



March 27, 2018

The Honorable Alex Azar, Secretary
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 via <http://www.regulations.gov>

Re: Comments of 17 State Attorneys General on Notice of Proposed Rulemaking entitled *Protecting Statutory Conscience Rights in Health Care; Delegations of Authority* (Department of Health and Human Services, Office for Civil Rights RIN 0945–ZA03)

Dear Secretary Azar:

The undersigned state Attorneys General, representing 17 states, join together here to stress the importance of the religious freedom and conscience rights the Department's January 26, 2018 notice of proposed rulemaking is intended to protect. Since the time of the founding, there has been an abiding respect in the nation's governmental structure for religious, moral, and ethical beliefs. This has been recognized through repeated Congressional enactments, as well as Supreme Court decisions. The Department's decision to return now to obeying these statutes and opinions is vital to restoring the rule of law to Washington, re-opening opportunities for cooperation between the Department and the state governments on the front lines of public health, and assuring that Americans may abide by their religious, moral, and ethical beliefs without fear of government intimidation and discrimination.

I. THE RIGHT TO OBEY ONE'S CONSCIENCE AS WELL AS RELIGIOUS AND MORAL CONVICTIONS IS ESSENTIAL TO A REPUBLICAN FORM OF GOVERNMENT AND PROTECTED BY OUR CONSTITUTION

Protecting religious liberty and freedom of conscience is at the root of the Constitution's commitment to individual liberty and limited government. The very first words in the Bill of Rights are "Congress shall make no law respecting an

establishment of religion, or prohibiting the free exercise thereof.” James Madison’s original draft of that portion of what became the First Amendment was even more to the present point: “the civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any matter, or on any pretext, infringed.” James Madison, Speech Proposing Amendments to the Constitution, Jun. 8, 1789.¹ Today, Madison’s original draft echoes in Justice Anthony Kennedy’s concurrence to *Burwell v. Hobby Lobby Stores, Inc.*:

In our constitutional tradition, freedom means that all persons have the right to believe or strive to believe in a divine creator and a divine law. For those who choose this course, free exercise is essential in preserving their own dignity and in striving for a self-definition shaped by their religious precepts. Free exercise in this sense implicates more than just freedom of belief. It means, too, the right to express those beliefs and to establish one’s religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community.

134 S.Ct. 2751, 2785 (2014) (Kennedy, J., concurring); *see also United States v. Macintosh*, 283 U.S. 605, 631 (1931) (Hughes, C.J., dissenting) (“in the forum of conscience, duty to a moral power higher than the state has always been maintained”).

Religious liberty requires freedom of conscience; and freedom of conscience is more than freedom of belief—it means freedom to act or not act in accordance with one’s beliefs and values. The principle that religious and moral convictions cannot be dictated or overridden by government has roots in the very founding of our nation. The founding generation believed conscience rights, grounded in religious and moral convictions, were inalienable rights that no government could ever justly deny. James Madison, perhaps the most important founder as it regards our Bill of Rights, once wrote:

The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated by their own minds cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men, is a duty towards the Creator. It is the duty of every man to render

¹ Available at <https://memory.loc.gov/cgi-bin/ampage?collId=llac&fileName=001/llac001.db&recNum=225>.

to the Creator such homage and such only as he believes to be acceptable to him. This duty is precedent, both in order of time and in degree of obligation, to the claims of Civil Society.

James Madison, Memorial and Remonstrance Against Religious Assessments (Jun. 20, 1785).

Discussing the religion clauses of the First Amendment, Justice Joseph Story famously encapsulated the common belief of our founders in noting that “rights of conscience are, indeed, beyond the reach of any human power. They are given by God, and cannot be encroached upon by human authority, without a criminal disobedience of the precepts of natural, as well as of revealed religion.” JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 701 (1833). In other words, our founding fathers believed the duty to obey one’s religious and moral convictions was an even stronger duty than the duty to obey the government.

The Supreme Court has held that government generally runs afoul of the Constitution when it takes an action that will coerce an individual into violating their religious beliefs or “penalize religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens.” *Lyng v. Northwest Indian Cemetery*, 485 U.S. 439, 449 (1988). As recently as last term, the Supreme Court has held that States choosing to exclude churches from a generally-available grant program violated the Free Exercise Clause. In doing so, the Court stated the First Amendment prohibited a government agency from “expressly denying a qualified religious entity a public benefit solely because of its religious character. Under our precedents, that goes too far. The Department’s policy violates the Free Exercise Clause.” *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017). Thus, by seeking to obey duly-enacted laws that protect religious freedom and conscience rights, the Department is furthering a core value of our Constitution.

