FIRST LIBERTY

October 3, 2022

Secretary Xavier Becerra
U.S. Department of Health and Human Services
Office for Civil Rights
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue SW
Washington, DC 20201

Re: 1557 NPRM—Docket ID HHS-OS-2022-0012; RIN 0945-AA17

Dear Secretary Becerra:

First Liberty Institute ("First Liberty") submits this comment responding to the Department of Health and Human Services' ("The Department's") Office for Civil Rights ("OCR") proposed rule, "Nondiscrimination in Health Programs and Activities" in Section 1557 of the Patient Protection and Affordable Care Act.

First Liberty is the largest legal organization in the nation dedicated exclusively to defending religious liberty for all Americans by pro bono legal representation of individuals and institutions of diverse faiths—Catholic, Protestant, Islamic, Jewish, Buddhist, Falun Gong, Native American religious practitioners, and others. For over thirty years, First Liberty attorneys have worked to defend religious freedom in the courts, including the U.S. Supreme Court, as well as testifying before Congress, and advising federal, state, and local officials about constitutional and statutory protections for religious liberty.

First Liberty opposes the Department's proposed revisions to its Section 1557 regulations because the revisions violate the Religious Freedom Restoration Act ("RFRA"), as multiple federal courts have already found.[1] Millions of Americans hold sincere religious beliefs about gender, sex, human life, and the body, and First Liberty represents clients from a wide variety of faith backgrounds whose religious exercise would be substantially burdened by the proposed Rule.

First Liberty represents multiple religious healthcare providers and entities, including Nurse Practitioners with religious objections to prescribing abortifacient and sterilizing medications, and a Physician's Assistant whose religious beliefs prevent her from prescribing gender-transition hormones or referring patients for gender-transition surgery.

Religious healthcare providers and institutions will continue to be targeted, sued, and eventually forced out of the healthcare field if Federal regulations do not permit them to follow their consciences. If enacted, the proposed Rule would also violate the Free Exercise Clause of the First Amendment because it is not neutral or generally applicable, and its mechanism for granting

[1] 42 U.S.C. § 2000bb, *et seq*.; see *Franciscan All. v. Becerra*, No. 21-11174, 2022 WL 3700044 (5th Cir. Aug. 26, 2022), *Christian Employers All. v. EEOC*, 2022 WL 1573689, at *1 (D.N.D. May 16, 2022); *Religious Sisters of Mercy v. Azar*, 513 F. Supp. 3d 1113, 1147–49 (D.N.D. 2021).

exemptions treats religious objections less favorably than secular objections. The Supreme Court's decision in *Bostock v. Clayton County* does not apply to Section 1557 or require the reinterpretation of "sex discrimination" to include sexual orientation and gender identity. On the contrary, *Bostock* recognizes robust protections for religious Americans, including the First Amendment and RFRA. Furthermore, the proposed Rule fails to respect existing state laws that protect religious liberty for healthcare providers. Every state has some form of religious freedom or conscience law in place.[2] Indeed, 23 states have enacted versions of the Religious Freedom Restoration Act, which apply the strict scrutiny test to government attempts to regulate conscience.[3] The Department must clarify that it will not preempt these laws through its proposed Rule.

I. The Department Must Revise the Rule to Comply with Federal Laws Including the Religious Freedom Restoration Act.

The federal government must comply with RFRA.[4] If finalized, the proposed Rule would substantially burden the free exercise of religion, triggering strict scrutiny. The Department will fail this test because it has not shown that its stringent approach satisfies a compelling interest, nor has it drafted the Rule in the least restrictive manner.

A. The proposed Rule would harm millions of Americans from a myriad of faith backgrounds who hold sincere religious beliefs about gender, marriage, and family life.

A bipartisan Congress enacted RFRA to "provide very broad protection for religious liberty" for all Americans living according to their sincerely held religious beliefs, including protection from government penalties or punishment.[5] Here, the proposed Rule infringes on sincerely held beliefs relating to sexual orientation, gender identity, marital and parental status, and termination of pregnancy. Religious beliefs about these sensitive areas of life, family, and conscience motivate persons of faith who interact with health programs and activities in healthcare (as patients, providers, health educators, and students), and in health insurance (the insured, insurers, brokers, benefits entities).

The proposed Rule fails to assess its negative impact on the religious liberty of people of faith. The Rule constrains religious believers in a wide breadth of roles, including individual healthcare providers in a variety of fields, such as obstetrics/gynecology, pharmacy, psychiatry, psychology/counseling, endocrinology, and surgery. Many institutions also operate according to sincerely held religious beliefs, such as employers, houses of worship, closely held corporations,

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[2] New Hampshire and Vermont do not have specific statutes protecting medical rights of conscience, but they have constitutional provisions and nondiscrimination laws that apply. Sarah M. Estelle, *Religious Liberty in the States 2022*, CENTER FOR RELIGION, CULTURE, AND DEMOCRACY, https://religiouslibertyinthestates.s3.us-east-2.amazonaws.com/Religious_Liberty_in_the_States_Report-2022.pdf.

[3] *Id., State Religious Freedom Restoration Acts*, NATIONAL CONFERENCE OF STATE LEGISLATURES (May 4, 2017), https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx.

[4] 42 U.S.C. § 2000bb.

[5] *Holt v. Hobbs*, 574 U.S. 352, 356 (2015).

religious hospitals, and health education institutions, and this Rule infringes on their religious exercise as well.[6]

The Department has requested comment on the potential impact of its policy causing "providers with religious and conscience objections leaving the profession, or covered entities existing the market."[7] Looking at hospitals alone, 18.5% of hospitals are religiously affiliated as of 2016; 14.5% of these are Catholic-owned or Catholic-affiliated, and 4.0% are affiliated with other faiths or denominations.[8] Even if merely a subset of these hospitals were forced to close or reduce their services, that would have a significant impact on patient access to healthcare at a time when the healthcare system is already facing severe shortages. Turning to individual providers, 51.2% of surveyed physicians reported themselves as religious, and 20.7% reported praying with patients.[9] Again, even if only a portion of these physicians have conscientious objections to participating in gender-transition treatment as the proposed Rule requires, the proposed Rule will have a significantly detrimental impact on the overall healthcare system as many are forced to withdraw from caring from the patients they seek to serve. According to a 2009 survey of religious medical professionals, 95% agreed with the statement, "I would rather stop practicing medicine altogether than be forced to violate my conscience."[10]

Even if the proposed Rule would violate the consciences of *only* Christian medical professionals, which is not the case as the next section shows, the Christian Medical & Dental Associations have more than 19,000 members. Most of these members share the organization's position, which affirms "the biblical understanding of humankind as having been created male and female," and that "healthcare professionals should not be forced to violate their conscientious commitment to their patients' health and welfare by being required to accept and participate in harmful gender-transition interventions, especially on the young and vulnerable."[11]

Research on religious beliefs shows that religions from diverse cultures and geographic regions assert—and have asserted for millennia—that sex is an objective, binary category that cannot be changed by self-perception or medical intervention.[12] If the proposed regulations discussed above are implemented, the Department will be inviting recipients to attack the faith of individuals from numerous religions, including:

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[6] *Burwell v. Hobby Lobby Stores, Inc.,* 573 U.S. 682, 706-08 (2014).
[7] 87 Fed. Reg. 47905.
[8] Maryam Guiahi, Patricia E. Helbin, & Stephanie B. Teal, *Patient Views on Religious Institutional Health Care*, Public Health, JAMA Netw. Open (2019), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2757998.
[9] Kristin A. Robinson, Meng-Ru Cheng, Patrick D. Hansen, Jicard J. Gray, Religious and Spiritual Beliefs of Physicians, J. Relig. Health (2017), https://pubmed.ncbi.nlm.nih.gov/27071796/#:~:text=Primary%20care%20physicians%20or%20medical,agnostic%2C%20and%2011.6%20%25%20atheist.
[10] Van Mol, Andre, *Health-Care Reform's Great Expectations and Physician Reality*, ANN PHARMACOTHER (2010); 44:1492-5.
[11] *CMDA Ethics Statement: Transgender Identification,* CHRISTIAN MEDICAL & DENTAL ASSOCIATIONS (2021), file:///Users/kaylatoney/Downloads/Transgender%20Identification%202021%20-%20October%20(1).pdf.
[12] *See, e.g.,* Christopher Yuan, *Gender Identity and Sexual Orientation,* THE GOSPEL COALITION, https://www.thegospelcoalition.org/essay/gender-identity-and-sexual-orientation/.

- **Amish Communities:** "In the Bible, marriage is a divinely ordered institution designed to form a permanent union between one man and one woman for one purpose (among others) of procreating or propagating the human race. That was God's order in the first of such unions (Genesis 1:27–28; 2:24; Matthew 19:5). If, in His original creation of humans, God had created two persons of the same sex, there would not be a human race in existence today. . . . The Christian point of view is based solely upon the Bible, the divinely inspired Word of God. A truly Christian standard of ethics is the conduct of divine revelation, not of statistical research nor of public opinion. Homosexuality is an illicit lust forbidden by God. . . In these passages, homosexuality is condemned as a prime example of sin—a sexual perversion. The Christian can neither alter God's viewpoint nor depart from it."[13]

- **Anglican Church in North America:** "Our foundation is the Scriptural truth that God made us male and female in His image—a profound unity with distinction (Genesis 1:27). God established marriage between male and female to fill the earth through procreation (Genesis 1:28)."[14]

- **Assemblies of God:** "Genesis 1:26–31 is the record of God creating, blessing, and commanding humanity as male and female. Humans are created in the 'image of God' as male and female. . . . The biblical recognition of two distinct human sexes, female and male, from the creation of humanity as male and female in Genesis 1:26–27, is affirmed by Jesus in Matthew 19:4 and Mark 10:6. . . . True human identity is what is being realized in relationship with Christ, body and an immaterial nature, which will culminate in the Resurrection. No account of humanity that asserts the interior life as the true self over against the body is a biblical understanding of humanity."[15] "It should be noted at the outset that there is absolutely no affirmation of . . . changes in sexual identity found anywhere in Scripture. Male and female genders are carefully defined and unconfused. The consistent ideal for sexual experience in the Bible is chastity for those outside a monogamous heterosexual marriage and fidelity for those inside such a marriage."[16]

- **Baha'i:** "Baha'u'llah teaches that the soul has no gender, race, or other physically ascribed identities. It is a spiritual reality that transcends all such distinctions. From this vantage point, Baha'is understand that the autonomy and welfare of human beings are not only determined by the laws and constraints of the natural world, but also by an objective spiritual existence that is integrally related to it."[17]

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[13] Lehman Strauss, *Homosexuality: The Christian Perspective*, MISSION TO AMISH PEOPLE (Nov. 1, 2019), https://www.mapministry.org/articles/2019/11/01/homosexuality-the-christian-perspective.

[14] Anglican Church in North America, *Sexuality and Identity: A Pastoral Statement from the College of Bishops*, Jan. 2021, https://anglicanchurch.net/sexuality-and-identity-a-pastoral-statement-from-the-college-of-bishops/.

