

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

STATE OF NEW YORK, et al.,

Plaintiffs,

v.

UNITED STATES DEPARTMENT
OF HEALTH AND HUMAN
SERVICES, et al.,

Defendants.

19 Civ. 4676 (PAE) (lead)

19 Civ. 5433 (PAE) (consolidated)

19 Civ. 5435 (PAE) (consolidated)

DECLARATION OF MATTHEW COLANGELO

Matthew Colangelo, pursuant to penalty of perjury under 28 U.S.C. § 1746, does hereby state the following:

I am an attorney in the Office of the New York State Attorney General and counsel to Plaintiffs in this action. I submit this Declaration in support of Plaintiffs’ reply memorandum of law in support of their cross-motion for summary judgment.

Attached to this Declaration are true and correct copies of the following numbered exhibits, including parts of the administrative record produced by Defendants in this action:

- 137. Comment, Whitman-Walker Clinic, Inc. (AR 135450)
- 138. Comment, Former EEOC Chair Jenny Yang & Former EEOC Legal Counsel Peggy Mastroianni (AR 147884)
- 139. Compl. 18-292941 (AR 542316)

Dated: October 3, 2019

/s/ Matthew Colangelo
Matthew Colangelo
Office of the New York State Attorney General
28 Liberty Street
New York, NY 10005
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Attorney for the Plaintiffs

Exhibit 137

**BEFORE THE UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES**

**Protecting Statutory Conscience Rights)
in Health Care; Delegations of Authority)**

**Docket No. HHS-OCR-2018-0002;
RIN 0945-ZA03**

Comments of Whitman-Walker Health on the Notice of Proposed Rulemaking

Whitman-Walker Clinic, Inc., dba Whitman-Walker Health (WWH or Whitman-Walker), submits these comments on the Proposed Rule published on January 26, 2018, 83 Fed. Reg. 3880. The Proposed Rule's sweeping language ventures far beyond the actual scope of the federal laws that it purports to enforce. HHS appears to be endorsing discriminatory behavior by health care workers, motivated by their personal beliefs, that would be corrosive of fundamental professional standards and would threaten our patients' welfare and Whitman-Walker's ability to fulfill our mission. We urge that the Proposed Rule be withdrawn, or at a minimum, that it be modified to make clear that no endorsement is intended of discrimination in health care against lesbian, gay, bisexual, transgender and queer persons – or any discrimination based on the race, ethnicity, gender, disability status or religion of patients.

Interest of Whitman-Walker Health

Whitman-Walker is a Federally Qualified Health Center serving the greater Washington, DC metropolitan area, with a distinctive mission. As our Mission Statement declares:

Whitman-Walker Health offers affirming community-based health and wellness services to all with a special expertise in LGBTQ and HIV care. We empower all persons to live healthy, love openly, and achieve equality and inclusion.

Our patient population is quite diverse and reflects our commitment to be a health home for individuals and families that have experienced stigma and discrimination, and have otherwise encountered challenges in obtaining affordable, high-quality health care. In calendar year 2017, we provided health-related services to more than 20,000 unique individuals. Of our medical and

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behavioral health patients, approximately 40% identified themselves as Black; approximately 40% identified themselves as White; and approximately 18% identified themselves as Hispanic. More than one-half identified their sexual orientation as gay, lesbian, bisexual or otherwise non-heterosexual. Approximately 8% identified themselves as transgender or gender-nonconforming. Our patients also are quite diverse economically; in 2017 approximately 35% of our medical and behavioral health patients reported annual income of less than the Federal Poverty Level, and another 12% reported income of 100 – 200% of the FPL.

Since the mid-1980s, Whitman-Walker's Legal Services Department has provided a wide range of civil legal assistance to our patients and to others in the community living with HIV or identifying as sexual or gender minorities. Through their work, our attorneys have broad and deep experience with HIV, sexual orientation and gender identity discrimination in health care, employment, education, housing and public services. In 2017, approximately one-half of the more than 3,000 individuals who received legal assistance, or assistance with public benefit programs, identified as gay, lesbian, bisexual or otherwise non-heterosexual, and 18% identified as transgender or gender-nonconforming.

As would be expected given our very diverse community, Whitman-Walker's patient population and legal clients also subscribe to a wide range of religious faiths.

Consistent with our commitment to welcoming and nondiscriminatory health care, our growing work force is very diverse. We currently have almost 270 employees at five sites in Washington, DC. More than 55% of our employees identify as people of color, and more than 55% are women. Although we of course do not require employees to identify their sexual orientation or gender identity, substantial numbers of our staff are sexual and gender minorities.

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And while we do not collect data on employee religious beliefs or practices, our work force includes a wide range of religious beliefs and practices, as well as a wide range of non-religious beliefs and philosophies.

The diversity of our patient population, legal clients and work force all reflect our commitment to inclusive, welcoming and nondiscriminatory health care of the highest quality, with a special focus on persons who fear, or who have experienced, the lack of such care elsewhere. The Proposed Rule's sweeping language and lack of specificity are of great concern; they appear to endorse discriminatory behavior, motivated by personal beliefs, that would be corrosive of fundamental professional standards and would threaten our patients' health and welfare and Whitman-Walker's mission.