The foregoing principles properly underpin and sustain the proposed rules and their underlying statutory authority. Regulatory protection for religious liberty and freedom of conscience protects against government-imposed burdens on private religious exercise within comprehensive regulatory schemes, such as health care and health insurance. And enforcement of federal funding conditions that require states to respect religious liberty and freedom of conscience are protecting rights guaranteed by the Constitution. As observed nearly fifty years ago, “it is hardly impermissible for Congress to attempt to accommodate free exercise values, in line with ‘our happy tradition’ of ‘avoiding unnecessary clashes with the dictates of conscience.’” *Gillette v. U.S.*, 401 U.S. 437, 453 (1971). Indeed, laws that protect religious liberty and freedom of conscience at or above the judicially-recognized, constitutional baseline have been

repeatedly sustained and enforced. *See, e.g., Cutter v. Wilkinson*, 544 U.S. 709, 744 (2005) (upholding the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §2000cc-1, et seq.); *Burwell*, 134 S. Ct at 2761 n.4 (citing *Hankins v. Lyght*, 441 F.3d 96, 108 (2nd Cir. 2006); *Guam v. Guerrero*, 290 F.3d 1210, 1220 (9th Cir. 2002)).

II. CONGRESS HAS SET A POLICY THAT RELIGIOUS LIBERTY AND CONSCIENCE RIGHTS ARE TO BE RESPECTED

Recognizing the importance of religious freedom and conscience rights, Congress has set as a broad policy that the federal government will not use religious or moral beliefs as a basis for disparate treatment of Americans participating in federal programs. And where Congress has set forth protections for religious freedom and conscience rights in connection with programs and acts administered by the Department, it is within the Department's purview to enforce these protections. The Department also is constitutionally and legally authorized to condition any partnership with a state or local government on the understanding that federal programs supported by federal funds must not require citizens to abandon their constitutionally-protected conscience or deeply held religious convictions.

A. Religious Freedom Restoration Act of 1993

The most overarching statement of Congressional policy on the protection of religious and conscience rights can be found in the Religious Freedom Restoration Act of 1993. In response to several Supreme Court opinions addressing religious liberty issues, Congress reaffirmed our fundamental commitment to protecting religious and conscience rights by enacting the Religious Freedom Restoration Act of 1993 which, among other things, prohibits governments from substantially burdening the rights of individuals to religious exercise without compelling justification, unless the government can demonstrate that its regulation is the least restrictive means of furthering a compelling government interest. *See* 42 U.S.C. § 2000bb *et seq.* The act binds the federal government, and has been specifically upheld in various circumstances. *See, e.g., Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826 (9th Cir. 1999); *Kikumura v. Hurley*, 242 F.3d 950 (10th Cir. 2001); *Holy Land Foundation for Relief and Development v. Ashcroft*, 333 F.3d 156 (D.C. Cir. 2003); *Hankins v. Lyght*, 441 F.3d 96 (2d Cir. 2006); *but see City of Boerne v. Flores*, 521 U.S. 507 (1997) (affirming limit on direct regulation of states by Congress). Thus, the Department has a legal obligation not to place undue burdens on the conscience rights of participants in its programs and, as mentioned above, does not threaten principles of federalism by requiring respect for constitutionally-protected conscience rights as a condition of receiving federal funds.

B. Religious/Conscience Protections Elsewhere

Consistent with the general need to protect religious freedom and conscience rights, Congress has passed statutory protections for such rights across many areas of law, including:

- 50 U.S.C. § 3806(j), which exempts an individual from being conscripted into the armed forces if “by reason of religious training and belief, [that individual] is conscientiously opposed to participation in war in any form.”
- 18 U.S.C. § 3597(b), which prohibits employees of state and federal prison systems and various other government employees from being required to be in attendance at or participate in any prosecution of or execution for capital crimes if such participation is contrary to the moral or religious convictions of the employee;
- 42 U.S.C. § 2996f(b)(8), which provides that the legal services corporation cannot use taxpayer funds to bring any proceeding or litigation seeking to compel any individual or institution to perform or in any way assist the performance of an abortion;
- 20 U.S.C. § 1687, excludes educational institutions controlled by religious organizations from Title IX’s gender discrimination provision, as the requirements would not be consistent with the religious tenets of such an organization.

III. CONGRESS HAS TAKEN PARTICULAR CARE TO PROTECT THE RELIGIOUS FREEDOM AND CONSCIENCE RIGHTS OF AMERICANS IN CONNECTION WITH FEDERAL HEALTHCARE PROGRAMS

The healthcare field necessarily involves actions and decisions that implicate religious and moral convictions about human dignity and the sanctity of human life. End-of-life care, final directives for those on life support, contraception, sterilization procedures, abortions, and various other invasive procedures all raise serious dilemmas for healthcare providers who hold a wide range of religious and moral convictions.

