

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

STATE OF NEW YORK, *et al.*,

Plaintiff,

v.

ALEX M. AZAR II, *et al.*,

Defendants.

No. 1:19-cv-04676-PAE

PLANNED PARENTHOOD FEDERATION
OF AMERICA, INC.; and PLANNED
PARENTHOOD OF NORTHERN NEW
ENGLAND, INC.,

Plaintiff,

v.

ALEX M. AZAR II, *et al.*,

Defendants.

No. 1:19-cv-05433-PAE

NATIONAL FAMILY PLANNING AND
REPRODUCTION HEALTH ASSOCIATION;
and PUBLIC HEALTH SOLUTIONS, INC.

Plaintiff,

v.

ALEX M. AZAR II, *et al.*,

Defendants.

No. 1:19-cv-05435-PAE

NOTICE OF FILING

Defendants submit this notice to inform the Court that they have supplemented the administrative record (“AR”) produced to Plaintiffs on July 22, 2019. Defendants made the supplemental materials available to Plaintiffs today, before 5:00 p.m., through a file transfer protocol that allows Plaintiffs to download them. The supplemental materials are largely described in the undersigned’s August 16, 2019 letter to the Court. *See* ECF No. 160. In addition to the materials described in that letter, however, Defendants have further supplemented the record to include ten documents consisting of portions of complaints submitted to the U.S. Department of Health & Human Services’ Office for Civil Rights (OCR). Defendants located these materials over the weekend during their quality check of the index of complaints submitted to OCR that Defendants agreed to provide to Plaintiffs. Defendants also note that—in addition to statutes, regulations, legal cases, Executive Orders, citations to the congressional record, and unacted bills—Defendants have excluded cited portions of the Federal Register, which are also not typically included in an administrative record.

Attached to this notice are the supplemental certification of Luis E. Perez that the AR is complete, a declaration executed by the undersigned, and an index to the supplemental AR materials.

Dated: August 19, 2019

Respectfully submitted,

JOSEPH H. HUNT
Assistant Attorney General

MICHELLE R. BENNETT
Assistant Branch Director

/s/ Bradley P. Humphreys

BRADLEY P. HUMPHREYS

(D.C. Bar No. 988057)

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Counsel for Defendants

Exhibit 1

CERTIFICATION

I, Luis E. Perez, state as follows:

1. I am Deputy Director of the Conscience and Religious Freedom Division of the Office for Civil Rights at the U.S. Department of Health and Human Services (HHS). I am familiar with the rule entitled *Protecting Statutory Conscience Rights in Health Care: Delegations of Authority*, 84 Fed. Reg. 23,170 (May 21, 2019) (2019 Final Rule), and the process by which HHS considered materials in finalizing that rule.
2. I certify to the best of my personal knowledge that the materials described below, together with the administrative record materials that Defendants provided on July 22, 2019, in the above captioned case (consisting of 546,163 pages), and with those publicly available materials otherwise referenced in the 2018 Proposed Rule, 83 Fed. Reg. 3,880 (Jan. 26, 2018) and in the 2019 Final Rule, which were referenced in the July 22, 2019, certification of the administrative record, constitute the complete administrative record for the 2019 Final Rule. The materials described below are as follows:
 - a. Materials regarding conscience protections in U.S. foreign assistance, including the United States President's Emergency Plan for AIDS Relief (PEPFAR) (approximately 119 pages).
 - b. Certain complaint records that were intended to be included in the administrative record on July 22, 2019 (approximately 43 pages).
 - c. Excel spreadsheets of meta-data automatically-generated by the E-Rulemaking Initiative's Federal Docket Management System for the public submissions on the 2018 NPRM, Protecting Statutory Conscience Rights in

Health Care; Delegations of Authority (Proposed Rule), 83 Fed. Reg. 3,880 (Jan. 26, 2018).