The Proposed Rule's Sweeping, Overbroad Language Threatens Great Harm to Our National Health Care System, and Particularly to Mission-Driven Health Systems Such as Whitman-Walker, and to LGBTQ Individuals and Families and Others Particularly at Risk of Discrimination

The Proposed Rule announces the intention of HHS' Office for Civil Rights to vigorously enforce a number of federal statutes that protect conscience rights under limited circumstances. Most of these statutes delineate the rights of health care providers, in certain circumstances, to decline to perform specific procedures without retaliation: abortion; procedures intended to result in sterilization; and medical interventions intended to end a patient's life. Several of the statutes pertain to the right of certain religious institutions to provide religiously-oriented, non-medical health care to their members. Other statutes delineate the right of certain health plans to participate in Medicaid or Medicare while declining to cover certain services, provided adequate notice is provided to their members. Other statutes address the right of *patients* (not providers) or the parents of minors to decline certain health-related screenings, vaccinations or treatments.

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The Proposed Rule, however, contains broad language that appears to sweep far beyond these limited circumstances, and implies that persons working in a health care field have a general right to decline to provide care for any reason, moral or religious, or for no articulable reason at all. *See, e.g.*, proposed Section 88.1 (Purpose) and Appendix A (mandatory notice to employees) to 45 C.F.R., 83 Fed. Reg. at 3931, declaring a broad, undefined right to accommodation for any religious or moral belief. *See also* 83 Fed. Reg. at 3881, 3887-89, 3903, which discusses at length the “problem” of health care workers being legally or professionally compelled to meet patient needs regardless of their personal beliefs. Moreover, HHS’ public pronouncements about the new Conscience and Religious Freedom Division within OCR, and encouraging health care workers to file complaints, send a message that health care workers’ personal beliefs prevail over their duties to patients. *E.g.*, <https://www.hhs.gov/about/news/2018/01/18/hhs-ocr-announces-new-conscience-and-religious-freedom-division.html> (January 18, 2018 press release); <https://www.hhs.gov/conscience/conscience-protections/index.html> (“Conscience Protections for Health Care Providers”) The statutes in question do not support these declarations of a general health care provider “right” to deny needed care.

The potentially harmful reach of the Proposed Rule is exacerbated by an overbroad, legally unsupported interpretation of what constitutes “assisting in the performance” of an objected-to medical procedure. The proposed definition – “to participate in any program or activity with an articulable connection to a procedure, health service, health program, or research activity [i]nclud[ing] but ... not limited to counseling, referral, training, and other arrangements for the procedure, health service, health program, or research activity” (Section

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88.2, 83 Fed. Reg. at 3923) – is so broad that it might authorize an individual in any health care-related job to decline to provide information or any assistance whatever to someone seeking care to which they may object. The problem is compounded by the broad definition of a protected refusal to provide a “referral” as “includ[ing] the provision of any information ... by any method ... pertaining to a health care service, activity, or procedure ... that could provide any assistance in a person obtaining ... a particular health care service” Section 88.2, 83 Fed. Reg. at 3924.

A sweeping interpretation of “conscience protection” rights for persons working in health care could have far-reaching consequences. Does HHS intend to countenance, for instance:

- Refusal to provide assistance to a same-sex couple with a sick child because of an objection to same-sex parenting?
- Refusal to even provide information to an individual questioning their gender identity on their possible options, or places where they might get the information or support they need?
- Refusal to provide help to a sick woman or man who is, or is thought to be Muslim because of a health care worker’s aversion to Islam?
- Refusal to provide assistance to an individual struggling with an opioid addiction because of a conviction that the addiction is the result of sin or the patient’s moral failings?
- Refusal to help an individual diagnosed with HIV or Hepatitis C because of moral or religious disapproval of the way that the individual acquired (or is assumed to have acquired) the infection – namely, sex or injection drug use?

The dangers to LGBTQ persons needing health care are particularly grave. Many studies and medical authorities have documented the persistence of biases – explicit or implicit – against LGBTQ persons among many health care workers at every level – from physicians, nurses and other licensed providers to front-desk staff. LGBTQ persons continue to encounter stigma and discrimination in virtually every health care setting, including hospitals, outpatient clinics,

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private doctors' offices, rehabilitation centers, and nursing homes. Transgender and gender-nonconforming persons are particularly at risk of substandard care or outright refusals of care. In this regard, it is particularly disturbing that the Proposed Rule offers, as an example of the "ills" it seeks to address, a lawsuit against a surgeon and hospital for refusing to perform a hysterectomy on a transgender man because of the patient's transgender status. 83 Fed. Reg. at 3888 n.36, 3889, *citing Minton v. Dignity Health*, No. 17-558259 (Calif. Super. Ct. Apr. 19, 2017). Statutes that provide limited protection for health care providers who object to performing sterilization procedures on religious or moral grounds provide no justification for denying a medically indicated treatment of any kind – surgical, hormonal or other – to a transgender person. Suggesting otherwise is to encourage the gender identity discrimination that already is too prevalent.

Messaging that health care workers are legally entitled to refuse or restrict care, based on their personal religious or moral beliefs, flies in the face of the standards and ethics of every health care profession, and would sow confusion and undermine the entire health care system. Health care is a fundamentally patient-oriented endeavor. With limited exceptions explicitly recognized in the statutes referenced in the Proposed Rule, the personal beliefs of health care workers are irrelevant to the performance of their jobs. A broad notion of a right to avoid "complicity" in medical procedures, lifestyles, or actions of other people with which one might personally disagree, which disregards the harm that might result to others, is legally, morally and politically unsupportable, particularly in a society like ours which encompasses, and encourages, a diversity of religious beliefs, cultures and philosophies. In health care, a sweeping right to "avoid complicity" is fundamentally corrosive. Encouraging employees of hospitals, health

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systems, clinics, nursing homes and physician offices to express and act on their individual beliefs, in our religiously and morally diverse nation, would invite chaos, consume health care institutions with litigation, and result in denial of adequate care to uncounted numbers of people – particularly racial and ethnic minorities and LGBTQ people. No hospital, clinic or other health care entity or office could function in such an environment.