[15] Assemblies of God, *Transgenderism, Transsexuality, and Gender Identity* (Adopted by the General Presbytery in Session August 5-7, 2017), https://ag.org/Beliefs/Position-Papers/Transgenderism-Transsexuality-and-Gender-Identity.

[16] Assemblies of God, *Homosexuality, Marriage, and Sexual Identity* (Aug. 4-5, 2014), https://ag.org/Beliefs/Position-Papers/Homosexuality-Marriage-and-Sexual-Identity.

[17] Baha'is of the United States, *What is the Baha'i View Pertaining to Identity?* https://www.bahai.us/bahai-teachings-homosexuality/.

- **Buddhism:** "Clinging to gender identity and letting conventional ideas about gender dictate one's life thus contradicts all central Buddhist teachings. One would then also have to contend that egolessness is gendered, which would be a self-contradictory, illogical proposition."[18] "*Pandaka* refers to male tranvestites and [effeminate] homosexuals… The scriptures describe the Buddha as expressing a compassionate attitude towards people who began to show cross-gender characteristics after ordination and to those who, while attracted to members of the same sex, were regarded as being physiologically and behaviourally true to the then prevailing cultural notions of masculinity. However, the Buddha opposed accepting into the *sangha* those who openly expressed cross-gender features at the time they presented for ordination. Volume Four of the *Vinaya* recounts a story of a *pandaka* who violated the clerical vow of celibacy and whose bad example led to a comprehensive ban on the ordination of *pandaka*."[19]

- **Church of God in Christ**: "The opening book of the Bible tells us: 'A man will leave his father and his mother and he must cleave to his wife and they must become one flesh' (Genesis 2:24). The Hebrew word 'wife' connotes one who is a female human being. Jesus confirmed that those yoked together in marriage should be 'male and female' (Matthew 19:4). Therefore, God intended marriage to be a permanent and an intimate bond between a man and a woman. Men and women are designed to complement each other so they may be capable of satisfying each other's emotional, spiritual, and sexual needs and desires."[20]

- **Church of Jesus Christ of Latter-day Saints:** "Church leaders counsel against elective medical or surgical intervention for the purpose of attempting to transition to the opposite gender of a person's birth sex ('sex reassignment'). Leaders advise that taking these actions will be cause for Church membership restrictions. Leaders also counsel against social transitioning. … Transgender individuals who do not pursue medical, surgical, or social transition to the opposite gender and are worthy may receive Church callings, temple recommends, and temple ordinances."[21]

- **Confucianism:** "Traditional Confucian culture, the common base of social culture in the mainland of China, Taiwan and Vietnam, is a complex system of moral, social, political, and religious thought with regard to individual's relationships with others and appropriate conduct. Its core concepts advocate filial devotion to family and priority of collective

[18] Rita M. Gross, *Why Go Beyond Gender?,* SHAMBHALIA PUBLICATIONS (March 27, 2018), https://www.shambhala.com/go-beyond-gender-excerpt-buddhism-beyond-gender/.
[19] Peter A. Jackson, *Male Homosexuality and Transgenderism in the Thai Buddhist Tradition*, (1993) http://buddhism.lib.ntu.edu.tw/museum/TAIWAN/md/md08-52.htm.
[20] General Assembly of the Church of God in Christ, Inc., Marriage: A Proclamation to COGIC Worldwide, https://www.cogic.org/generalassembly/proclamation-on-marriage
[21] The Church of Jesus Christ of Latter-Day Saints, *What is the Church's Position on Transitioning?* https://www.churchofjesuschrist.org/topics/transgender/understanding?lang=eng.

interests, self-cultivation of virtue and *unequal gender roles*."[22] "[T]he biological processes associated with female reproduction are ranked on a hierarchical scale reflecting women's social position that conforms with Confucian gender hierarchies and social mores."[23]

- **Daoism:** "Daoist philosophy . . . advocated for gender equality. This idea was reinforced in the symbolism of yin-yang by illustrating the complementary, dualistic, interdependent, and equal natures of the male (yang) female (yin) elements. One would not exist without the other and both have been equally important in creating and sustaining life. If one of the components were missing, reality would not be complete."[24]

- **Falun Gong:** "With regards to sexual ethics, Falun Gong holds traditional views similar to the teachings of Buddhism or Christianity. In short, Falun Gong aims at taking attachments and desires lightly, including sexual desire, and stipulates that sexual relations should only occur in the context of monogamous, heterosexual marriage."[25]

- **Jehovah's Witnesses:** "Are sexual practices and gender really a matter of personal choice? What does God's Word have to say on these issues? … According to the Bible book of Genesis, God himself created the differences between males and females."[26]

- **Lutheran Church**: "[T]ransgenderism cannot be reconciled with Luther's explanation of the first article of the Creed. When Lutherans confess that God has made us and all creatures, that he's made our bodies and souls, and that it is our duty to thank and praise him for this, we are not merely confessing God as our creator. We're also confessing him as our Lord, the one who is both responsible for making the universe and who has divine ownership over every atom of his creation, including our flesh."[27]

- **Orthodox Church of America:** "The Bible says 'Male and female He Created them' (Gen. 1:27). Our sexuality began with our creation. Since the Fall, however, we have

[22] Ersheng Gao. *How does Traditional Confucian Culture Influence Adolescence in Three Asian Cities?*, NATIONAL LIBRARY OF MEDICINE (Nov. 18, 2014), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4235616/#:~:text=Confucianism%20sees%20sexuality%20as%20taboo,of%20marriage%20is%20not%20condoned.

[23] Megan Pellouchoud, *Women's Biological Threat to Confucian Social Order: An Examination of Gender Constructs through an Analysis of Pre-Modern Chinese Literature*, OREGON UNDERGROUND RESEARCH JOURNAL (2018), https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/23514/OURJ_spring_2018_MPellouchoud.pdf?sequence=1&isAllowed=y.

[24] Dessie Miller, *Celebrating the Feminine: Daoist Connections to Contemporary Feminism in China*, Master's Projects and Capstones, University of San Francisco (2017), at 3, https://repository.usfca.edu/cgi/viewcontent.cgi?article=1607&context=capstone#:~:text=Daoism%20emphasizes%20gender%20equality%20by,be%20understood%20without%20the%20other.

[25] Falun Dafa InfoCenter, *"Intolerant"?*, https://faluninfo.net/misconceptions-intolerant/.

[26] Watch Tower Bible And Tract Society of Pennsylvania, *The Bible's Viewpoint: Alternative Life-Styles—Does God Approve?* (2022), https://wol.jw.org/en/wol/d/r1/lp-e/102003726.

[27] The Council on Biblical Manhood and Womanhood, *A Lutheran View of Transgenderism* (Nov. 21, 2021), https://cbmw.org/2021/11/21/a-lutheran-view-of-transgenderism/.

become confused about what it means to be male and female. On one level there are clear biological differences such as reproductive organs, hormones, etc. On the level of social interaction, though, there is a variety of ways of distinguishing males from females, men from women, and vice versa."[28]

- **Orthodox Judaism:** "Orthodox Judaism generally does not accept that a person can change gender/sex. However, for purposes of public order and propriety, Orthodox rabbis will sometimes accommodate trans people's gender expressions in limited ways."[29] "Male homosexual intercourse is forbidden by the Torah for both Jews[30] and Gentiles."[31] "It is noteworthy, in this context, that whilst the exact meanings of many Biblical commandments have been subject to dispute in the Mishnaic and Talmudic period, there has been absolute unanimity throughout the entire rabbinic tradition as to the unequivocal meaning of the Biblical injunction regarding male homosexual intercourse."[32] "[W]e have to strive to 'maintain sexual purity' on a universal level and it is 'our obligation… to incorporate the Holiness Code into our everyday civic and communal life.'"[33]

- **Presbyterian Church in America:** "Statement 2: Image of God. We affirm that God created human beings in his image as male and female (Gen. 1:26-27). Likewise, we recognize the goodness of the human body (Gen. 1:31; John 1:14) and the call to glorify God with our bodies (1 Cor. 6:12-20). As a God of order and design, God opposes the confusion of man as woman and woman as man (1 Cor. 11:14-15). While situations involving such confusion can be heartbreaking and complex, men and women should be helped to live in accordance with their biological sex."[34]

- **Roman Catholicism:** According to Catechism of the Catholic Church, Sexual Identity (No. 2333), "Everyone, man and woman, should acknowledge and accept his sexual identity. Physical, moral, and spiritual difference and complementarity are oriented toward the goods of marriage and the flourishing of family life. The harmony of the couple and of society depends in part on the way in which the complementarity, needs, and mutual support between the sexes are lived out."[35] "Sexuality, by means of which man and woman give themselves to one another through the acts which are proper and exclusive to spouses,

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[28] Orthodox Church of America, *"In the Beginning…" Healing our Misconceptions*, https://www.oca.org/the-hub/two-become-one/session-2-in-the-beginning-.-.-.-healing-our-misconceptions.

[29] Aaron H. Devor, *Transgender People and Jewish Law*, DE GRUYTER (2016), https://www.degruyter.com/document/doi/10.1515/9783110434392-022/pdf.

[30] Leviticus 18:22; Leviticus 20:13.

[31] Chaim Rapoport, *Judaism and Homosexuality: An Alternate Rabbinic View*, 13 Hakirah, the Flatbush Journal of Jewish Law and Thought 29, 30 (citing Sanhedrin 58a (expounding on Genesis 2:24) and Maimonides, Mishneh Torah, Hilkhot Melakhim 9:5), https://hakirah.org/Vol13Rapoport.pdf.

[32] *Id.* at 30.

[33] *Id.* at 32.

[34] *Forty-Seventh General Assembly of the Presbyterian Church in America Ad Interim Committee on Human Sexuality* (May 2020), https://pcaga.org/wp-content/uploads/2020/05/AIC-Report-to-48th-GA-5-28-20.pdf.