Thus, Congress has set a clear policy prohibiting the government from discriminating against individuals and organizations on the basis of their conscience or religious or moral convictions. Such protections include:

- 42 U.S.C. § 238n(a)(1), often called the “Coates-Snow Amendment,” prohibits discrimination against a medical provider that

“refuses to undergo training in the performance of induced abortions, to require or provide such training, to perform such abortions, or to provide referrals for such training or such abortions;”

- 42 U.S.C. § 300a–7, often called the “Church amendment,” which prohibits hospitals or individuals from being excluded from receiving federal funds under several federal programs based on their refusal to participate in abortion or sterilization procedures if they object on moral or religious grounds;

- 42 U.S.C. § 238n, which prohibits federal, state, and local government entities that receive certain federal funds from discriminating against healthcare providers who refuse to undergo, provide, or refer individuals for training in the performance of abortions;

- 42 U.S.C. § 1395w-22(j)(3)(B), which prohibits health insurers participating in a Medicare Advantage plan from being required to provide coverage for a medical service if the insurer objects to the provision of such service on moral or religious grounds;

- The Hyde/Weldon amendment, approved by Congresses and Presidents every year since 2004, which prohibits federal funds from being distributed to any federal, state, or local government entity if such government entity discriminates against individuals or healthcare entities that do not provide, pay for, provide coverage of, or refer for abortions.

IV. WITHOUT A DEPARTMENTAL ENFORCEMENT MECHANISM, THERE CAN BE NO ASSURANCE THAT THE ALREADY ENACTED PROTECTIONS FOR RELIGIOUS FREEDOM AND CONSCIENCE RIGHTS WILL BE HONORED

Despite the clearly-expressed directives from Congress set out above, the Department in recent years has failed to assure that participants in its healthcare programs honor these conscience and religious freedom protections. In particular, the Department has failed to adequately address situations where program participants have coerced healthcare professionals into participating in abortions, dispensing drugs that end human life, and providing health insurance coverage for abortions.²

² See, e.g., Gene Johnson, *Ruling: Washington Can Require Pharmacies to Dispense Plan B*, Seattle Times, Jul. 23, 2015, available at <https://www.seattletimes.com/seattle-news/ruling-washington-can-require-pharmacies-to-dispense-plan-b/>; Julia Duin, *N.Y. Nurse Sues After Forced to Aid Abortion*, WASHINGTON TIMES, Jul. 31, 2009, available at <https://www.washingtontimes.com/news/2009/jul/31/nurse-sues-after-aiding-abortion/>; Sarah Pulliam Bailey, *Is California Forcing Churches to Pay*

Of additional concern, the Department itself has chosen at times to deny participation in federal healthcare programs based on a state or entity's religious or moral objections to providing various services. In 2011, the Department chose to exclude the United States Conference of Catholic Bishops from a grant program to help victims of human trafficking because the charity group did not refer individuals for abortion services.³ In 2012, the Department excluded the State of Texas from the Title X grant program because of actions taken by the Texas Legislature to protect the widely-held religious and moral convictions of Texas taxpayers concerning abortion.⁴

These types of actions undermine the constitutional and statutory protections for religious freedom and conscience rights, and the Department's proposal would put in a place a check to ensure such actions do not occur in the future. Perhaps the most important portion of the proposed rule is the designation of the Office for Civil Rights as the responsible entity for enforcing conscience protections. Given the breadth of the Department's programs and the large number of statutes governing them, it is absolutely critical that protecting religious freedom and conscience rights be a priority of some dedicated element within the Department. The Office for Civil Rights appears to us to be the most appropriate body within the Department to do so. The Office of Civil Rights has decades of experience working with complaints related to preventing discrimination and protecting constitutional rights; it has processes already in place for accepting and processing complaints of such misconduct from the public; and it has regional offices around the country to make it easier for those who have been discriminated against to seek redress. Finally, aside from the Office of Civil Rights' obvious expertise and capabilities, it is important that the Office of Civil Rights be responsible for protecting religious freedom and conscience rights because such an assignment sends a clear message that the Department regards discrimination based on religious or moral beliefs to be just as inappropriate as other forms of invidious conduct rightly prohibited by law.

for Abortions?, Washington Post, Oct. 24, 2014, available at https://www.washingtonpost.com/national/religion/is-california-forcing-churches-to-pay-for-abortions/2014/10/24/60b10e7a-5ba6-11e4-9d6c-756a229d8b18_story.html?utm_term=.39e8b9a7fa58.

³ See Jerry Markon, *Health, Abortion Issues Split Obama Administration and Catholic Groups*, Washington Post, Oct. 31, 2011, available at https://www.washingtonpost.com/politics/health-abortion-issues-split-obama-administration-catholic-groups/2011/10/27/gIQAXV5xZM_story.html?utm_term=.5bce95cd65fb.

⁴ See Letter from the Hon. Ken Paxton to Alex Azar, Mar. 22, 2018, at <https://bit.ly/2DNLdQR>.

The undersigned state Attorneys General applaud the Department for its attention and dedication to this issue, and look forward to working with the Department to assure that principles of federalism, religious freedom, and freedom of conscience are restored to their proper place in our constitutional system of government.

Sincerely,



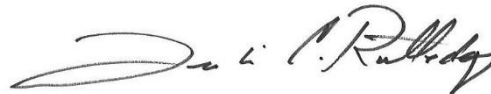
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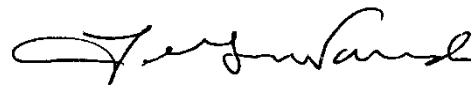
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