the nurses may now refuse to participate in abortions for religious reasons.[30]

- A nurse at Mount Sinai Hospital in New York was forced to participate in a late-term abortion against her conscience and religious convictions. She was threatened with severe penalties including termination and loss of license if she refused to participate in the abortion. Following a request from her attorneys, the U.S. Department of Health and Human Services investigated the hospital for civil rights violations. Mount Sinai Hospital now has a policy that no person can be forced to participate in an abortion against that person's conscience.[31]

- The Department's rule implementing Section 1557 of the Affordable Care Act declined to include a religious conscience exemption and instead required religious practitioners to sue in order to vindicate their conscience rights. The rule interpreted sex discrimination to include discrimination based upon "termination of pregnancy" or gender identity, which could be interpreted to require doctors to perform abortions or gender transitions, even if they do not believe it to be in the best interest of the patient and even if doing so would violate the doctor's religious beliefs. A group of religious health care systems and states filed a lawsuit, which resulted in an injunction against the rule.[32]

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[29] *Foothill Church v. Rouillard*, No. 2:15-cv-02165 (E.D. Cal., Oct. 23, 2017).
[30] *See* Seth Augenstein, *UMDNJ, 12 Nurses Settle Lawsuit Claiming They Were Forced to Assist with Abortions*, NJ.COM (DEC. 22, 2011), http://www.nj.com/news/index.ssf/2011/12/umdnj_settles_with_nurses_over.html.
[31] *Cenzon-DeCarlo v. Mount Sinai Hosp.*, 626 F.3d 695 (2d Cir. 2010).
[32] *Franciscan All., Inc. v. Burwell,* No. 7:16-cv-108 (N.D. Tex., filed Aug. 23, 2016); *see also The Jurisprudence of the Body: Conscience rights in the Use of the Sword, Scalpel, and Syringe*, 21 TEX. REV. LAW & POL. 409 (2017).

- After a patient gave birth to a healthy baby, she complained that a doctor at Mercy Regional Medical Center had advised her to consider abortion. In response, the Catholic hospital's chief medical officer instructed the doctor not to recommend abortions in order to uphold the hospital's religious, pro-life stance. The ACLU demanded that the state Department of Public Health and Environment investigate and end the hospital's policy.[33]

- The American Civil Liberties Union ("ACLU") filed a lawsuit in 2016 against the U.S. Department of Health and Human Services as part of an effort to force Roman Catholic relief agencies to refer immigrants for abortions and contraceptives, in violation of Catholic religious beliefs.[34]

- California passed the Reproductive FACT Act, which requires pro-life pregnancy centers to display notices advertising California programs that provide state-subsidized abortions. Several lawsuits have been filed challenging the Reproductive FACT Act, and several pro-life pregnancy centers have announced that advertising abortions violates their religious beliefs and they would either close or refuse to obey such a law. The case is currently pending before the Supreme Court of the United States.[35]

Sterilization

- The American Civil Liberties Union ("ACLU") on behalf of Rachel Miller threatened to sue a Dignity Health Catholic hospital in Redding, California. The hospital initially refused to allow a doctor to conduct a sterilization procedure in its facilities because Catholic doctrine teaches that voluntary sterilization is gravely immoral. After the ACLU threatened to sue, the hospital allowed the procedure to go forward.[36]

Contraceptives and Abortion-Inducing Drugs

- Dr. Doris Fernandes, a Catholic physician working in Philadelphia's District Health Center, was fired for refusing to prescribe contraceptives or abortion-causing drugs. Patients seeking these drugs would be transferred to another physician at the clinic. In 2013, Dr. Fernandes was terminated after refusing to obey an order to begin prescribing

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[33] *See ACLU: Durango Hospital Illegally Bans Abortion Discussion*, CBS Denver (Nov. 13, 2013), http://denver.cbslocal.com/2013/11/13/aclu-durango-hospital-illegally-bans-abortion-discussion/.
[34] *Am. Civil Liberties Union of N. Cal. v. Burwell*, No. 3:16-cv-03539 (N.D. Cal., filed June 24, 2016); *see also Am. Civil Liberties Union of Mass. v. Sebelius*, No. 1:09-cv-10038-RGS (D. Mass., Mar. 23, 2012) (involving a similar case out of Massachusetts).
[35] *Nat. Inst. of Family & Life Advocates v. Becerra*, No. 16-1140.
[36] Bob Egelko, *Catholic Hospital Backs Down on Tubal Ligation Refusal*, SF GATE (Aug. 24, 2015), https://www.sfgate.com/health/article/Catholic-hospital-backs-down-on-tubal-ligation-6463205.php.