The impact of a broad, legally unsupported expansion of health care worker refusal rights on Whitman-Walker and our patients would be particularly drastic. Providing welcoming, high-quality care to the LGBTQ community and to persons affected by HIV is at the core of our mission. These are communities which are in particular need of affirming, culturally competent care because of the widespread stigma and discrimination they have experienced and continue to experience. We strive to message to all our staff that one's personal religious and moral views are irrelevant to our mission and to patient needs. It would be very difficult if not impossible for us to accommodate individual health care staff who might object to, e.g., transgender care, or counseling and assisting pregnant clients with their pregnancy termination options, or harm-reduction care for substance abusers, or care for lesbian, gay or bisexual patients – without fundamentally compromising our mission and the quality of patient care. Many of our LGBTQ patients and patients with HIV have experienced substantial stigma and discrimination and are very sensitive to being welcomed or not welcomed in a health care setting. If they encounter discrimination at WWH from any staff person at any point, our reputation as a safe and welcoming place would be undermined. There are multiple “patient touches” in our system as in any health care system: from the staff person answering the phone or sitting at the front desk to

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the physician to the pharmacy worker. Each of those touches can promote or undermine patient health – can convey respect and affirmation or disrespect and rejection.

Moreover, in our diverse workforce, encouraging individual employees to think that their personal beliefs can prevail over their duties to patients – and to their fellow employees – would introduce confusion and discord into our staff as well pose barriers to patient care. The harm to our operations, finances and employee morale would be particularly complicated because we, like many health care entities, have a quasi-unionized workforce. Attempts to accommodate, for instance, one employee's unwillingness to work with transgender patients, or patients perceived to be gay, or Muslim patients, or persons with opioid addiction, would impose burdens on other staff, and likely would result in grievances filed by other employees. We would incur substantial financial costs and drains on staff time that would substantially challenge our ability to care for a growing patient load. There would also be increased pressure to ascertain whether job applicants will be unwilling to perform essential job functions, which seems likely to undermine our philosophy, which is to foster a diverse workforce.

In addition, there is every reason to believe that the Proposed Rule, and HHS' overly broad messaging of its legal authority, would result in increased discrimination against LGBTQ people and people with HIV at other health care centers and providers, outside Whitman-Walker. Biased attitudes towards LGBTQ people are still widespread but have tended to be more restrained or repressed due to changing social norms in some places. HHS messaging about the conscience rights of health care workers, particularly if not narrowly confined to specific procedures identified in the authorizing statutes, threatens to stimulate a sharp increase in those attitudes, which will have significant negative impacts on individual and public health. Fear of

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discrimination among LGBTQ people would also increase. Whitman-Walker's health care providers – particularly our counselors, psychiatrists and other behavioral health staff – have many patients who have experienced traumatic stigma and discrimination – based on sexual orientation, gender identity, HIV status, race/ethnicity, and/or other factors. The creation of the new OCR Conscience and Religious Freedom Division, and HHS messaging to date, is causing increased fear and anxiety among our patients and in the LGBTQ community generally.

Escalating health care discrimination, and escalating fear of such discrimination, would result in increased demand for Whitman-Walker's services. Such increased demand would present considerable financial challenges. Many of our services to current patients lose money, due to third-party reimbursement rates and indirect cost reimbursement rates in contracts and grants which are substantially less than our cost of service. Substantially increased demand for our services, driven by increased discrimination and fear of discrimination outside Whitman-Walker, would exacerbate that pressure.

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Conclusion

For the above reasons, Whitman-Walker Health requests that the Proposed Rule be withdrawn. At a minimum, HHS should substantially modify the Rule to make clear that it does not permit discrimination in health care against lesbian, gay, bisexual, transgender and queer persons – or any discrimination based on the race, ethnicity, gender, disability status or religion of any patient.

Respectfully Submitted,

A handwritten signature in cursive script that reads "Daniel Bruner".

Naseema Shafi, JD, Deputy Executive Director
Meghan Davies, MPH, CHES, CPH, Chief of Operations and Program Integration
Sarah Henn, MD, MPH, Senior Director of Health Care Operations and Medical Services
Randy Pumphrey, D.Min., LPC, BCC, Senior Director of Behavioral Health
Daniel Bruner, JD, MPP, Senior Director of Policy
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Exhibit 138

March 27, 2018

Director Roger Severino
Office for Civil Rights
Department of Health and Human Services
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue, SW
Washington, D.C. 20201

Submitted Electronically

Attention: Comments in Response to Department of Health and Human Services, Office for Civil Rights, Conscience NPRM, RIN 0945-ZA03

As a former Chair and a former Legal Counsel of the U.S. Equal Employment Opportunity Commission (“EEOC”), we are writing in strong opposition to the Department of Health and Human Services’ (the “Department”) proposed rule “Protecting Statutory Rights in Health Care” (“Proposed Rule”).¹ Because the Proposed Rule will upset the careful balance struck under Title VII of the Civil Rights Act of 1964, as amended (“Title VII”),² lead to unnecessary confusion and litigation, and result in patients losing access to critical care, we urge you to withdraw the Proposed Rule in its entirety. At the very least, the Proposed Rule should make clear that nothing in the regulation should be construed to alter the legal framework for religious accommodation requests under Title VII.