[35] U.S Counsel of Catholic Bishops, *Gender Theory/Gender Ideology—Select Teaching Resources* (Aug. 7, 2019), https://www.usccb.org/resources/Gender-Ideology-Select-Teaching-Resources_0.pdf.

is not something simply biological, but concerns the innermost being of the human person as such."[36]

- **Seventh-day Adventist Church:** "[T]he desire to change or live as a person of another gender may result in biblically inappropriate lifestyle choices. Gender dysphoria may, for instance, result in cross-dressing, sex reassignment surgery, and the desire to have a marital relationship with a person of the same biological sex. On the other hand, transgender people may suffer silently, living a celibate life or being married to a spouse of the opposite sex."[37]

- **Shi'ah and Sunni Muslims:** "Prophet Mohammad (pbuh) has stated that: 'men and women are twin halves of each other' (Bukhari). This narration also brings home the fact that men and women are created from a single source. Furthermore, by using the analogy of twin half, the Prophet (pbuh) has underlined the reciprocal and interdependent nature of men and women's relationships."[38] "There are fatwas from different Islamic countries which give rulings regarding sex change surgery or gender reconstruction surgery with regard to both the khunsa and the mukhannath (the transsexual). These fatwas generally agree that gender reconstruction surgery for the khunsa is permissible in Islam but prohibited in the case of the mukhannath."[39]

- **Sikhism:** "Although it is true that the 'idea of gender' has changed wildly throughout different times and different cultures, we don't see any specific examples of that type of deconstruction within the span of Sikh history. In fact, as mentioned earlier via the Manji-Pir system and Singh-Kaur, the solidification and acknowledgement of male and female genders is socially built into Sikh institutions. Norms of masculinity and femininity have indeed evolved, but *this does not mean that such norms did not exist* — in fact, traditional Sikh canon conveys the exact opposite."[40]

- **Southern Baptists:** "Man is the special creation of God, made in His own image. He created them male and female as the crowning work of His creation. The gift of gender is thus part of the goodness of God's creation."[41] "God's design was the creation of two distinct and complementary sexes, male and female (Genesis 1:27; Matthew 19:4; Mark 10:6) which designate the fundamental distinction that God has embedded in the very biology of the human race. . . . [G]ender identity is determined by biological sex and not by one's self-perception—a perception which is often influenced by fallen human nature

[36] Catholic Catechism, No. 2361, https://www.usccb.org/sites/default/files/flipbooks/catechism/569/#zoom=z.
[37] Seventh-day Adventist Church, *Statement on Transgenderism*, https://www.adventist.org/official-statements/statement-on-transgenderism/.
[38] *Marriage in Islam*, Why Islam? Facts about Islam, https://www.whyislam.org/social-issues/marriage-in-islam/.
[39] Ani Amelia Zainuddin, et al, *The Islamic Perspectives of Gender-Related Issues in the Management of Patients with Disorders of Sex Development*, NATIONAL LIBRARY OF MEDICINE (April 21, 2016), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5272885/.
[40] Jung Nihang, *The Manipulation of Gurbani and the Sikh Gurus for Gender Politics,* May 13, 2021, https://jodhsingh.medium.com/the-manipulation-of-gurbani-and-the-sikh-gurus-for-gender-politics-77225b1c9cb7.
[41] Baptist Faith & Message 2000, https://bfm.sbc.net/bfm2000/#xviii.

> in ways contrary to God's design (Ephesians 4:17–18). . . . [W]e extend love and compassion to those whose sexual self-understanding is shaped by a distressing conflict between their biological sex and their gender identity . . . . [W]e regard our transgender neighbors as image-bearers of Almighty God and therefore condemn acts of abuse or bullying committed against them . . . [W]e oppose efforts to alter one's bodily identity (e.g., cross-sex hormone therapy, gender reassignment surgery) to refashion it to conform with one's perceived gender identity."[42]

RFRA and the First Amendment provide robust protection for religious believers who adhere to these faiths and for individuals who do not participate in a specific religious tradition but who hold deep, sincere beliefs about the body, sexuality, marriage, gender, and human life.[43] Even if an individual is not a member of one of these religious groups, religious liberty protections still apply as long as the belief is sincerely held.[44] The Department would violate both the Free Exercise and Establishment Clauses if they decided that a sincerely held religious objection from an individual of faith is not "legitimate" merely because he or she does not belong to one of the faith traditions listed above. Conscience rights also belong to those who do not identify with a particular religion at all. According to philosopher Edward Tingley, "conscience rights protect those who object to the norm of what even a majority thinks is right," and [t]he claim of wrong needs only to be serious and defensible. In our context, because moral complicity is prosecutable, physicians and pharmacists have the right to decline participation in or referral for procedures and therapies violating their ethical or religious convictions."[45]

Various religious texts define marriage between a man and woman as a sacred institution. Sacred texts that define beliefs on marriage, sexuality, chastity, and sex as binary (male and female) include the Qu'ran,[46] Ahadith,[47] Catholic Catechism,[48] the Torah,[49] the Bible, and the Book of Mormon.[50]

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[42] Southern Baptist Convention, *On Transgender Identity,* June 1, 2014, https://www.sbc.net/resource-library/resolutions/on-transgender-identity/.

[43] *Thomas* v. *Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981).

[44] *Holt v. Hobbs*, 574 U.S. 352, 362 (2015) (finding that even if religious claimant's belief were "idiosyncratic," the "guarantee of the Free Exercise Clause is 'not limited to beliefs which are shared by all of the members of a religious sect.'") (quoting *Thomas*, 450 U.S. at 714).

[45] Van Mol, Andre, *Health-Care Reform's Great Expectations and Physician Reality*, ANN PHARMACOTHER (2010); 44:1492-5.

[46] *Marriage in Islam*, Why Islam? Facts About Islam (March 5, 2015), https://www.whyislam.org/social-issues/marriage-in-islam/; *Women are the Twin Halves of Men*, Observer News Service, (March 9, 2017), https://kashmirobserver.net/2017/03/09/women-are-the-twin-halves-of-men/.

[47] Dr. Sikiru Gbena Eniola, *An Islamic Perspective of Sex and Sexuality: A Lesson for Contemporary Muslims*, 12 IOSR JOURNAL OF HUMANITIES AND SOCIAL SCIENCE 2 (May-Jun. 2013), at 20-28, https://www.iosrjournals.org/iosr-jhss/papers/Vol12-issue2/C01222028.pdf

[48] Catholic Catechism, No. 2361, https://www.usccb.org/sites/default/files/flipbooks/catechism/569/#zoom=z.

[49] *Issues in Jewish Ethics: Homosexuality*, JEWISH VIRTUAL LIBRARY, https://www.jewishvirtuallibrary.org/homosexuality-in-judaism.

[50] The Church of Jesus Christ of Latter-Day Saints, *Chastity, Chaste,* https://www.churchofjesuschrist.org/study/scriptures/tg/chastity?lang=eng

Many religious traditions include beliefs related to bodily integrity and sanctification, and these beliefs have a practical, positive impact on patients' health. "Considerable research suggests that greater general religiousness (e.g., religious affiliation, rates of church attendance, self-rated importance of religion) is tied to lower levels of health compromising behavior and greater endorsement of health protective attitudes and behaviors in the general population."[51] Individuals' religious beliefs make a difference in their health-related choices, too. For example, college students who "viewed their bodies as being a manifestation of God (e.g., My body is a temple of God) and as characterized by sacred qualities (e.g., holy, blessed[,] sacred)" exhibited "greater health protective behaviors, high levels of exercise, greater subjective satisfaction of one's body, less unhealthy eating practices, more disapproval of alcohol consumption and illicit drug use, and less alcohol consumption."[52]

Many faith traditions hold sincere religious beliefs about sex-segregated facilities for healthcare. For example, research has shown that there is a need for religious cultural competency to understand Muslims' beliefs about sexuality, marriage, and modesty. Because of their religious beliefs, Muslim patients are often deeply uncomfortable interacting with opposite-sex providers in eye contact and physical contact, undergoing physical exams and intimate surgical procedures (such as intrapartum and postpartum care), receiving counseling about sexual health and infertility, and using facilities (such as bathrooms and shared overnight facilities).[53]

B. Every court to consider the merits of this Rule's predecessor has found that it violates RFRA.

When the Obama Administration first promulgated its 2016 Rule, which redefined sex discrimination to include gender identity and termination of pregnancy, legal challenges abounded. These lawsuits, brought by concerned religious organizations and individuals, coalesced into three major cases. In all three, multiple courts have repeatedly held that 2016 Rule violated RFRA. By seeking to resurrect the stringent restrictions on medical professionals in its new NPRM, the Department is once again violating RFRA and will face legal consequences for its actions.

In *Franciscan Alliance v. Becerra*, the Fifth Circuit and Northern District of Texas held multiple times that the 2016 Rule violated RFRA.[54] The Christian Medical and Dental Associations, with over 19,000 healthcare professionals as members, along with two religious hospitals, Franciscan Alliance and Specialty Physicians of Illinois, claimed that the Rule violated RFRA by forcing religious medical providers to perform abortions and gender-reassignment surgeries that violate their sincerely held religious beliefs. The district court agreed, finding the

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[51] Annette Mahoney, Robert A. Carles, Kenneth I. Pargament, Amy Wachholtz, Laura Edwards Leeper, Mary Kaplar & Robin Frutchey, *The Sanctification of the Body and Behavioral Heatlh Patterns of College Students,* The International Journal for the Psychology of Religion, Vol. 15 No. 3 (2005).
[52] *Id.* at 3.
[53] Shahawy S, Deshpande NA, Nour NM, *Cross-Cultural Obstetric and Gynecologic Care of Muslim Patients*, OBSTET GYNECOL (Nov. 2015); 126(5):969-973; *see also* ATTUM B, HAFIZ S, MALIK A, SHAMOON Z, CULTURAL COMPETENCE IN THE CARE OF MUSLIM PATIENTS AND THEIR FAMILIES (2022).
[54] *Franciscan All. v. Becerra*, 47 F.4th 368 (5th Cir. Aug. 26, 2022).

RFRA violation so severe that it merited a permanent injunction, prohibiting the Department from ever enforcing Section 1557 against Franciscan Alliance or the other plaintiffs "'in a manner that would require [it] to perform' or insure gender-reassignment surgeries or abortions."[55] The Fifth Circuit affirmed and held that Franciscan Alliance's RFRA claim was not moot. Indeed, the court cited the Department's March 2022 Guidance as clear evidence of a credible threat of enforcement against these religious plaintiffs, noting that "HHS has also repeatedly refused to disavow enforcement against Franciscan Alliance" and other religious plaintiffs.[56] This should send a clear signal to the Department that its 2022 NPRM will continue to face judicial sanctions for violating RFRA, because the 2022 NPRM, "if adopted, would reinstate much the same approach as the 2016 Rule."[57]

This recent holding is consistent with previous opinions in *Franciscan Alliance*: the Rule violates RFRA. In December 2016, the district court held that the Rule "places substantial pressure on Plaintiffs to perform and cover transitions and abortion procedures," that the government failed to prove its rule advances a compelling interest, and that it failed to consider the "numerous less restrictive means available to provide access and coverage for transition and abortion procedures."[58] In October 2019, the court found once again that "the Rule substantially burdens Private Plaintiffs' religious exercise by making the practice of religion more expensive in the business context," and that it violated RFRA "by expressly prohibiting religious exemptions."[59] The court made clear that "Defendants have twice failed to demonstrate that applying the Rule to Private Plaintiffs . . . would achieve a compelling governmental interest through the least restrictive means."[60] The Fifth Circuit affirmed and ruled that the district court should consider providing permanent protection,[61] and in August 2021, the district court granted that permanent injunction, finding that the Biden Administration's interpretation of Section 1557 is "materially indistinguishable from the 2016 Rule."[62] Thus, ever since they first examined the 2016 Rule, these courts have consistently found that it violates RFRA by imposing a substantial burden on religious healthcare providers and failing to pass strict scrutiny. The 2022 Rule, if enacted, will fare no differently in court.