contraceptives. Following a lawsuit, Dr. Fernandes received a settlement in which the city agreed to respect the deeply held religious beliefs of medical providers.[37]

- For six years, Walgreens accommodated Pharmacist Dr. Philip Hall's deeply held religious beliefs, including his strong objection to the dispensation of abortion-inducing drugs. When customers asked for these drugs, he either referred them to another pharmacist there or another nearby pharmacy. However, in August 2013, Walgreens attempted to coerce Hall to violate his religious beliefs. After he was fired, Hall filed a lawsuit in federal court to protect his religious freedom. The case settled.[38]

- Pharmacists Luke Vander Bleek and Glen Kosirog filed a lawsuit after Governor Rod Blagojevich issued an "Emergency Rule" stating that pharmacists cannot refuse to fill prescriptions for emergency contraceptives. After a five year legal battle, an Illinois judge ruled that the "Emergency Rule" violated the First Amendment and the Illinois Religious Freedom Restoration Act.[39]

- An Illinois state trial court issued a temporary restraining order protecting a Catholic-owned business from state law requiring contraceptive coverage in its health care plans to employees. The court held that the law imposes a substantial burden on the free exercise of religion.[40]

- Eight faculty members of Belmont Abbey College filed a complaint with the Equal Employment Opportunity Commission ("EEOC") because the college declined to provide coverage for contraceptives in accordance with Catholic teachings. After initially ruling in support of the college, the EEOC then reversed its opinion and declared the college had engaged in sex discrimination by denying oral contraceptives to its female employees.[41]

- A pharmacist was fined over $20,000 and had restrictions placed on his license after he refused to give a patient oral contraceptives because their use is against his religious beliefs as a Roman Catholic.[42]

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[37] *Fernandes v. City of Philadelphia,* No. 2:14-cv-05704 (E.D. Pa., filed Oct. 7, 2014).
[38] *Hall v. Walgreen Company*, No. 2:14-cv-00015 (M.D. Tenn. Feb. 19 2015).
[39] *Morr-Fitz, Inc. v. Blagojevich*, No. 2005-495 (Ill. Ck. Ct. Apr. 5, 2011).
[40] *Yep v. Ill. Dep't of Ins.*, No. 2012 CH 5575 (Dupage Co. IL Cir. Ct., Jan. 15, 2013).
[41] *See* Patrick J. Reilly, *Look Who's Discriminating Now*, WALL STREET JOURNAL (Aug. 13, 2009), https://www.wsj.com/articles/SB10001424052970203863204574346833989489154.
[42] *Noesen v. Dep't. of Regulation & Licensing*, 311 Wis. 2d 237 (Wis. Ct. App. 2008).

V. Conclusion

As the Department considers modifications to the rule, we urge the Department to continue to provide broad protections for religious freedom. Healthcare practitioners must be free to work in a way that is consistent with their ethical beliefs and professional judgments in order to be able to provide the best care to their patients. This proposed rule serves to protect First Amendment religious freedom rights, healthcare professionals' capacity to uphold the tenets of the Hippocratic Oath, and the ethical integrity of the medical profession.

Thank you for your consideration of these comments.

Respectfully submitted,

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Dirk DeWolfe
Executive Director
Town and Country Manor

Martin Schappell
President and CEO
Shell Point Retirement Community

Deborah M. Sprague
Executive Director
Chapel Pointe

Exhibit 5

A Passionate Voice for Compassionate Care

March 27, 2018

Department of Health and Human Services
Office for Civil Rights
Attn: Conscience NPRM
RIN 0945-ZA03
Room 509F Herbert H. Humphrey Building
Washington, DC 20201

REF: RIN 0945-ZA 03
Protecting Statutory Conscience Rights in Health Care; Delegations of Authority: Proposed Rule, 83 Fed. Reg. 3880, January 26, 2018

Dear Sir or Madam:

The Catholic Health Association of the United States (CHA) is pleased to submit these comments in support of the referenced proposed rule to implement, enforce and promote awareness of existing Federal laws protecting conscience rights in the context of health care.