3. Additionally, based on HHS's review, and the representations of counsel for Defendants in the accompanying declaration of Bradley Humphreys, to the best of my knowledge and in good faith, I certify that the materials described in the accompanying Supplemental Index constitute a compilation of publicly available materials that were cited in the 2019 Final Rule, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23,170 (Mar. 21, 2019), and the 2018 NPRM Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 83 Fed. Reg. 3,880 (proposed Jan. 26, 2018), *excluding* statutes, regulations, Federal Register citations, legal cases, Executive Orders, the congressional record, and unenacted bills.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on August 19, 2019



Luis E. Perez
Deputy Director

Exhibit 2

DECLARATION OF BRADLEY P. HUMPHREYS

I, Bradley P. Humphreys, state as follows:

1. I am a Trial Attorney in the Federal Programs Branch of the Civil Division, United States Department of Justice, and I represent Defendants in the cases challenging the rule entitled *Protecting Statutory Conscience Rights in Health Care: Delegations of Authority*, 84 Fed. Reg. 23,170 (May 21, 2019) (Final Rule).

2. I submit this declaration, along with the accompanying supplemental certification Luis E. Perez, Deputy Director of the Conscience and Religious Freedom of the Office for Civil Rights (OCR), in response to the Court's August 16, 2019 Order in *State of New York, et al. v. U.S. Department of Health and Human Services*, No. 1:19-cv-0476 (S.D.N.Y), ECF No. 158.

3. To facilitate supplementation of the administrative record for the rulemaking at issue in these cases, my colleagues and I in the Federal Programs Branch worked with counsel and staff at the U.S. Department of Health & Human Services' Office of General Counsel and OCR.

4. In response to inquiries from the plaintiffs in these cases related to the completeness of the administrative record, and in order to respond to those inquiries expeditiously, my colleagues and I in the Federal Programs Branch assisted with gathering publicly available sources cited in the rule challenged in these cases, *Protecting Statutory Conscience Rights in Health Care: Delegations of Authority*, 84 Fed. Reg. 23,170 (May 21, 2019) (Final Rule), and the accompanying 2018 Notice of Proposed Rulemaking (NPRM), *Protecting Statutory Conscience Rights in Health Care; Delegations of Authority*, 83 Fed. Reg. 3880 (Jan. 26, 2018), *excluding* statutes, regulations, Federal Register citations, legal cases, Executive Orders, the congressional record, and unenacted bills.

5. OCR provided us a list of sources cited in the Final Rule and the NPRM. My

colleagues and I worked to compile the items on OCR's list, not including statutes, regulations, Federal Register citations, legal cases, Executive Orders, the congressional record, and unenacted bills, with the goal of compiling all such sources.

6. For websites publicly cited in the rulemakings in the scope of the Supplemental Index, we have included a screenshot of the website as close in time as possible to the date that was cited in the relevant rule or proposed rule. When no date was cited, we have included a screenshot of the website as close in time as possible to the date on which the relevant rule or proposed rule was published. If we were able to locate an archived screenshot of the relevant website, we included it. Otherwise, a current screenshot of the relevant website was included.

7. After compiling the publicly available materials described above, we provided the documents to OCR for them to review in order to ensure that the versions we collected were the same versions considered by OCR during the rulemaking process.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: August 19, 2019

Respectfully submitted,


BRADLEY P. HUMPHREYS
(D.C. Bar No. 988057)

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Exhibit 3

INDEX TO THE SUPPLEMENT TO THE ADMINISTRATIVE RECORD

Final Rule: Protecting Statutory Conscience Rights in Health Care; Delegations of Authority
84 Fed. Reg. 23,170 (Mar. 21, 2019)