Indeed, courts are already finding that the Biden Administration's interpretation of Section 1557 likely violates RFRA and the Free Exercise Clause. In late 2021, the Christian Employers Alliance challenged the Biden Administration's new HHS Guidance on Section 1557, alleging that it violates RFRA, the Free Exercise Clause and the Free Speech Clause by compelling them to provide health insurance coverage for gender transition service against their religious beliefs, to affirm gender transitions, and to forgo maintaining facilities in accordance with their beliefs.[63] The

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[55] *Franciscan All. v. Becerra*, 47 F.4th 368, 373 (5th Cir. Aug. 26, 2022).
[56] *Id.* at 376 (citing *HHS Notice and Guidance on Gender Affirming Care, Civil Rights, and Patient Privacy*, U.S. DEP'T OF HEALTH & HUMAN SERVS. (Mar. 2, 2022), https://perma.cc/LX26-59QR).
[57] *Id.* at 373.
[58] *Franciscan All. v. Burwell,* 227 F. Supp. 3d 660, 693 (N.D. Tex. 2016).
[59] *Franciscan All. v. Azar,* 414 F. Supp. 3d 928, 942–44 (N.D. Tex. 2019).
[60] *Id.*
[61] *Franciscan All. v. Becerra*, 843 Fed. App'x 662 (5th Cir. 2021).
[62] *Franciscan All. v. Becerra*, 553 F. Supp. 3d 361 (N.D. Tex. 2021).
[63] *Christian Employers All. v. EEOC*, No. 1:21-cv-195, 2022 WL 1573689, at *1 (D.N.D. May 16, 2022).

court found that the plaintiffs, employers who run their businesses and organizations according to their religious beliefs, had standing because they showed a "credible threat" of enforcement given that the Department was promising to put the 2016 Rule "back into effect."[64] The court also found that under the Biden Administration, the Department's current interpretation of Section 1557 "is substantially the same as the 2016 Rule," and that it "characterizes the [plaintiff's] stated beliefs as 'abuse' or 'discrimination.'"[65] The court granted a preliminary injunction shielding Alliance members from enforcement of the Department's new rule and enjoined the Department from "interpreting or enforcing Section 1557 of the ACA and any regulations against the Alliance's present or future members in a manner that would require them to provide, offer, perform, facilitate, or refer for gender transition services," or "prevents, restricts or compels the Alliance's members' speech on gender identity issues."[66] The Department's new rule likely violates RFRA because it imposes a substantial burden in the form of "monetary penalties for [plaintiffs'] refusal to violate religious beliefs," and the government has failed to show a compelling interest in refusing exemptions to these particular claimants.[67]

In another round of litigation challenging the 2016 Rule, a coalition of hospital systems affiliated with the Catholic Church and the State of North Dakota brought RFRA and APA challenges which have been successful at every stage so far.[68] In January 2017, the court in *Religious Sisters of Mercy* stayed enforcement of the 2016 Rule against the Catholic Plaintiffs, to the extent that it prohibited discrimination on the basis of gender identity and termination of pregnancy.[69]

Reaching the merits in January 2021, the court held that implementing Section 1557 according to the Department's 2016 Rule would substantially burden the religious exercise of the nuns, Catholic hospitals, and Catholic University, who all hold sincere religious beliefs about procreation and the sanctity of human life and "believe that performing gender-transition procedures would violate their medical judgment by potentially causing harm to patients."[70] For these religious healthcare providers, "adverse practical consequences abound" if Section 1557 is enforced against them, because "refusal to perform or cover gender-transition procedures would result in the Catholic Plaintiffs losing millions of dollars in federal healthcare funding and incurring civil and criminal liability."[71] The court also held that the Department failed to show a compelling interest in "ensuring nondiscriminatory access to healthcare" because this was too "broadly formulated," and "[n]either HHS nor the EEOC has articulated how granting specific exemptions for the Catholic Plaintiffs will harm the asserted interests in preventing

[64] *Christian Employers All.*, 2022 WL 1573689, at *5.
[65] *Id.* at *5, *7.
[66] *Id.* at *9.
[67] *Id.* at *8.
[68] *Religious Sisters of Mercy v. Azar*, 513 F. Supp. 3d 1113, 1147–49 (D.N.D. 2021) (order struck down transgender mandate as violating RFRA and APA); *see also Catholic Benefits Assoc. v. Burwell*, No. 3:16-cv-00432 (D.N.D. 2016) (consolidated with *Religious Sisters of Mercy* in 2017).
[69] *Religious Sisters of Mercy v. Burwell*, No. 36 Civ. 3:16-cv-386 (D.N.D. Jan. 23, 2017).
[70] *Religious Sisters of Mercy*, 513 F. Supp. 3d at 1132.
[71] *Id.* at 1147.

discrimination."[72] The court recognized many less restrictive alternatives beyond forcing Catholic providers to violate their beliefs: the Government could assume the cost, the employers could provide subsidies or tax credits to employees, community health centers and hospitals with income-based support could provide the services, or ACA exchanges could expand access without compromising conscientious objectors.[73] Because the Department failed to show that none of these alternatives would be feasible, it failed strict scrutiny. Thus, the court granted permanent injunctive relief for the Catholic plaintiffs.[74]

These rulings make clear that both the 2016 Rule and the proposed Rule violate RFRA. If enacted, the proposed Rule will continue to be challenged in court, and judges will continue to enjoin its enforcement against religious healthcare providers who are able to sue—as they should. Yet members of minority faiths may not receive protection from these injunctions. And most healthcare providers with sincere religious convictions do *not* work for Catholic hospitals. On the contrary, religious providers give excellent medical care to all patients in a myriad of medical settings, most of which are not religiously affiliated at all. Furthermore, medical providers with individual religious objections that do not necessarily correspond to an official religious institution or denomination remain unprotected by these injunctions.

Finally, the Department's proposed Rule does not address the closures of healthcare facilities, the withdrawal of religious healthcare providers from the marketplace, or the deprivation of federal financial assistance, all of which would have a significant negative impact on patient access to the healthcare sector as a whole. These impacts would especially limit providers' ability to provide equitable care to persons with disabilities, racial minorities, and persons in rural areas that would face significant gaps in care if religious providers were forced to withdraw from the marketplace. The proposed Rule recognizes this issue, yet its requirements would exacerbate it:

> There are an increasing number of communities in the United States with limited options to access healthcare from non-religiously affiliated healthcare providers. As a practical matter, then, many patients and their families may have little or no choice about where to seek care, particularly in exigent circumstances, or in cases where the quality or range of care may vary dramatically among providers.[75]

Despite this acknowledgement, the Department has not calculated the effects of diminished access to faith-based healthcare providers on low-income and rural Americans. The consequences of the Department's violation of faith-based healthcare providers' rights of conscience would disparately impact rural hospitals and urban hospitals that primarily serve minority populations, and thus the proposed Rule "would in effect devastate access to Catholic medical care and other faith-based

[72] *Religious Sisters of Mercy*, 513 F. Supp. 3d at 1148.
[73] *Id.* at 1148–49.
[74] *Id.* at 1152–53.
[75] 87 Fed. Reg. 47840.

care across the board that are the backbone of caring for patients, especially the poor, in our country."[76]

C. Because these issues are still percolating in the courts, the agency should not erode religious liberty even further at this time.

As the court in *Christian Employers Alliance* pointed out, the changes between the 2016 Rule and the 2020 Rule have led to "conflicting decisions by separate courts, each holding that HHS must enforce Section 1557 in opposite manners."[77] Drastic policy changes with each new administration have increased confusion and decreased the ability of healthcare providers to rely on stable regulations without fear of negative enforcement against them. This counsels in favor of pausing the proposed Rule at least until the courts can reach a consensus about which version should apply and how exactly it applies.

On October 3, 2022, the court in *State of Texas v. EEOC* ruled that the Biden Administration's March 2 Guidance[78] was "arbitrary and capricious" for several reasons, including that it appears to misstate the law:

> By its terms, the March 2 Guidance leaves the reader with the impression that Section 504 generally defines gender dysphoria as a disability—subject to some exceptions—even though the opposite is true. . . . Nor do Defendants explain how HHS and OCR arrived at the March 2 Guidance's conclusion that "denial of … care solely on the basis of [a patient's] sex assigned at birth or gender identity likely violates Section 1557.". . . Because Defendants appear to misstate the law and do not detail what went into their decision-making, the Court finds the March 2 Guidance arbitrary and capricious.[79]

After the Trump Administration issued the 2020 Rule and after the Supreme Court decided *Bostock v. Clayton County*, two district courts extended *Bostock*'s reasoning to Title IX as applied through Section 1557, entering injunctions modifying the 2020 Rule and purportedly restoring certain provision of the 2016 Rule. These were APA challenges, not RFRA challenges, and they left undisturbed the consistent holdings that the 2016 Rule violated RFRA. In *Walker v. Azar*, the court decided to leave the following definitions from the 2016 Rule in effect: 'on the basis of sex,' 'gender identify,' and 'sex stereotyping.'"[80] But the court found that the plaintiffs lacked standing to challenge any other portions of the Rule, and it did not address the Title IX religious exemption

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[76] Louis Brown, *Eliminating medical conscience rights threatens human dignity and the freedom to love,* THE HILL (Apr. 29, 2022), https://thehill.com/opinion/healthcare/3471359-eliminating-medical-conscience-rights-threatens-human-dignity-and-the-freedom-to-love/.

[77] *Christian Employers All.,* 2022 WL 1573689, at *5 (citing *Religious Sisters of Mercy*, 513 F. Supp. 3d at 1144 (D.N.D. 2021); *Whitman-Walker Clinic*, 485 F. Supp. 3d 1 (D.D.C. 2020)).

[78] *HHS Notice and Guidance on Gender Affirming Care, Civil Rights, and Patient Privacy*, U.S. DEP'T OF HEALTH & HUMAN SERVS. (Mar. 2, 2022), https://perma.cc/LX26-59QR.

[79] *State of Texas v. EEOC*, No. 74 Civ. 2:21-CV-194-Z (N.D. Tex. Oct. 1, 2022), at 18.

[80] *Walker v. Azar*, 480 F. Supp. 3d 417, 430 (E.D.N.Y. 2020).

at all (which the Trump Administration added to the 2020 Rule to protect religious institutions and healthcare providers).

In *Whitman-Walker Clinic, Inc. v. HHS*, the court preliminarily enjoined the Department from "enforcing the repeal of the 2016 Rule's definition of discrimination '[o]n the basis of sex' insofar as it includes 'discrimination on the basis of . . . sex stereotyping.'"[81] This opinion went further than *Walker v. Azar* because it addressed the Title IX religious exemption, finding that it was improperly included in the 2020 Rule. But even this opinion recognized the strength of RFRA in providing religious protections. The court conceded that the Department could incorporate Title IX's religious exemption in the future, as long as it adequately considered the effect on prompt access to care. The court also noted that "nothing in this decision renders religiously affiliated providers devoid of protection. Far from it."[82] Protections for religious providers include the ACA's clauses ensuring that federal laws protecting conscience still apply.[83] "The 2020 Rule, moreover, explicitly acknowledges that Section 1557 is subject to RFRA's protections of religious conscience from government-imposed burdens, protections the Supreme Court has confirmed are 'very broad.'"[84] In February 2021, the D.C. Circuit stayed the appeal in light of ongoing agency proceedings.[85]

Several other cases challenging the 2020 Rule are still pending but have been stayed in light of the proposed Rule and the NPRM process.[86] Instead of creating more confusion in these cases by changing its policies yet again, the Department should at least retain the robust religious protections from the 2020 Rule. If it does not, overlapping and conflicting injunctions will continue to plague any attempts at enforcement.