Background

As you know, Title VII prohibits, among other things, religious discrimination in employment. Under Title VII, employers must provide reasonable accommodation of employees’ sincerely held religious beliefs, observances, and practices when requested, unless doing so would impose an undue hardship on the employer in conducting business operations.³ The statute provides an

¹ Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 83 Fed. Reg. 3880 (proposed Jan. 26, 2018) (*to be codified at* 45 C.F.R. pt. 88) [*hereinafter* Rule].

² 42 U.S.C. § 2000e-2 et seq.

³ 42 U.S.C. § 2000e-2(a) provides that it is an unlawful employment practice for an employer:

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

42 U.S.C. § 2000e(j) provides that:

The term “religion” includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee’s or

exception for religious organizations with respect to the prohibition on religious discrimination, allowing them to give preference for employment to members of their own religion, even when that employment is not directly related to the religious activities of the organization.⁴

There is a robust body of case law that has developed under federal courts' interpretation of Title VII's prohibition on religious discrimination, which balances an employee's right to religious belief and an employers' business need, including the need to ensure patient access to care. In addition, the EEOC has issued regulations and guidance that further explain and interpret Title VII's religious discrimination prohibition, including a Compliance Manual Chapter issued in July 2008 following a unanimous, bipartisan vote of the Commission, which remains in effect today.⁵ This approach is constitutionally sound, and consistent with the Establishment Clause of the U.S. Constitution.

The Proposed Rule Is Unnecessary

Title VII already protects individuals from employment discrimination based on religion, rendering the Proposed Rule unnecessary. Like other employees governed by Title VII, healthcare workers are already protected from religious discrimination and have the right to reasonable accommodation of their religious beliefs. Cases illustrate that this right has been applied to health care workers by courts across the country.⁶ In light of these long-standing protections, it is clear the Proposed Rule seeks to solve a problem that does not exist.

prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

Subject to certain jurisdictional requirements, Title VII's prohibitions apply to employers, employment agencies, and unions. 42 U.S.C. § 2000e-2.

⁴ Section 702(a) of Title VII, 42 U.S.C. § 2000e-1(a), provides:

This subchapter shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

Section 703(e)(2) of Title VII, 42 U.S.C. § 2000e-2(e)(2) provides:

it shall not be an unlawful employment practice for a school, college, university, or educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

⁵ See *Guidelines on Discrimination Because of Religion*, 29 C.F.R. Part 1605; U.S. EQUAL EMP. OPPORTUNITY COMM'N., *Compliance Manual Section 12* (2008), available at <http://www.eeoc.gov/policy/docs/religion.html>.

⁶ See, e.g., *Hellwege v. Tampa Family Health Ctrs.* 103 F. Supp. 3d 1303, 1313 (M.D. Fla. 2015) (finding that plaintiff adequately alleged a prima facie case of employment discrimination under Title VII after the potential employer failed to hire her as a midwife given her religious beliefs against hormonal contraceptives); *Nead v. Board of Trustees of Eastern Ill. Univ.*, No. 05-2137, 2006 WL 1582454, *4 (C.D. Ill. 2006) (denying employer's motion to dismiss as the plaintiff established a prima facie case of employment discrimination on the basis of religion by the employer when it denied a promotion to a nurse who would not dispense emergency contraception); *Hellinger v.*

The Proposed Rule Conflicts With and Upsets Title VII's Carefully Balanced Framework and Likely Violates the Establishment Clause

An employee's right to accommodation for religious belief is not absolute, and Title VII recognizes that there are some cases in which an employer may be excused from providing an accommodation if doing so would impose an undue hardship on the employer. The undue hardship consideration may include the effect on the public or patients seeking care. For example, an employer considering a request by a pharmacist not to fill certain prescriptions may argue that allowing the sole pharmacist on duty to refuse could place the employer in the position of being unable to effectively provide services to the public. In such a case, the EEOC recognizes that the employer may be excused from providing the accommodation because it would impose an undue hardship.⁷ Additionally, courts have found that an employer may refuse a request for an accommodation that would result in discrimination against others or deprive them of contractual or other statutory rights.⁸

In other words, Title VII requires a careful balancing. And this balancing of interests that characterizes the Title VII analysis is particularly essential in the health care context, where a patient's life and health may be endangered because of an employee's refusal to provide needed health care.

In contrast to the Title VII framework, the Proposed Rule attempts to create an absolute right to religious accommodation for health care providers who oppose particular medical procedures. It also appears intended to override state laws governing access to health care, which would conflict with court decisions under Title VII that consider whether an accommodation would result in the denial of health care services in violation of state law requiring the provision of certain services by health care providers.⁹ The Proposed Rule therefore threatens to disrupt Title VII's balance, which is the legal framework under which complaints of employment discrimination based on religion have been judged for over 40 years.

Moreover, the Proposed Rule likely violates the Establishment Clause. The Proposed Rule conditions the receipt of federal funds on an agreement to give preference to particular religious beliefs, and purports to nullify the undue hardship defense to religious accommodation claims by health care workers who oppose abortion and other selected medical procedures. These weaknesses, when introduced into the Title VII analysis, threaten to dismantle a complex

Eckerd Corp., 67 F. Supp. 2d 1359, 1366 (S.D. Fla. 1999) (finding that defendant violated Title VII by failing to consider an accommodation for a pharmacist who refused to sell condoms).

⁷ U.S. EQUAL EMP. OPPORTUNITY COMM'N, *Compliance Manual Section 12-IV-C-3* (2008), available at <http://www.eeoc.gov/policy/docs/religion.html>.