Bates Number	Description
000546164 - 000546204	Mark L. Rienzi, <i>The Constitutional Right Not to Kill</i> , 62 Emory L.J. 121 (2012)
000546205 - 000546342	Department of Justice Title VI Legal Manual
000546343 - 000546344	<i>Federal Marketplace Progress Fact Sheet</i> , CCIIO, May 31, 2013
000546345 - 000546594	IHS FY 2018 Congressional Justification of Estimates to the Appropriations Committees (2017)
000546595 - 000546630	Bureau of Labor Statistics, <i>Occupational and Employment Statistics, Occupational Employment and Wages</i> , May 2016
000546631 - 000546632	<i>Abortion is Legal, but What Percentage of ObGyns Will Provide One?</i> , Freakonomics (August 24, 2011, 1:57 p.m.)
000546633 - 000546634	<i>U.S. Catholic Health Care: The Nation's Largest Group of Not-for-Profit Health Care Providers</i> , Catholic Health Association of the United States (2017)
000546635 - 000546636	HHS-5161-1 Form (OMB No. 0990-0317) (expiration date 1/31/2017)
000546637 - 000546640	<i>History of Our Ministry</i> , Christian Medical & Dental Associations
000546641 - 000546643	<i>About Us</i> , American Association of Pro-Life Obstetricians and Gynecologists
000546644 - 000546688	Table of Small Business Size Standards, Small Business Administration, Oct. 1, 2017
000546689 - 000546692	Memorandum from Jacob Lew, Dir., Office Of Mgmt. & Budget, Exec. Office of the President, To Heads of Exec. Dep'ts, Agencies, & Independent Establishments Assessment of Federal Regulations and Policies on Families (Jan. 26, 1999)
000546693 - 000546717	Memorandum from the Attorney General, Federal Law Protections for Religious Liberty (Oct. 6, 2017)
000546718 - 000546719	Civil Rights Information Request for Medicare Certification, OMB No. 0945-0006 (expiration date 04/30/2017) (Medicare Part A)
000546720 - 000546721	HHS-5161-1 Form (OMB No. 0930-0367) (expiration date 06/30/2020) (HHS Grant Applications)
000546722 - 000546725	Guidance on Hardship Exemptions from the Individual Shared Responsibility Provision for Persons Experiencing Limited Issuer Options or Other Circumstances, Center for Consumer Information and Insurance Oversight, Centers for Medicare & Medicaid Services
000546726 - 000546727	Medicare.gov, Religious non-medical health care institution items & services
000546728 - 000546729	CMS.gov, Religious Nonmedical Health Care Institutions
000546730 - 000546732	Rob Stein, <i>Obama Plans to Roll Back 'Conscience' Rule Protecting Health Care Of Workers Who Object to Some Types of Care</i> , The Washington Post (Feb. 28, 2009)

000546733 - 000546733	LI Hospital issues abortion apology to nurses, N.Y. Post (Apr. 28, 2010)
000546734 - 000546776	U.S. Conference of Catholic Bishops, <i>Ethical and Religious Directives for Catholic Health Services</i> (Nov. 17, 2009)
000546777 - 000546782	ACOG, <i>The Limits of Conscientious Refusal in Medicine</i> , Committee Opinion No. 385, 110 Obstet Gyn. 1479 (2007)
000546783 - 000546794	Letter from Roger T. Severino, Dir., Dep't of Health & Human Serv's. Office for Civil Rights, to Xavier Becerra, Att'y. Gen., State of Cal. (Jan. 18, 2019)
000546795 - 000546796	Letter from California Department of Managed Health Care, Re: Limitations or Exclusions of Abortion Services
000546797 - 000546806	Bob Egelko, <i>California's assisted-dying loophole: Some doctors won't help patients die</i> , San Francisco Chronicle (Aug. 12, 2017)
000546807 - 000546811	Letter from OCR Director to Complainants (June 21, 2016)
000546812 - 000546823	Pew Research Center, <i>What Unites and Divides Urban, Suburban, and Rural Communities</i> (May 22, 2018)
000546824 - 000546829	<i>Counseling and Waiting Periods for Abortion</i> , Guttmacher Institute (Oct. 1, 2018)
000546830 - 000546857	1 Richard J. Pierce, Jr., <i>Administrative Law Treatise</i> § 6.4 (4th ed. 2002)
000546858 - 000546867	https://www.merriamwebster.com/dictionary/refer
000546868 - 000546876	https://www.dictionary.com/browse/refer
000546877 - 000546883	U.S. Policy Statement for the International Conference on Population, 10 Population & Dev. Rev. 574 (1984)
000546884 - 000547100	U.S. Dep't of Health & Human Serv., HHS, Office of the Assistant Secretary for Resources and Technology, Office of Grants, HHS Grants Policy Statement, I-31 (Jan. 2007)
000547101 - 000547103	Provider Payment and Delivery Systems, Medicaid and CHIP Payment and Access Commission (MACPAC)
000547104 - 000547107	Medicare Advantage Program Payment System, The Medicare Payment Advisory Commission (MEDPAC) (Oct. 2016)
000547108 - 000547172	International Covenant on Economic, Cultural and Social Rights, adopted Dec. 16, 1966, 993 U.N.T.S. 3.
000547173 - 000547173	CMS.gov, Centers for Medicare & Medicaid Services, Religious Nonmedical Health Care Institutions
000547174 - 000547177	Administration for Community Living, National Network of University Centers for Excellence in Developmental Disabilities Education, Research & Service
000547178 - 000547184	Administration for Community Living, The Development Disabilities Assistance and Bill of Rights of 2000 (DD Act) Funding Allocations
000547185 - 000547185	Administration for Community Living, AIDD Developmental Disabilities Councils (DDC) Awards for the States/Territories, FY 2017 Annual Allocation,