D. A flurry of litigation shows that religious providers will be targeted, sued, and prosecuted if they remain true to their consciences and violate the proposed Rule.

While every court to examine the merits of religious plaintiffs' RFRA claims has found in favor of the religious healthcare providers, these providers face a very credible threat of enforcement if the proposed Rule is enacted. Many courts have concluded that categorically declining to perform or insure gender transitions—as many religious healthcare providers must—violates Section 1557 and Title VII, even when the decision to decline is religiously based. And this issue is creating a large amount of costly litigation for hospitals and providers, including religious hospitals and providers:

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[81] *Whitman-Walker Clinic v. HHS*, 485 F. Supp. 3d 1, 64 (D.D.C. 2020).
[82] *Id.* at 46.
[83] "The ACA instructs that no provision 'shall be construed to have any effect on Federal laws regarding (i) conscience protection; (ii) willingness or refusal to provide abortion; and (iii) discrimination on the basis of the willingness or refusal to provide, pay for, cover, or refer for abortion or to provide or participate in training to provide abortion.'" *Whitman-Walker Clinic,* 485 F. Supp. 3d at 46 (quoting 42 U.S.C. § 18023(c)(2)).
[84] *Id.* at 46 (citing 45 C.F.R. § 92.6(b) and *Burwell v. Hobby Lobby Stores, Inc*., 573 U.S. 682, 693 (2014)).
[85] *Whitman-Walker Clinic, Inc. v. HHS*, No. 1886057 Civ. 20-5331 (D.C. Cir. Feb. 18, 2021).
[86] *See, e.g., Boston All. of Gay, Lesbian, Bisexual & Transgender Youth v. U.S. Dep't of Health & Human Servs*., No. 1:20-cv-11297, 2020 WL 3891426 (D. Mass. July 9, 2020); *New York v. U.S. Dep't of Health & Human Servs.,* No. 1:20-cv-05583, 2020 WL 4059929 (S.D.N.Y. July 20, 2020).

- *Hammons v. Univ. of Md. Sys. Corp.,* 551 F. Supp. 3d 567, 591 (D. Md. 2021) (Catholic hospital violated Section 1557 when it declined to perform gender-transition procedure because of religious beliefs);
- *C.P. ex rel. Pritchard v. Blue Cross Blue Shield of Ill.,* 536 F.Supp.3d 791, 793-94 (W.D. Wash. 2021) (transgender plaintiff stated claim of sex discrimination under Section 1557 against Catholic employer whose health plan excluded transition procedures because of religious beliefs);
- *Conforti v. St. Joseph's Healthcare Sys*., No. 2:17-cv-00050, 2019 WL 3847994 (D.N.J. 2019) (transgender plaintiff sued for sex discrimination under Section 1557 against Catholic hospital that declined to schedule gender-transition surgery because of religious beliefs; case settled and was dismissed in 2021)
- *Robinson v. Dignity Health*, No.16-3035 (N.D. Cal. filed June 6, 2016) (transgender employee sued Catholic hospital whose health insurance plan excluded gender-transition surgery because of religious beliefs; case settled)
- *Scott v. St. Louis Univ. Hosp.*, No. 4:21-cv-01270, 2022 WL 1211092, at *1, 6 (E.D. Mo. Apr. 25, 2022) (plaintiff stated claim for discrimination under Section 1557 and the ACA, where employer excluded transition procedures for minor child);
- *Tovar v. Essentia Health*, 342 F.Supp.3d 947, 947, 950 (D. Minn. 2018) (employee denied coverage for minor's gender-transition surgery stated claim for sex discrimination under Section 1557)
- *Flack v. Wis. Dep't of Health Servs.*, 328 F.Supp.3d 931, 934-35, 946-51 (W.D. Wis. 2018) (granting preliminary injunction to transgender plaintiffs because Wisconsin's Medicaid program excluding coverage for transition procedures likely violated Section 1557); *but see Hennessy-Waller v. Snyder*, 529 F. Supp.3d 1031 (D. Ariz. 2021), *aff'd*, *Doe v. Snyder*, 28 F.4th 103 (9th Cir. 2022) (denying preliminary injunction to minor plaintiffs because Arizona's Medicaid program excluding coverage for transition procedures did not likely violated Section 1557, and *Bostock* was limited to Title VII claims)
- *Cruz v. Zucker*, 218 F. Supp. 3d 246 (S.D.N.Y. 2016) (finding for transgender plaintiffs who challenged denial of Medicaid coverage for gender dysphoria treatments under Section 1557)
- *Prescott v. Rady Children's Hosp.-S.D*., 265 F.Supp.3d 1090 (S.D. Cal. 2017) (holding that parent of transgender patient stated claim under Section 1557 for sex discrimination)
- *Kadel v. Folwell*, 446 F. Supp. 3d 1 (M.D.N.C. Mar. 11, 2020) (transgender plaintiffs challenging state employee health plan which excluded coverage of gender-transition treatments stated claim for sex discrimination under Section 1557 of Affordable Care Act, Title IX, and the Equal Protection Clause)
- *Toomey v. Arizona*, No. CV-19-00035, 2021 WL 753721 (D. Ariz. 2021) (denying preliminary injunction to transgender employee seeking insurance coverage for gender-transition surgery, because Title VII claims were unlikely to succeed as there was no discrimination based on transgender status)

- *Boyden v. Conlin*, 341 F. Supp. 3d 979 (W.D. Wis. September 18, 2018) (exclusion of gender transition treatment from insurance coverage for transgender state employees violated Title VII and Section 1557 nondiscrimination provision)

The growing number of cases against healthcare providers, including religious providers whose insurance excludes gender-transition procedures, is telling. Religious individuals and institutions face a credible threat of enforcement, whether from this Department if the proposed Rule is enacted, from continued litigation when they do voice religious objections to providing services that violate their consciences, or—most likely—both. This is all the more reason for the Department to retain the robust religious freedom protections from the 2020 Rule and carefully consider the impact of its decisions on religious healthcare providers.

II. The Department Must Revise the Rule to Comply with the Constitution.

The Department is bound to comply with the U.S. Constitution, which protects the free exercise of religion, free speech (which includes religious speech), and the Tenth Amendment (which ensures that states who provide religious freedom protections are not commandeered to restrict the rights by the federal government). As currently written, the proposed Rule violates the Free Exercise Clause, the Free Speech Clause, and the Tenth Amendment.

A. The proposed Rule triggers strict scrutiny under the Free Exercise Clause because it is not neutral or generally applicable.

Under the First Amendment, government policies and practices that substantially burden the free exercise of religion are subject to strict scrutiny unless they are neutral and generally applicable.[87] In *Obergefell v. Hodges*, the Supreme Court recognized that many Americans have sincere religious objections to social movements such as same-sex marriage based on "decent and honorable religious or philosophical premises," and that "neither they nor their beliefs are disparaged here."[88] Disparagement of religious beliefs, as the Court recognized in *Masterpiece Cakeshop* and reiterated in *Kennedy v. Bremerton*, is a separate Free Exercise Clause violation. When "'official expressions of hostility' to religion accompany laws or policies burdening religious exercise . . . the Court has "set aside such policies without further inquiry."[89] Notably, religious discrimination triggers the highest level of scrutiny in constitutional law, while gender discrimination triggers only intermediate scrutiny, and there is no clear legal standard on how to evaluate gender identity discrimination.[90]

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[87] *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531–32 (1993); *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021) ("Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature.").

[88] *Obergefell v. Hodges*, 576 U.S. 644, 672 (2015).

[89] *Kennedy v. Bremerton Sch. Dist*. 142 S. Ct. 2407, 2422 n.1 (2022) (quoting *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1732 (2018)).

[90] *Compare Lukumi*, 508 U.S. at 546 (applying "most rigorous form of scrutiny to religious discrimination case), *with Nguyen v. U.S.*, 533 U.S. 53 (2001) (applying intermediate scrutiny to sex discrimination case).

Here, the proposed Rule is not neutral because the Department singles out religious beliefs on gender transition or gender-affirming care. First, the Department ignored repeated calls for a religious exemption and intentionally removed the religious exemption from Title IX that was included in the 2020 Rule, rolling back the protections for faith-based providers that the previous administration put in place. President Biden's Executive Order fulfilled a campaign promise to "[g]uarantee" the ACA's "nondiscrimination protections for the LGBTQ+ community" and "reverse" "religious exemptions" for "medical providers" with religious objections or conscience concerns.[91] The intentional removal of the religious exemption from the 2020 Rule sends a message of hostility to religious healthcare providers that they are no longer protected.

Second, the Department has specifically drafted its prohibition on categorical objections to refer to "a provider's belief:" "However, a provider's belief that gender transition or other gender-affirming care can never be beneficial for such individuals (or its compliance with a state or local law that reflects a similar judgment) is not a sufficient basis for a judgment that a health service is not clinically appropriate."[92] This blanket determination that consistent religious objections can never be a sufficient basis for a healthcare provider's judgment provides no room for nuanced decisions based on conscience. If anything, this approach punishes the providers with the most integrity—providers who take individualized approaches to caring for each patient yet hold consistent religious beliefs that prevent them from approving or participating in gender-transition procedures. While the non-religious provider with an occasional objection to providing gender-transition procedures (that could indeed be rooted in discrimination against a certain patient) gets a free pass, the consistent, religiously committed provider whose conscience does not alter no matter the circumstance is punished because of her religious beliefs.

Contrary to popular narratives, the scholarly literature is not unanimous that gender-affirming care is medically necessary in religious environments, and religious communities who do not affirm a preferred identity do not negatively impact transgender patients' health. In the American Journal of Orthopsychiatry, health professionals wrote: "We did not find support for our hypothesis that exposure to non-affirming religious settings – operationalized as individuals with affiliation with non-affirming religious settings versus those who never attend religious services – predicts more depressive symptoms and worse psychological well-being."[93] On the contrary, "it is the moral and religious convictions of religious sisters and Catholic healthcare workers that drive them to love and care for underserved African American communities," as one example of a minority population who uniquely relies on and benefits from faith-based healthcare.[94] Instead of recognizing this importance and allowing for religious providers to serve patients according to

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[91] *Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation* (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/.

[92] 87 Fed. Reg. 47918.

[93] David M. Barnes and Ilan H. Meyer, *Religious affiliation, internalized homophobia, and mental health in lesbians, gay men, and bisexuals*, 82(4) AM J ORTHOPSYCHIATRY 505 (Oct. 2012).

[94] Louis Brown, "Eliminating medical conscience rights threatens human dignity and the freedom to love," *The Hill* (Apr. 29, 2022), https://thehill.com/opinion/healthcare/3471359-eliminating-medical-conscience-rights-threatens-human-dignity-and-the-freedom-to-love/.

their consciences and convictions, the proposed Rule perpetuates a stereotype that religious Americans are bigots. That message of hostility violates the Free Exercise Clause.

B. The Department's mechanism for granting individualized exemptions triggers strict scrutiny under the Free Exercise Clause and Supreme Court jurisprudence.