⁸ Peterson v. Hewlett-Packard Co., 358 F.3d 599, 606 (9th Cir. 2004) (“[A]n employer need not accommodate an employee's religious beliefs if doing so would result in discrimination against his co-workers or deprive them of contractual or other statutory rights.”).

⁹ See Bhatia v. Chevron U.S.A., Inc., 734 F.2d 1382, 1383-84 (9th Cir. 1984) (holding that an employer is not liable under Title VII when accommodating an employee's religious belief would require the employer to violate federal or state law); Westbrook v. North Carolina A&T Univ., 51 F. Supp. 3d 612, 625 (M.D.N.C. 2014).

statutory framework that has consistently withstood constitutional challenge under the Establishment Clause.¹⁰

The Proposed Rule Will Lead to Confusion

The Proposed Rule makes no mention of Title VII and instead, sets out an entirely different and conflicting standard for some workplace discrimination complaints. As a practical matter, introducing another standard under the Proposed Rule will foster confusion among health care employers, who are left in the impossible position of being subject to, and trying to satisfy, both.

The lack of clarity regarding the interplay between the Proposed Rule and the Title VII religious accommodation analysis will not only result in profound confusion and extensive litigation, but will be especially burdensome to small businesses that are likely to have fewer resources available to help them understand how to apply the Proposed Rule. By the Department's own estimate, over three quarters of the more than 571,282 entities that would be affected by the Proposed Rule are doctors' offices and pharmacies.¹¹

Given these legal and practical concerns, the Proposed Rule should be withdrawn. At a minimum, the Department should specify that Title VII will continue to provide the legal standard for deciding all workplace religious accommodation complaints. This is especially critical in the health care context, where the balancing of interests that characterizes the Title VII analysis is essential because of the need to ensure continuity of medical care for individuals without unnecessary and potentially life-threatening denials or delays.

Sincerely,



Peggy Mastroianni



Jenny R. Yang

¹⁰ See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 90 (1977); *McDaniel v. Essex Int'l, Inc.*, 696 F.2d 34, 36 (6th Cir. 1982); *Nottelson v. Smith Steel Workers D.A.L.U.* 19806, AFL-CIO, 643 F.2d 445, 454 (7th Cir. 1981); *Tooley v. Martin Marietta Corp.*, 648 F.2d 1239, 1244-46 (9th Cir. 1981).

¹¹ See Rule *supra* note 1, at 119-124 (Estimated number of persons and entities covered by NPRM; Of the estimated 571,282 persons and entities covered by the NPRM 430,232 are estimated to be doctors offices and pharmacies).

Exhibit 139



DEPARTMENT OF HEALTH AND HUMAN SERVICES
 OFFICE FOR CIVIL RIGHTS (OCR)
CIVIL RIGHTS DISCRIMINATION COMPLAINT

Form Approved: OMB No. 0990-0269.
 See OMB Statement on Reverse.



YOUR FIRST NAME [REDACTED]	YOUR LAST NAME [REDACTED]
HOME CELL PHONE (Please include area code) [REDACTED]	WORK PHONE (Please include area code) [REDACTED]
STREET ADDRESS [REDACTED]	CITY [REDACTED]
STATE [REDACTED]	E-MAIL ADDRESS (if available) [REDACTED]

Are you filing this complaint for someone else? Yes No
 If Yes, whose civil rights do you believe were violated?

FIRST NAME The Little Sisters of the Poor	LAST NAME [REDACTED]
--	-------------------------

I believe that I have been (or someone else has been) discriminated against on the basis of:

- Race / Color / National Origin
 Age
 Religion
 Sex
 Disability
 Other (specify): _____

Who or what agency or organization do you believe discriminated against you (or someone else)?

PERSON/AGENCY/ORGANIZATION
Commonwealth of Pennsylvania, Attorney General Josh Shapiro

STREET ADDRESS <u>Office of Attorney General , Strawberry Square, 16th Floor</u>	CITY <u>Harrisburg</u>
STATE <u>Pennsylvania</u>	PHONE (Please include area code) <u>(717) 787-3391</u>

When do you believe that the civil right discrimination occurred?

LIST DATE(S)
10/11/2017, 01/11/2018

Describe briefly what happened. How and why do you believe that you have been (or someone else has been) discriminated against? Please be as specific as possible. (Attach additional pages as needed)

Pennsylvania is trying to force religious objectors to provide insurance coverage for abortion-inducing drugs and devices, along with contraceptives and sterilization. Pennsylvania itself does not require health insurance plans governed by state law to cover contraceptives, <https://www.governor.pa.gov/governor-wolf-calls-legislature-make-birth-control-coverage-mandate/>, but that has not stopped it from challenging the federal government's religious exemption of the Little Sisters of the Poor (LSP) from a federal contraception mandate. Pennsylvania has filed a federal

This field may be truncated due to size limit. See the "Allegation Description" file in the case folder.

Please sign and date this complaint. You do not need to sign if submitting this form by email because submission by email represents your signature.

SIGNATURE [REDACTED]	DATE (mm/dd/yyyy) <u>01/11/2018</u>
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Filing a complaint with OCR is voluntary. However, without the information requested above, OCR may be unable to proceed with your complaint. We collect this information under authority of Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973 and other civil rights statutes. We will use the information you provide to determine if we have jurisdiction and, if so, how we will process your complaint. Information submitted on this form is treated confidentially and is protected under the provisions of the Privacy Act of 1974. Names or other identifying information about individuals are disclosed when it is necessary for investigation of possible discrimination, for internal systems operations, or for routine uses, which include disclosure of information outside the Department of Health and Human Services (HHS) for purposes associated with civil rights compliance and as permitted by law. It is illegal for a recipient of Federal financial assistance from HHS to intimidate, threaten, coerce, or discriminate or retaliate against you for filing this complaint or for taking any other action to enforce your rights under Federal civil rights laws. You are not required to use this form. You also may write a letter or submit a complaint electronically with the same information. To submit an electronic complaint, go to OCR's web site at: www.hhs.gov/ocr/civilrights/complaints/index.html. To mail a complaint see reverse page for OCR Regional addresses.