000547186 - 000547186	Administration for Community Living, AIDD Protection and Advocacy (PADD) Awards for the States/Territories FY 2017 Annual Allocation, https://www.acl.gov/sites/default/files/about-acl/2017-06/PADD-2017.pdf
000547187 - 000547694	2012 North American Industry Classification System Definitions
000547695 - 000547702	Statistics of U.S. Businesses Methodology
000547703 - 000547706	U.S. Census, NACIS, Frequently Asked Questions
000547707 - 000547707	U.S. Census Glossary, Firm
000547708 - 000547715	Esther Hing, et al., Nat'l Ctr. For Health Statistics, Centers for Disease Control and Prevention, U.S. Dep't of Health and Human Servs., <i>Acceptance of New Patients with Public and Private Insurance by Office-Based Physicians: United States, 2013</i> , NCHS Data Brief No. 195 (Mar. 2015).
000547716 - 000547717	U.S. Census, 2012 NAICS Definition, 621399 Offices of All Other Miscellaneous Health Practitioners
000547718 - 000547999	Indian Health Service, FY 2019 Justification of Estimates for Appropriations Committees (2018)
000548000 - 000548094	Guidance for Regulatory Impact Analysis, Office of the Assistant Secretary for Planning and Evaluation, U.S. Department of Health and Human Services, 2016
000548095 - 000548097	Executive Office of the President, Office of Management and Budget, M-18-24, Memorandum for Heads of Executive Departments and Agencies, <i>Strategies to Reduce Grant Recipient Reporting Burden</i> (Sept. 5, 2018)
000548098 - 000548314	U.S. Dep't of Health & Human Serv., HHS, Office of the Assistant Secretary for Resources and Technology, Office of Grants, HHS Grants Policy Statement, I-31 (Jan. 2007)
000548315 - 000548318	USPS Postage Rates, Stamps.com
000548319 - 000548366	Circular A-4, Regulatory Analysis, OMB (Sept. 17, 2003)
000548367 - 000548367	Salary Table 2016-DCB, OPM (effective January 2016)
000548368 - 000548368	Salary Table No. 2016-ES, OPM (effective January 2016)
000548369 - 000548413	Table of Small Business Size Standards Marched to North American Industry Classification System Codes, U.S. Small Business Administration, (effective Oct. 1, 2017)
000548414 - 000548416	Application for Financial Assistance SF-424, OMB # 4040-0004
000548417 - 000548418	Application for Financial Assistance SF-424 (R&R), OMB # 4040-0001