Under the First Amendment, a government policy or practice is not neutral and generally applicable when it provides exemptions or when it otherwise treats secular conduct more favorably than religious exercise. According to the unanimous Supreme Court in *Fulton v. City of Philadelphia*, "A law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions."[95] The Court has also held that regulations "trigger strict scrutiny under the Free Exercise Clause, whenever they treat *any* comparable secular activity more favorably than religious exercise."[96]

Here, the proposed Rule triggers strict scrutiny because it allows for providers to decline gender-transition services based on secular medical judgment while removing the religious exemption that protected providers with conscientious objections. The NPRM claims that it is not requiring issuers to "cover all services related to gender-affirming care for transgender individuals—or all medically necessary services generally."[97] On the contrary, "[i]ssuers retain flexibility in designing their benefit packages, and this proposed rule would not require issuers to cover any particular benefit or to cover all medically necessary services."[98] The proposed Rule "does not compel a provider to prescribe a specific treatment that the provider decides not to offer after making a nondiscriminatory bona fide treatment decision."[99] The Rule gives two examples, both of which show a willingness to make secular exceptions but not religious ones:

- "[A] family practice covered by the rule would not be required to provide transition-related surgery where surgical care is not within its normal area of practice.
- Nor would the proposed rule require a pediatrician to prescribe hormone blockers for a prepubescent gender-nonconforming minor if that health care provider concluded, pursuant to a nondiscriminatory bona fide treatment decision, that social transition was the clinically indicated next step for that child."[100]

This allowance for flexibility and exemptions seems logical and well-warranted. But it triggers strict scrutiny under *Fulton* by not allowing any flexibility to providers with religious objections based on belief.[101] Further, it is completely up to the Department's discretion to decide what is a "legitimate, nondiscriminatory reason for denying or limiting" a service, and the

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[95] *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021).
[96] *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021).
[97] 87 Fed. Reg. 47824, 47874 (Aug. 4, 2022).
[98] 87 Fed. Reg. 47874.
[99] 87 Fed. Reg. 47867.
[100] 87 Fed. Reg. 47867.
[101] *Fulton*, 141 S. Ct. at 1877.

Department makes clear that "a provider's view that no gender transition or other gender-affirming care can ever be beneficial for such individuals (or its compliance with a state or local law that reflects a similar judgment) is not a sufficient basis for a judgment that a health service is not clinically appropriate."[102] This example that the proposed Rule includes makes clear that religious objections would not be considered legitimate:

- "[A] gynecological surgeon may be in violation of the rule if they accept a referral for a hysterectomy but later refuse to perform the surgery upon learning the patient is a transgender man. If OCR were to receive a complaint in a case such as this, it would evaluate whether the provider had a legitimate basis for concluding that the surgery would not be clinically appropriate for the patient. If the surgeon invokes such a justification, OCR would make a determination as to whether the reason was a pretext for discrimination."[103]

Thus, the proposed Rule's supposed "flexibility" does not apply to providers with religious objections.[104] If doctors are unwilling to participate in gender-transition procedures because they consistently disagree on religious grounds rather than medical judgment, those are considered "categorical exclusions" and a "pretext for discrimination."[105] This policy treats secular activity such as the exercise of independent medical judgment more favorably than religious reasons for declining to participate in controversial medical procedures, and such unequal treatment triggers strict scrutiny under *Tandon v. Newsomm.*[106]

C. The Department's proposed scheme for evaluating religious exemption requests is inadequate and problematic for several reasons.

As the Department has requested comments on its proposed scheme for requesting religious exemptions and "invite[s] comments from covered entities controlled by or affiliated with religious organizations [and] providers employed by such entities,"[107] we raise several concerns as civil rights attorneys who represent religious organizations and religious healthcare providers.

The Department's scheme for requesting religious exemptions in the proposed Rule is problematic for several reasons. First, it forces religious entities to expose themselves to potential sanctions in order to even request an exemption. Unlike the broader religious exemption that the 2020 Rule incorporated from Title IX, which recognizes the robust protections belonging to religious entities by the very nature of their identity under the First Amendment and RFRA, this scheme requires entities to ask, "Mother, may I?" in a way that puts their operations at risk. The very act of requesting an exemption would expose a religious hospital or healthcare provider to potential targeting by an agency that has repeatedly proven itself a bully to religious entities. Under

[102] 87 Fed. Reg. 47867.
[103] 87 Fed. Reg. 47867.
[104] 87 Fed. Reg. 47867.
[105] 87 Fed. Reg. 47867.
[106] *Tandon*, 141 S. Ct. at 1296.
[107] 87 Fed. Reg. 47841.

Secretary Becerra, the Department has "systematically targeted or ignored conscience and religious freedom protections, such as by sidelining HHS's Conscience and Religious Freedom Division, abandoning the case of a nurse illegally forced to participate in abortion, rescinding protections for faith-based adopted and foster care agencies in three states, and proposing to rescind conscience protection regulations."[108] Religious institutions who request an exemption will lose their privacy and anonymity, which may in turn have a chilling effect on their provision of healthcare services. Some institutions may experience pressure to reduce or eliminate their services altogether rather than expose themselves to targeting by the Department. This would only exacerbate the problems the Department already recognizes: that a lack of religious exemptions "could also result in providers with religious and conscience objections leaving the profession, or covered entities exiting the market."[109]

Second, the scheme contains no guarantee of adequate review or opportunity to appeal. The procedural process is unclear. Who will evaluate claims? Will the Conscience and Religious Freedom Division be involved? If so, this should be stated explicitly in the regulation. Also, the Department under Secretary Becerra has characterized a general goal of nondiscrimination as a compelling interest, so there is no guarantee that religious exemption requests will receive adequate review and case-by-case consideration. Further, if an exemption request is denied, there is no appeal process available.

Third, the proposed Rule still violates RFRA despite its purported religious exemption scheme. The Department's vague promises to consider RFRA are not adequate protection for the religious liberties of healthcare providers and organizations with conscientious objections. As the Fifth Circuit recently held in *Franciscan Alliance*:

> In *Speech First, Inc. v. Fenves* the defendant vaguely promised to not enforce the challenged policies "contrary to the First Amendment"—similar to HHS's promise to "comply with the Religious Freedom Restoration Act . . . and all other legal requirements." We held that the plaintiffs had standing to bring suit because they were within the "class whose [conduct] is arguably restricted," and the defendant's promise was so vague that the scope of liability was both "unknown by the [defendant] and unknowable to those regulated by it."[110]

So too here. The Department's promise to consider religious exemption requests is vague with no guarantee of due process, appeal, or unbiased decisionmaking. The scope of liability for religious institutions and healthcare providers remains both "unknown" and "unknowable"—exactly what the Fifth Circuit found showed a credible threat of enforcement that gave religious plaintiffs standing to sue.

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[108] Rachel N. Morrison, *HHS's Proposed Nondiscrimination Regulations Impose Transgender Mandate in Health Care*, THE FEDERALIST SOCIETY (Sept. 8, 2022), https://fedsoc.org/commentary/fedsoc-blog/hhs-s-proposed-nondiscrimination-regulations-impose-transgender-mandate-in-health-care-1.
[109] 87 Fed. Reg. 47905.
[110] *Franciscan All.*, 47 F.4th at 377.

For all these reasons, the Department should reinstate the portion of the 2020 Rule that incorporated Title IX's broad religious exemption. This is logical because the Department is already using Title IX to interpret Section 1557, and it would provide much more clarity, notice, and assurance to religious entities and providers that their beliefs will be respected. This would also save the Department time and money from not having to review individual requests, and it would reduce the need for costly litigation because religious entities would have robust protection without having to expose themselves publicly to potential sanction and discrimination.

D. The proposed Rule will fail strict scrutiny because the Department lacks a compelling interest and has ignored a host of less restrictive alternatives.

The Department cannot pass muster by asserting a "broadly formulated interest" in preventing discrimination on the basis of gender identity, or increasing access to healthcare for transgender individuals, especially given the increasingly diverse and competitive marketplace with a myriad of options for health insurance and healthcare providers. On the contrary, the Supreme Court requires courts to "scrutinize the asserted harm of granting specific exemptions to particular religious claimants and to look to the marginal interest in enforcing the challenged government action in that particular context."[111] This means that to pass strict scrutiny, the Department must show a compelling interest in denying religious exemptions to each particular religious provider with an objection to providing gender-transition procedures. As the court in *Religious Sisters of Mercy* made clear, it has not done so: "Neither HHS nor the EEOC has articulated how granting specific exemptions for the Catholic Plaintiffs will harm the asserted interests in preventing discrimination."[112]

The "flexibility"[113] in the application of the proposed Rule undermines the Department's attempt to show it has a compelling interest such that its "nondiscrimination policies can brook no departures."[114] The proposed Rule allows for several non-religious exceptions: 1) if a provider gives a "legitimate, non-discriminatory reason" for declining a treatment; 2) if a provider makes a "nondiscriminatory bona fide treatment decision;" 3) if gender-transition procedures are outside a clinic's normal area of practice, or 4) if a pediatrician concludes that social transition would be a better next step than puberty blockers for a minor patient.[115] All these exceptions undermine the Department's assertion that non-discriminatory access to gender-transition procedures is such a compelling interest that no exceptions can be made for religious providers or institutions.

Not only does the Department fail to assert a compelling interest for its proposed Rule, it also ignores the contributions of religious healthcare providers and the many benefits of religion for patient health. For example, studies show the dramatic benefits of religious coping and the role of faith-based and spiritual support during physical and mental illness. According to a Mayo Clinic publication, "most studies have shown that religious involvement and spirituality are associated

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[111] *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006).
[112] *Religious Sisters of Mercy*, 513 F. Supp. 3d at 1148.
[113] 87 Fed. Reg. 47874.
[114] *Fulton*, 141 S. Ct. at 1882.
[115] 87 Fed. Reg. 47867.

with better health outcomes, including greater longevity, coping skills, and health-related quality of life (even during terminal illness) and less anxiety, depression, and suicide. Several studies have shown that addressing the spiritual needs of the patient may enhance recovery from illness."[116] Furthermore, scholars have identified "a number of facets of religious involvement that are uniquely linked with health outcomes. For example, investigators increasingly recognize the importance of church-based social support for health and well-being, particularly for African Americans."[117] On the whole, religious attendance increases longevity by improving and maintaining good health behaviors, mental health, and social relationships.[118]

Religious healthcare providers are uniquely equipped to address not only the physical but also the spiritual needs of patients who desire a faith perspective. According to the World Health Organization, "spirituality is an important dimension of patients' quality of life."[119] And "the value of spirituality is not . . . solely as a means of reducing clinicians' distress or promoting better healthcare outcomes, but should be considered as intrinsically valuable."[120] Thus, ousting religious healthcare providers from the field ignores the needs of LGBTQ patients with faith commitments, who often find themselves caught between conflicting pressures and norms and would value the perspective of a religious healthcare provider to assist them in sorting through that process. For example, among individuals who identified as LGBT and Christian, "[r]eligiosity was associated with higher levels of eudaimonic well-being and lower levels of depression, anxiety, and stress."[121] For patients with gender dysphoria, the mental health benefits of a diversity of religious support and healthcare providers should be recognized. A study on body dysmorphia found that the positive body image of "[w]omen in the Religious group increased significantly compared to Control women (who declined) in how they felt about their appearance and looks. Women in the Spiritual condition improved marginally compared to the Control condition."[122] Analyzing the links between religion, gender, and body image, scholars reported:

> A recent review concluded that in normal non-diagnosed women, religiosity and body image are often linked in positive, healthy ways (Boyatzis and Quinlan 2008). For example, healthier body image is positively associated with women's self-rated importance of religion (Joughin et al. 1992), worship attendance and self-rated

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[116] Paul S. Mueller, M.D., David J. Plevak, M.D. and Teresa A. Rummans, *Religious Involvement, Spirituality, and Medicine: Implications for Clinical Practice*, 76 MAYO CLINIC PROC. 1225, 1235 (2001), https://www.mayoclinicproceedings.org/article/S0025-6196(11)62799-7/pdf.