The remaining information on this form is optional. Failure to answer these voluntary questions will not affect OCR's decision to process your complaint.

Do you need special accommodations for us to communicate with you about this complaint? (Check all that apply)

- Braille
 Large Print
 Cassette tape
 Computer diskette
 Electronic mail
 TDD
 Sign language interpreter (specify language): _____
 Foreign language interpreter (specify language): _____ Other: _____

If we cannot reach you directly, is there someone we can contact to help us reach you?

FIRST NAME		LAST NAME	
HOME / CELL PHONE (Please include area code)		WORK PHONE (Please include area code)	
STREET ADDRESS		CITY	
STATE	ZIP	E-MAIL ADDRESS (If available)	

Have you filed your complaint anywhere else? If so, please provide the following. (Attach additional pages as needed)
 PERSON/AGENCY/ORGANIZATION/ COURT NAME(S)

DATE(S) FILED	CASE NUMBER(S) (If known)
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To help us better serve the public, please provide the following information for the person you believe was discriminated against (you or the person on whose behalf you are filing).

ETHNICITY (select one) RACE (select one or more)
 Hispanic or Latino
 American Indian or Alaska Native
 Asian
 Native Hawaiian or Other Pacific Islander
 Not Hispanic or Latino
 Black or African American
 White
 Other (specify): _____
 PRIMARY LANGUAGE SPOKEN (if other than English) _____

How did you learn about the Office for Civil Rights?

- HHS Website/Internet Search
 Family/Friend/Associate
 Religious/Community Org
 Lawyer/Legal Org
 Phone Directory
 Employer
 Fed/State/Local Gov
 Healthcare Provider/Health Plan
 Conference/OCR Brochure
 Other (specify): _____

To mail a complaint, please type or print, and return completed complaint to the OCR Regional Address based on the region where the alleged violation took place. If you need assistance completing this form, contact the appropriate region listed below.

<p>Region I - CT, ME, MA, NH, RI, VT Office for Civil Rights, DHHS JFK Federal Building - Room 1875 Boston, MA 02203 (617) 565-1340; (617) 565-1343 (TDD) (617) 565-3809 FAX</p>	<p>Region V - IL, IN, MI, MN, OH, WI Office for Civil Rights, DHHS 233 N. Michigan Ave. - Suite 240 Chicago, IL 60601 (312) 886-2359; (312) 353-5693 (TDD) (312) 886-1807 FAX</p>	<p>Region IX - AZ, CA, HI, NV, AS, GU, The U.S. Affiliated Pacific Island Jurisdictions Office for Civil Rights, DHHS 90 7th Street, Suite 4-100 San Francisco, CA 94103 (415) 437-8310; (415) 437-8311 (TDD) (415) 437-8329 FAX</p>
<p>Region II - NJ, NY, PR, VI Office for Civil Rights, DHHS 26 Federal Plaza - Suite 3312 New York, NY 10278 (212) 264-3313; (212) 264-2355 (TDD) (212) 264-3039 FAX</p>	<p>Region VI - AR, LA, NM, OK, TX Office for Civil Rights, DHHS 1301 Young Street - Suite 1169 Dallas, TX 75202 (214) 767-4056; (214) 767-8940 (TDD) (214) 767-0432 FAX</p>	
<p>Region III - DE, DC, MD, PA, VA, WV Office for Civil Rights, DHHS 150 S. Independence Mall West - Suite 372 Philadelphia, PA 19106-3499 (215) 861-4441; (215) 861-4440 (TDD) (215) 861-4431 FAX</p>	<p>Region VII - IA, KS, MO, NE Office for Civil Rights, DHHS 601 East 12th Street - Room 248 Kansas City, MO 64106 (816) 426-7277; (816) 426-7065 (TDD) (816) 426-3686 FAX</p>	
<p>Region IV - AL, FL, GA, KY, MS, NC, SC, TN Office for Civil Rights, DHHS 61 Forsyth Street, SW. - Suite 16T70 Atlanta, GA 30303-8909 (404) 562-7886; (404) 562-7884 (TDD) (404) 562-7881 FAX</p>	<p>Region VIII - CO, MT, ND, SD, UT, WY Office for Civil Rights, DHHS 999 18th Street, Suite 417 Denver, CO 80202 (303) 844-2024; (303) 844-3439 (TDD) (303) 844-2025 FAX</p>	<p>Region X - AK, ID, OR, WA Office for Civil Rights, DHHS 701 Fifth Avenue, Suite 1600, MS - 11 Seattle, WA 98104 (206) 615-2290; (206) 615-2296 (TDD) (206) 615-2297 FAX</p>

Burden Statement

Public reporting burden for the collection of information on this complaint form is estimated to average 45 minutes per response, including the time for reviewing instructions, gathering the data needed and entering and reviewing the information on the completed complaint form. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a valid control number. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to: HHS/OS Reports Clearance Officer, Office of Information Resources Management, 200 Independence Ave. S.W., Room 531H, Washington, D.C. 20201. Please do not mail complaint form to this address.