CHA is the national leadership organization of the Catholic health ministry, representing more than 2,000 Catholic health care sponsors, systems, hospitals, long-term care facilities and related organization across the continuum of care. CHA represents the largest not-for-profit provider of health care services in the nation:

- 1 in 6 patients in the United States is cared for in a Catholic hospital each year
- More than 5 million admissions to Catholic hospitals each year, including one million Medicaid admissions
- All 50 states and the District of Columbia are served by Catholic health care organizations
- Approximately 750,000 individuals are employed in Catholic hospitals

As a Catholic health ministry, our mission and our ethical standards in health care are rooted in and inseparable from the Catholic Church's teachings about the dignity of each and every human person, created in the image of God. Access to health care is essential to promote and protect the inherent and inalienable worth and dignity of every individual. These values form the basis for our steadfast commitment to the compelling moral implications of our heath care ministry and have driven CHA's long history of insisting on and working for the right of everyone to affordable, accessible health care. As lawmakers were developing the health care reform package that culminated in the passage of the Affordable Care Act, we made clear that our vision

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for health care demanded that everyone receive the same level and quality of care, without limits or variation based on age, race, ethnicity, or financial means, or one's health, immigration or employment status. Our members are committed to providing health care services to any person in need of care, without regard to race, color, national origin, sex, age, or disability, or any other category or status. Every individual seeking health care should always be treated with kindness and respect, and failure to do so because of discomfort with or animus against an individual on any basis is unacceptable. At the same time, we firmly believe that organizations and individuals should not be required to participate in, pay for, provide coverage for or refer for services that directly contradict their deeply held religious or moral beliefs and convictions.

For over two hundred years, individual and institutional Catholic health care providers have carried out this mission in a manner consistent with our religious and moral convictions, the source of both our work and the limits on what we will do. For the past several decades we have had the explicit protection of federal laws which defend our right to provide health care in accord with our convictions. CHA has long supported and worked for the enactment of conscience clause protections such as the Church Amendments, Section 245 of the Public Health Service Act, the Weldon Amendment and the Affordable Care Act. Legal protections such as these are essential for the continuation of both our own ministry and our nation's commitment to freedom of religion and of conscience. The lack of implementing regulations and of clarity concerning enforcement mechanisms for these laws has stymied their effectiveness. We welcome the proposed rule, which effectively reflects the intent and content of the underlying laws, and offer the following comments.

- **Definition of "health care entity" and "referral"**

We support the proposed definition of "health care entity." Including the terms "sponsor" and "third party administrator" clarifies that the Weldon amendment protections for provider-sponsored organizations, health maintenance organizations and health insurance plans are not limited only to the issuers of such plans but extend to the plan sponsors and third-party administrators. We also welcome the definition of "referral or refer for," which makes clear that providers cannot be compelled in any way to assist in the procurement of services which their religious and moral convictions would prevent them from performing.

- **Minimizing Administrative Burden**

The proposed rule would require certain recipients to submit written assurances and certifications of compliance with federal health care conscience and anti-discrimination laws. We believe this is appropriate and consistent with the requirements of other civil rights laws. The preamble notes that this requirement would be implemented through "modified versions of the applicable civil rights clearance forms … or similar forms that may be developed and implemented in the future." (83 Fed.Reg. 3896). We urge OCR to implement this requirement by amending the

existing forms relevant recipients are already required to submit, in order to minimize the administrative burden on recipients.

- **Compliance and Enforcement**

As indicated above, the lack of effective and reasonable enforcement mechanisms has been an obstacle to ensuring that the conscience protections intended by Congress in laws such as the Church Amendments, Section 245 of the Public Health Service Act, the Weldon Amendment and the Affordable Care Act have been fully realized. We support the broad range of enforcement options included in the proposed rule. We endorse the expressed preference for informal settlement among the parties when there appears to have been a failure to comply. When the withholding of federal funds is an appropriate enforcement option, we agree that there should be flexibility to suspend funding in whole or in part. We also believe it is important to establish meaningful due process measures, including forms of notice, hearing and appeal, when OCR finds a compliance violation that cannot be resolved informally.

- **Further clarification**

We suggest that the final rule provide further clarification in two areas.

We support the requirement to post notices concerning Federal health care conscience and associated anti-discrimination laws, and request clarification on what language translation requirements apply to such notices.

Certain conscience laws, such as the Weldon amendment, forbid States receiving federal funds from discriminating against health care entities because they decline to participate in certain services or procedures. The final rule should clarify that once a State receives federal funds, the non-discrimination requirement applies to all agencies and offices of the State whether or not the specific agency or office in question itself receives federal funds.

Thank you for the opportunity to provide comments on the proposed rule implementing key Federal conscience protections. If you should have any questions about these comments or would like additional information, please do not hesitate to contact Kathy Curran, Senior Director, Public Policy, at 202-296-3993.

Sincerely,

Sr. Carol Keehan, DC
President and CEO