[117] Christopher G. Ellison, Reed T. DeAngelis, and Metin Güven, *Does Religious Involvement Mitigate the Effects of Major Discrimination on the Mental Health of African Americas?* RELIGION AND MENTAL HEALTH OUTCOMES (Sept. 2017).

[118] Chatters, Linda M., *Religion and health: Public health research and practice*, ANNUAL REVIEW OF PUBLIC HEALTH, 21, 335–367, https://www.annualreviews.org/doi/pdf/10.1146/annurev.publhealth.21.1.335.

[119] Anne L. Dalle Ave and Daniel P. Sulmasy, *Health Care Professionals' Spirituality and COVID-19*, JAMA 2021; 326(16): 1577-1578, https://jamanetwork.com/journals/jama/fullarticle/2785147#nav.

[120] *Id.*

[121] Shilpa Boppana, *The impact of religiosity on the psychological well of LGBT Christians,* JOURNAL OF GAY & LESBIAN MENTAL HEALTH, 23:4 (2019), 412-426.

[122] Boyatzis, Chris J., et al., *Experimental Evidence that Theistic-Religious Body Affirmations Improve Women's Body Image*, 46(4) JOURNAL FOR THE SCIENTIFIC STUDY OF RELIGION 553–564 (2007).

> religiosity (Mahoney et al. 2005), intrinsic orientation (Forthun et al. 2003; Smith et al. 2003), and religious wellbeing (i.e., a close relationship with God).[123]

Many religious healthcare providers seek to bridge the gap between patients' physical health and spiritual health in ways that benefit both individuals and communities as a whole. For example, the Catholic Health Association makes its mission clear: "As part of the Catholic Health Ministry, we honor the dignity of every person, and we are committed to the common good. We strive always to act in a way that is consistent with our identity and to serve all persons with care and compassion."[124]

In sum, faith-based providers help to advance many important interests relating to public health, yet the Department ignores all this and focuses only on a generalized interest in "nondiscriminatory access to healthcare," which is not enough to pass muster under the First Amendment.[125]

The proposed Rule will also fail strict scrutiny because the Department has not chosen the least restrictive means to fulfill its interest. On the contrary, the Department's approach is maximally restrictive to religious healthcare institutions and providers. In *Religious Sisters of Mercy*, the court recognized many less restrictive alternatives beyond forcing Catholic providers to violate their beliefs: the Government could assume the cost, the employers could provide subsidies or tax credits to employees, community health centers and hospitals with income-based support could provide the services, or ACA exchanges could expand access without compromising conscientious objectors.[126] The court in *Franciscan Alliance* listed similar alternatives: "examples of other less restrictive means the government could use to ensure access to transition procedures and abortions include[e] assisting individuals seeking such procedures by finding healthcare providers who offer those services and then assuming the cost."[127]

Incorporating the religious exemption from Title IX would be the most straightforward less-restrictive-means for the Department to accomplish its interests. Another option, given the other exemptions that the proposed Rule allows, is that the Rule could recognize sincere objections based on religious beliefs as one of the legitimate, non-discriminatory reasons for declining to participate or recommend a gender-transition procedure. The Department has not shown that it has considered these alternatives, or that none of them would be feasible. Thus, the proposed Rule fails strict scrutiny.

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[123] Kristin J. Joman and Chris J. Boyatzis, *Body Image in Older Adults: Links with Religion and Gender*, J ADULT DEV (2009) 16:230-238.
[124] Amy Wilson-Stronks, et al., *Faith-Based Health Care and the LGBT Community: Opportunities and Barriers for Equitable Care*, TANENBAUM, https://tanenbaum.org/wp-content/uploads/2020/05/Faith-Based-Health-Care-LGBTQ.pdf.
[125] *Religious Sisters of Mercy*, 513 F. Supp. 3d at 1148.
[126] *Id.* at 1148–49.
[127] *Franciscan All., Inc. v. Azar,* 414 F. Supp. 3d 928, 943 (N.D. Tex. 2019).

E. *Bostock* recognizes and affirms the robust religious protections in the Constitution, RFRA, and Title VII.

The proposed Rule relies heavily on *Bostock v. Clayton County*, inappropriately seeking to import the Court's analysis of a Title VII claim into the context of healthcare provision.[128] Yet both the majority and the dissent in *Bostock* specifically spelled out the many legal and constitutional protections for religion which apply over and above its interpretation of Title VII. As the majority explained, the Court is "deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society."[129] The Court highlighted three doctrines that protect religious liberty, particularly in the context of sex discrimination claims:

- Title VII's religious organization exemption, which allows religious organizations to employ individuals "of a particular religion";
- The ministerial exception under the First Amendment, which "can bar the application of employment discrimination laws 'to claims concerning the employment relationship between a religious institution and its ministers'";
- The Religious Freedom Restoration Act (RFRA), which the Court described as a "super statute, displacing the normal operation of other federal laws," that "might supersede Title VII's commands in appropriate cases."[130]

Because it is constitutionally and statutorily required and since the Department is relying on *Bostock* in the Proposed Rule, the Department must recognize the important protections for religious exercise under the First Amendment and RFRA. The Department must also recognize that the Court in *Bostock* was not seeking to resolve potential conflicts over sex discrimination claims and religious liberties, but was instead warning lower courts and government actors to recognize the limits of its holding and take additional care to respect religious liberty when these difficult questions arise. Lower courts have taken note; in *Christian Employers Alliance*, the court found that "*Bostock* specifically notes, however, the Supreme Court was 'deeply concerned' with preserving the free exercise of religion and specifically pointed to the Religious Freedom Restoration Act and the First Amendment, noting that this was an issue for future cases, as none of the employers had brought the issue before the Court."[131]

F. *Bostock* does not apply to Section 1557 or require the reinterpretation of "sex discrimination" to include sexual orientation and gender identity.

The Department's attempt to apply the Title VII analysis in *Bostock* to the wholly separate context of healthcare in Section 1557 is legally problematic and has harmful consequences for religious healthcare providers. Multiple courts have already recognized that Title IX and Title VII are inherently different in the ways that they refer to "sex." Unlike *Bostock*, Section 1557 "does

[128] 87 Fed. Reg. 47829-47830.
[129] *Bostock*, 140 S. Ct. at 1754.
[130] *Id.*
[131] *Christian Employers All.*, 2022 WL 1573689, at *3.

not employ the terms 'sex,' 'sexual orientation,' or 'gender identity.'" Instead, Section 1557 expressly incorporates Title IX, which prohibits discrimination 'on the basis of sex.'"[132] The court in *Neese v. Becerra* held:

> *Bostock's* Title VII analysis does not control the Title IX and Section 1557 analysis with the ease, precision, and force envisioned in Defendants' Motion. Though courts *generally* apply the legal standards used in Title VII cases to decide Title IX cases . . . Title IX and Section 1557 are not identical to Title VII in every material instance.[133]

One of the key differences is that Title IX refers to "sex" in a binary way that does not include "sexual orientation" or "gender identity." Indeed, Congress has attempted to add these terms to Title IX multiple times, but each attempt has failed.[134] Notably, Section 1557 is linked only to Title IX, not Title VII or the Court's interpretation of it in *Bostock.*

Further, *Bostock* itself expressly limited the extent of its holding to Title VII cases, not cases involving other regulations or statutes:

> The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today. Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind.[135]

The court in *Religious Sisters of Mercy* recognized the explicit limitations of *Bostock* with regard to Section 1557:

> The Court warned that its decision did not "prejudge" any "other federal or state laws that prohibit sex discrimination." [*Bostock*, 140 S. Ct.] at 1753. Indeed, a dissent from Justice Alito went so far as to identify Section 1557 as having the potential to "emerge as an intense battleground under the Court's holding." *Id.* at 1781 (Alito, J., dissenting). And the Court separately expressed continued commitment to safeguarding employers' religious convictions. *Id.* at 1753-54 (majority opinion). Referencing the RFRA by name, the Court categorized it as "a kind of super statute" that "might supersede Title VII's commands in appropriate cases."[136]

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[132] *Neese* v. *Becerra,* No. 2:21-cv-00163-Z, 2022 WL 1265925, at *14 (N.D. Tex. Apr. 26, 2022).
[133] *Id.* at *13.
[134] *See, e.g.,* H.R. 1652, 113th Cong. (2013); S. 439, 114th Cong. (2015).
[135] *Bostock*, 140 S. Ct. at 1753.
[136] *Religious Sisters of Mercy*, 513 F. Supp. 3d at 1129–30 (quoting *Bostock*, 140 S. Ct. at 1754).

On October 3, 2022, the court in *State of Texas v. EEOC* agreed that Bostock includes these important limitations: "Justice Gorsuch expressly stated *Bostock* did not decide "future cases" affecting religion and arising under Title VII's religious-employer exemption, the Religious Freedom Restoration Act, or the "ministerial exception" defined in *Hosanna-Tabor*."[137]

There are many other key differences between *Bostock* and the Section 1557 context. Employment cases are fundamentally different from healthcare provision, where life-and-death decisions are made and religious healthcare providers' consciences are uniquely constrained because of the physical, emotional, and spiritual impact of their actions affecting patients' lives. Also, *Bostock* only considered clients who were consenting adults, not minors with gender dysphoria.

III. The Department Needs to Clarify Whether It Will Respect Existing State Laws that Protect Religious Liberty.

The Department should not rescind language in current Section 92.6(a) which prohibits the Department from "supersed[ing] State laws that provide additional protections against discrimination on any basis described in § 92.2 of this part."[138] This language is written by Congress and is relevant to the interpretation of Section 1557. Unlike the Affordable Care Act, which is limited in its application, the Constitution preempts all federal statutes, and RFRA is a "super statute, displacing the normal operation of other federal laws."[139]

In addition, proposed 45 C.F.R § 92.206(c) restricts protections under state law by stating that "a provider's compliance with a state or local law that reflects a similar judgment" that "gender transition or other gender-affirming care can never be beneficial for such individuals," "is not a sufficient basis for a judgment that a health service is not clinically appropriate."[140] Not only does this provision improperly constrain the independent medical judgment of healthcare providers, but it also seeks to preempt state law on important issues of conscience where states have, in many cases, already acted to protect religious freedom in the medical context.