COMPLAINANT CONSENT FORM

The Department of Health and Human Services' (HHS) Office for Civil Rights (OCR) has the authority to collect and receive material and information about you, including personnel and medical records, which are relevant to its investigation of your complaint.

To investigate your complaint, OCR may need to reveal your identity or identifying information about you to persons at the entity or agency under investigation or to other persons, agencies, or entities.

The Privacy Act of 1974 protects certain federal records that contain personally identifiable information about you and, with your consent, allows OCR to use your name or other personal information, if necessary, to investigate your complaint.

Consent is voluntary, and it is not always needed in order to investigate your complaint; however, failure to give consent is likely to impede the investigation of your complaint and may result in the closure of your case.

Additionally, OCR may disclose information, including medical records and other personal information, which it has gathered during the course of its investigation in order to comply with a request under the Freedom of Information Act (FOIA) and may refer your complaint to another appropriate agency.

Under FOIA, OCR may be required to release information regarding the investigation of your complaint; however, we will make every effort, as permitted by law, to protect information that identifies individuals or that, if released, could constitute a clearly unwarranted invasion of personal privacy.

Please read and review the documents entitled, *Notice to Complainants and Other Individuals Asked to Supply Information to the Office for Civil Rights* and *Protecting Personal Information in Complaint Investigations* for further information regarding how OCR may obtain, use, and disclose your information while investigating your complaint.

In order to expedite the investigation of your complaint if it is accepted by OCR, please read, sign, and return one copy of this consent form to OCR with your complaint. Please make one copy for your records.

- As a complainant, I understand that in the course of the investigation of my complaint it may become necessary for OCR to reveal my identity or identifying information about me to persons at the entity or agency under investigation or to other persons, agencies, or entities.



- I am also aware of the obligations of OCR to honor requests under the Freedom of Information Act (FOIA). I understand that it may be necessary for OCR to disclose information, including personally identifying information, which it has gathered as part of its investigation of my complaint.
- In addition, I understand that as a complainant I am covered by the Department of Health and Human Services' (HHS) regulations which protect any individual from being intimidated, threatened, coerced, retaliated against, or discriminated against because he/she has made a complaint, testified, assisted, or participated in any manner in any mediation, investigation, hearing, proceeding, or other part of HHS' investigation, conciliation, or enforcement process.

After reading the above information, please check ONLY ONE of the following boxes:

CONSENT: I have read, understand, and agree to the above and give permission to OCR to reveal my identity or identifying information about me in my case file to persons at the entity or agency under investigation or to other relevant persons, agencies, or entities during any part of HHS' investigation, conciliation, or enforcement process.

CONSENT DENIED: I have read and I understand the above and do not give permission to OCR to reveal my identity or identifying information about me. I understand that this denial of consent is likely to impede the investigation of my complaint and may result in closure of the investigation.

Signature: _____ Date: 01/11/2018
*Please sign and date _____ need to sign if submitting this form by email because submission by email represents your signature.

Name (Please print): _____

Address: _____

Telephone Number: _____



NOTICE TO COMPLAINANTS AND OTHER INDIVIDUALS ASKED TO SUPPLY INFORMATION TO THE OFFICE FOR CIVIL RIGHTS

Privacy Act

The Privacy Act of 1974 (5 U.S.C. §552a) requires OCR to notify individuals whom it asks to supply information that:

— OCR is authorized to solicit information under:

- (i) Federal laws barring discrimination by recipients of Federal financial assistance on grounds of race, color, national origin, disability, age, sex, religion under programs and activities receiving Federal financial assistance from the U.S. Department of Health and Human Services (HHS), including, but not limited to, Title VI of the Civil Rights Act of 1964 (42 U.S.C. §2000d et seq.), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. §794), the Age Discrimination Act of 1975 (42 U.S.C. §6101 et seq.), Title IX of the Education Amendments of 1972 (20 U.S.C. §1681 et seq.), and Sections 794 and 855 of the Public Health Service Act (42 U.S.C. §§295m and 296g);
- (ii) Titles VI and XVI of the Public Health Service Act (42 U.S.C. §§291 et seq. and 300s et seq.) and 42 C.F.R. Part 124, Subpart G (Community Service obligations of Hill-Burton facilities);
- (iii) 45 C.F.R. Part 85, as it implements Section 504 of the Rehabilitation Act in programs conducted by HHS; and
- (iv) Title II of the Americans with Disabilities Act (42 U.S.C. §12131 et seq.) and Department of Justice regulations at 28 C.F.R. Part 35, which give HHS "designated agency" authority to investigate and resolve disability discrimination complaints against certain public entities, defined as health and service agencies of state and local governments, regardless of whether they receive federal financial assistance.
- (v) The Standards for the Privacy of Individually Identifiable Health Information (The Privacy Rule) at 45 C.F.R. Part 160 and Subparts A and E of Part 164, which enforce the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (42 U.S.C. §1320d-2).

OCR will request information for the purpose of determining and securing compliance with the Federal laws listed above. Disclosure of this requested information to OCR by individuals who are not recipients of federal financial assistance is voluntary; however, even individuals who voluntarily disclose information are subject to prosecution and penalties under 18 U.S.C. § 1001 for making false statements.

Additionally, although disclosure is voluntary for individuals who are not recipients of federal financial assistance, failure to provide OCR with requested information may preclude OCR from making a compliance determination or enforcing the laws above.