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000548420 - 000548433	Letters from Michelle Rouillard, Director, California Department of Managed Health Care, to Seven Insurers Re: Limitations or Exclusions of Abortion Services (Aug. 22, 2014).
000548434 - 000548435	Julie D. Cantor, M.D., J.D., <i>Conscientious Objection Gone Awry—Restoring Selfless Professionalism in Medicine</i> , 360 New England J. Med. 1484–85 (April 9, 2009)
000548436 - 000548438	The Polling Company, Inc./WomanTrend, Highlights of The Polling Company, Inc. Phone Survey of the American Public and Online Survey of Faith-Based Professionals (polls released April 8, 2009)
000548439 - 000548443	Additional materials from the 343 Complaints referenced in the 2019 Final Rule, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority (Final Rule), 84 Fed. Reg. 23,170 (May 21, 2019).
000548444 - 000548444	U.S. Census Bureau, Statistics of U.S. Businesses, 2015, NAICS code 611310 (Colleges, Universities, and Professional Schools)
000548445 - 000548490	Lynn Wardle, <i>Protection of Health-Care Providers' Rights of Conscience in American Law: Present, Past, and Future</i> , 9 Ave Maria L. Rev. 1 (2010)
000548491 - 000548499	Occupational Employment Statistics: Occupational Employment and Wages, 29-1064 Obstetricians and Gynecologists, May 2017
000548500 - 000548504	Lori R. Freedman, <i>When There's a Heartbeat: Miscarriage Management in Catholic-Owned Hospitals</i> , AM. J. PUB. HEALTH (2008)
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000548599 - 000548603	Kaiser Foundation Health Plan and Hospitals Report: 2017 Financial Results, Kaiser Permanente (Feb. 9, 2018)
000548604 - 000548610	Our One Ascension Journey: Year in Review, Ascension
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000548614 - 000548620	Thrive: Give Back, Kaiser Permanente
000548621 - 000548626	U.S. Gen. Servs. Admin., System for Award Management, SAM Release Notes Build 2019–02–01 (Feb. 2, 2019)
000548627 - 000548706	Defs.' Brief in Opp. To Pls.' App. For Prelim. Inj. at 26, <i>Danquah v. Univ. of Med. & Dentistry of N.J.</i> , No. 2:11-cv-06377-JLL-MAH, ECF No. 26 (D.N.J. filed Nov. 22, 2011)
000548707 - 000548710	Christian Medical & Dental Association summary of Key Findings on Conscience Rights Polling conducted April, 2009
000548711 - 000548726	Luisa Blanchfield, <i>Abortion and Family Planning-Related Provisions in U.S. Foreign Assistance Legislation and Policy</i> , Congressional Research Service (Dec. 1, 2010)

000548727 - 000548742	Luisa Blanchfield, <i>Abortion and Family Planning-Related Provisions in U.S. Foreign Assistance Legislation and Policy</i> , Congressional Research Service (Jan. 24, 2017)
000548743 - 000548759	Luisa Blanchfield, <i>Abortion and Family Planning-Related Provisions in U.S. Foreign Assistance Legislation and Policy</i> , Congressional Research Service (Updated Sept. 12, 2018)
000548760 - 000548762	SF-1151 Nonexpenditure Transfer Authorization of funds from the U.S. Department of State to U.S. Department of Health and Human Services, Example
000548763 - 000548780	Amendment #1 to Memorandum of Agreement Between the Department of State Office of the U.S. Global AIDS Coordinator (OGAC) and the U.S. Department of Health and Human Services (HHS) to Allocate Funds Appropriated in FY 2017
000548781 - 000548782	48 C.F.R. 253-370-9 Non-Discrimination for Conscience
000548783 - 000548784	HHS.gov, President's Emergency Plan for AIDS Relief (PEPFAR) Office
000548785 - 000548829	A Firm Foundation: the PEPFAR Consultation on the Role of Faith-based Organizations in Sustaining Community and Country Leadership in the Response to HIV/AIDS (2012)
000548830 - 000549863	Excel spreadsheets of meta-data from the E-Rulemaking Initiative's Federal Docket Management System for public submissions submitted on the 2018 NPRM, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority (Proposed Rule), 83 Fed. Reg. 3,880 (Jan. 26, 2018)
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000549873 - 000549887	Memorandum from Jonathan Imbody, Christian Medical Association, Vice President for Government Relations to Office of Public Health and Science, Department of Health and Human Services (Apr. 9, 2009)
000549888 - 000549902	The Polling Company, Inc./WomanTrend, Highlights of The Polling Company, Inc. Phone Survey of the American Public, fielded March 31, 2009 through April 3, 2009)
000549903 - 000549940	Additional materials from the 343 Complaints referenced in the 2019 Final Rule, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority (Final Rule), 84 Fed. Reg. 23,170 (May 21, 2019).