OCR has the authority to disclose personal information collected during an investigation without the individual's consent for the following routine uses:

- (i) to make disclosures to OCR contractors who are required to maintain Privacy Act safeguards with respect to such records;
- (ii) for disclosure to a congressional office from the record of an individual in response to an inquiry made at the request of the individual;
- (iii) to make disclosures to the Department of Justice to permit effective defense of litigation; and
- (iv) to make disclosures to the appropriate agency in the event that records maintained by OCR to carry out its functions indicate a violation or potential violation of law.

Under 5 U.S.C. §552a(k)(2) and the HHS Privacy Act regulations at 45 C.F.R. §5b.11 OCR complaint records have been exempted as investigatory material compiled for law enforcement purposes from certain Privacy Act access, amendment, correction and notification requirements.

Freedom of Information Act

A complainant, the recipient or any member of the public may request release of OCR records under the Freedom of Information Act (5 U.S.C. §552) (FOIA) and HHS regulations at 45 C.F.R. Part 5.

Fraud and False Statements

Federal law, at 18 U.S.C. §1001, authorizes prosecution and penalties of fine or imprisonment for conviction of "whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations or makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry".



PROTECTING PERSONAL INFORMATION IN COMPLAINT INVESTIGATIONS

To investigate your complaint, the Department of Health and Human Services' (HHS) Office for Civil Rights (OCR) will collect information from different sources. Depending on the type of complaint, we may need to get copies of your medical records, or other information that is personal to you. This Fact Sheet explains how OCR protects your personal information that is part of your case file.

HOW DOES OCR PROTECT MY PERSONAL INFORMATION?

OCR is required by law to protect your personal information. The Privacy Act of 1974 protects Federal records about an individual containing personally identifiable information, including, but not limited to, the individual's medical history, education, financial transactions, and criminal or employment history that contains an individual's name or other identifying information.

Because of the Privacy Act, OCR will use your name or other personal information with a signed consent and only when it is necessary to complete the investigation of your complaint or to enforce civil rights laws or when it is otherwise permitted by law.

Consent is voluntary, and it is not always needed in order to investigate your complaint; however, failure to give consent is likely to impede the investigation of your complaint and may result in the closure of your case.

CAN I SEE MY OCR FILE?

Under the Freedom of Information Act (FOIA), you can request a copy of your case file once your case has been closed; however, OCR can withhold information from you in order to protect the identities of witnesses and other sources of information.

CAN OCR GIVE MY FILE TO ANY ONE ELSE?

If a complaint indicates a violation or a potential violation of law, OCR can refer the complaint to another appropriate agency without your permission.

If you file a complaint with OCR, and we decide we cannot help you, we may refer your complaint to another agency such as the Department of Justice.

CAN ANYONE ELSE SEE THE INFORMATION IN MY FILE?

Access to OCR's files and records is controlled by the Freedom of Information Act (FOIA). Under FOIA, OCR may be required to release information about this case upon public request. In the event that OCR receives such a request, we will make every effort,



as permitted by law, to protect information that identifies individuals, or that, if released, could constitute a clearly unwarranted invasion of personal privacy.

If OCR receives protected health information about you in connection with a HIPAA Privacy Rule investigation or compliance review, we will only share this information with individuals outside of HHS if necessary for our compliance efforts or if we are required to do so by another law.

DOES IT COST ANYTHING FOR ME (OR SOMEONE ELSE) TO OBTAIN A COPY OF MY FILE?

In most cases, the first two hours spent searching for document(s) you request under the Freedom of Information Act and the first 100 pages are free. Additional search time or copying time may result in a cost for which you will be responsible. If you wish to limit the search time and number of pages to a maximum of two hours and 100 pages; please specify this in your request. You may also set a specific cost limit, for example, cost not to exceed \$100.00.

If you have any questions about this complaint and consent package,
Please contact OCR at <http://www.hhs.gov/ocr/office/about/contactus/index.html>

OR

Contact your OCR Regional Office
(see Regional Office contact information on page 2 of the Complaint Form)

Pennsylvania is trying to force religious objectors to provide insurance coverage for abortion-inducing drugs and devices, along with contraceptives and sterilization. Pennsylvania itself does not require health insurance plans governed by state law to cover contraceptives, <https://www.governor.pa.gov/governor-wolf-calls-legislature-make-birth-control-coverage-mandate/>, but that has not stopped it from challenging the federal government's religious exemption of the Little Sisters of the Poor (LSP) from a federal contraception mandate. Pennsylvania has filed a federal lawsuit to try to force the federal government to take away the religious exemption it has provided to LSP and other groups.

Pennsylvania is thus engaged in religious discrimination. It is directly targeting religious objectors in an effort to force them to provide objected-to services, even though it has never objected to much larger exemptions for secular employers. For many years, many other employers were exempt from the federal contraceptive mandate—including millions of employers with grandfathered plans (who are allowed to exclude this coverage) and small employers (who do not need to provide any coverage at all). Pennsylvania did not sue the federal government or otherwise seek to interfere with the rights of these employers to exclude the relevant coverage for secular reasons, including purely financial reasons.

But in October, Pennsylvania filed a federal lawsuit seeking to attack the right of religious objectors to get the same treatment that other employers already have for secular reasons. Singling out religious actors for special negative treatment is the essence of religious discrimination. If the Little Sisters excluded this coverage because they had a grandfathered plan, Pennsylvania would apparently not complain; but because they exclude for religious reasons, Pennsylvania filed a federal lawsuit to attack their rights. Pennsylvania's complaint is available here: <http://s3.amazonaws.com/becketnewsite/Complaint-in-Commonwealth-of-Pennsylvania-v.-Trump.pdf>