The proposed Rule's statement on preemption is vague and unclear as to how it would apply to state laws protecting conscience rights. The Rule "explicitly provides that it is not to be construed to supersede State or local laws that provide additional protections against discrimination on any basis articulated under the regulation."[141] But the Rule does not define whether state laws protecting religious freedom and conscience rights for medical providers would fall under the category of "protections against discrimination."[142]

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[137] *State of Texas v. EEOC*, No. 74 Civ. 2:21-CV-194-Z (N.D. Tex. Oct. 1, 2022), at 8.
[138] 45 C.F.R. § 92.6.
[139] *Bostock*, 140 S. Ct. at 1754.
[140] 87 Fed. Reg. 47918.
[141] 87 Fed. Reg. 47907.
[142] *Id.*

Every state has some form of religious freedom or conscience law in place.[143] Indeed, 23 states have enacted versions of the Religious Freedom Restoration Act, which apply the strict scrutiny test to government attempts to regulate conscience.[144] The Department needs to clarify that it will respect these applicable, binding state religious freedom protections for individuals, which address their conscience objections specifically to procedures of abortion, sterilization, and contraception in the healthcare context. Further, the Rule must state that it will not preempt the following state laws:

- **Alabama:**[145]
  - Religious Freedom Restoration Act: Ala. Const. Am. 622
  - Health Care Rights of Conscience Act: Ala. Code § 22-21B-4
    - Open-ended conscience provision, abortion and sterilization exemptions for individual providers, civil and criminal immunity, and preclusion of government action for providers with conscience objections to abortion or sterilization
- **Alaska**:[146]
  - Abortions: Alaska Stat. § 18.16.010(b)
    - Abortion exemption with civil immunity for individual providers, private and public hospitals; not limited in medical emergencies
- **Arizona**:[147]
  - Religious Freedom Restoration Act: Ariz. Rev. Stat. § 41-1493.01
  - Exemption from participating in abortion: Ariz. Rev. Stat. § 36-2154
    - Abortion exemption for individual providers, private and public hospitals; not limited in medical emergencies
- **Arkansa**s:[148]
  - Religious Freedom Restoration Act: 2015 SB 975
  - Exemption from participating in abortion: Ark. Code Ann. § 20-16-601(a)
  - Arkansas Human Heartbeat Protection Act: Ark. Code Ann. § 20-16-301-305
    - Abortion exemption from civil liability for individual providers, private and public hospitals, with protection from government consequences; not limited in medical emergencies
    - Sterilization exemption from civil liability for individuals and private hospitals
    - Contraceptive exemption from civil liability for individuals and private hospitals

[143] New Hampshire and Vermont do not have specific statutes protecting medical rights of conscience, but they both have constitutional provisions and nondiscrimination laws that apply. Sarah M. Estelle, *Religious Liberty in the States 2022*, CENTER FOR RELIGION, CULTURE, AND DEMOCRACY (Sept. 2022), https://religiouslibertyinthestates.s3.us-east-2.amazonaws.com/Religious_Liberty_in_the_States_Report-2022.pdf.

[144] *Id.,* State Religious Freedom Restoration Acts, National Conference of State Legislatures (May 4, 2017), https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx.

[145] *Id.* at 20.

[146] *Id.* at 21.

[147] *Id.* at 22.

[148] *Id.* at 23.

- **California**:[149]
  - Exemption from participating in abortion: CA Health & Safety § 123420
    - Abortion exemption from civil liability for individual providers and private hospitals; not limited in medical emergencies
  - Exemption for dispensing drugs: CA Bus. & Prof. § 733(b)(3)
    - Contraceptive exemption for individuals
- **Colorado**:[150]
  - Limitations on sterilization: Colo. Rev. Stat. § 25.5-10-235(2)
    - Sterilization exemption from civil and criminal liability for individuals and private and public hospitals
  - Contraceptive exemption: Colo. Rev. Stat. § 25-6-102(9)
    - Contraceptive exemption from civil and criminal liability for individuals and private hospitals
- **Connecticut:**[151]
  - Religious Freedom Restoration Act: Conn. Gen. Stat. § 52-571b
  - Exemption from participating in abortion: Conn. Agencies Regs. § 19-13-D54(f)
    - Abortion exemption for individuals, not limited in medical emergencies
- **Delaware:**[152]
  - Medical Practice Act: 24 Del. Laws § 1791
    - Abortion exemption from civil liability for individuals, private and public hospitals, with protection from government consequences; not limited in medical emergencies
- **Florida:**[153]
  - Religious Freedom Restoration Act: Fla. Stat. § 761.01, *et seq.*
  - Exemption from participating in termination procedure: Fla. Stat. § 390.0111(8)
    - Abortion exemption from civil liability for individuals, private and public hospitals; not limited in medical emergencies
    - Sterilization exemption from civil liability for individuals
  - Exemption from prescribing contraceptives: Fla. Stat. §381.0051(5)
    - Contraceptive exemption from civil liability for individuals
- **Georgia:**[154]
  - Performance of sterilization procedures: Ga. Code Ann. § 31-20-6
    - Sterilization exemption from civil liability for individuals, private and public hospitals
  - Objections to providing abortion-related services: Ga. Code Ann. § 16-12-142
    - Abortion exemption from civil liability for individuals, private and public hospitals; not limited in medical emergencies

[149] Estelle, *Religious Liberty in the States 2022*, CENTER FOR RELIGION, CULTURE, AND DEMOCRACY, at 24.
[150] *Id.* at 25.
[151] *Id.* at 26.
[152] *Id.* at 27.
[153] *Id.* at 28.
[154] *Id.* at 29.

- **Hawaii**:[155]
    - Intentional termination of pregnancy: Haw. Rev. Stat. § 453-16(e)
        - Abortion exemption from civil liability for individuals, private and public hospitals; not limited in medical emergencies
- **Idaho**:[156]
    - Religious Freedom Restoration Act: Idaho Code § 73-402
    - Exemption from performing abortions: Idaho Code § 18-612
        - Abortion exemption from civil and criminal liability for individuals, private and public hospitals, with protection from government consequences
    - Exemption from participating in sterilization: Idaho Code §39-3915
        - Sterilization exemption from civil liability for individuals, private and public hospitals
- **Illinois**:[157]
    - Religious Freedom Restoration Act: 775 Ill. Comp. Stat. § 35/1, *et seq.*
    - Health Care Right of Conscience Act: 745 Ill. Comp. Stat. § 70/1-70/4
        - Abortion exemption from civil and criminal liability for individuals, private and public hospitals, with protection from government consequences
        - Sterilization exemption from civil and criminal liability for individuals, private and public hospitals, with protection from government consequences
        - Contraceptive exemption from civil and criminal liability for individuals, private and public hospitals, with protection from government consequences
- **Indiana:**[158]
    - Religious Freedom Restoration Act: 2015 SB 101, *enacted March 26, 2015;* 2015 SB 50, *enacted April 2, 2015*
    - Mandatory participation in abortion: Ind. Code § 16-34-1-4
        - Abortion exemption for individuals and private hospitals, not limited in medical emergencies
- **Iowa**[159]
    - Abortions: Iowa Code § 146.1-146.3
        - Abortion exemption from civil liability for individuals and private hospitals, with protection from government consequences
- **Kansas**:[160]
    - Religious Freedom Restoration Act: Kan. Stat. Ann. § 60-5301, *et seq.*
    - Kan. Stat. Ann. §§ 65-443, 65-444, 65-446, 65-447
        - Abortion exemption from civil liability for individuals and private and public hospitals, not limited in medical emergencies

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[155] Estelle, *Religious Liberty in the States 2022*, CENTER FOR RELIGION, CULTURE, AND DEMOCRACY, at 30.
[156] *Id.* at 31.
[157] *Id.* at 32.
[158] *Id.* at 33.
[159] *Id.* at 34.
[160] *Id.* at 35.

        - Sterilization exemption from civil and criminal liability for individuals, private and public hospitals
- **Kentucky**:[161]
    - Religious Freedom Restoration Act: Ky. Rev. Stat. Ann. § 446.350
    - Abortions: Ky. Rev. Stat. Ann. § 311.800
        - Abortion exemption from civil liability for individuals and private hospitals, with protection from government consequences; not limited in medical emergencies; public hospitals not permitted to perform abortions except to save life of mother
        - Sterilization exemption for individuals
- **Louisiana**:[162]
    - Religious Freedom Restoration Act: La. Rev. Stat. § 13:5231, *et seq.*
    - Abortion; Discrimination against certain persons: La. Stat. Ann. § 40:1061.2
    - Abortion; Discrimination against hospitals, clinics, etc.: La. Stat. Ann. § 40:1061.3
        - Abortion exemption from civil and criminal liability for individuals and private and public hospitals, with protection from government consequences
- **Maine:**[163]
    - Immunity and employment protection: Me. Stat. tit. 22, §1591
    - Discrimination for abstaining from performing abortions: Me. Stat. tit. 22, § 1592
        - Abortion exemption from civil liability for individuals and private and public hospitals, with protection from government consequences; not limited in medical emergencies
    - Due process in sterilization: Me. Stat. tit. 34-B, § 7016(1)
        - Sterilization exemption from civil and criminal liability for individuals and private and public hospitals
    - Family planning services: Me. Stat. tit. 22, § 1903(4)
        - Contraceptive exemption from criminal liability for individuals and private hospitals
- **Maryland**:[164]
    - Md. Code Ann., Health-Gen. § 20-214(a)
        - Abortion exemption from civil liability for individuals and private and public hospitals, with protection from government consequences
    - Md. Code Ann., Health-Gen. § 20-214(b)
        - Sterilization exemption from civil liability for individuals and private and public hospitals, with protection from government consequences
- **Massachusetts**:[165]
    - Mass. Gen. Laws § 4.1.272.21B, § 1.16.112.12I

[161] Estelle, *Religious Liberty in the States 2022*, CENTER FOR RELIGION, CULTURE, AND DEMOCRACY, at 36.
[162] *Id.* at 37.
[163] *Id.* at 38.
[164] *Id.* at 39.
[165] *Id.* at 40.

        - Abortion exemption from civil liability for individuals and private hospitals, with protection from government consequences; not limited in medical emergencies
        - Sterilization exemption from civil liability for individuals and private hospitals, with protection from government consequences
        - Contraceptive exemption for private hospitals, with protection from government consequences
- **Michigan:**[166]
    - Mich. Comp. Laws §§ 333.20181-20182
        - Abortion exemption from civil and criminal liability for individuals and private and public hospitals; not limited in medical emergencies
- **Minnesota:**[167]
    - Minn. Stat. § 145.414(a)
        - Abortion exemption for individuals and private and public hospitals, with protection from government consequences; not limited in medical emergencies
- **Mississippi:**[168]
    - Religious Freedom Restoration Act: Miss. Code § 11-61-1
    - Abortion: Miss. Code Ann. §§ 41-107-5, -7, -9
        - Abortion exemption from civil and criminal liability for individuals and private and public hospitals, with protection from government consequences; not limited in medical emergencies
        - Sterilization exemption from civil and criminal liability for individuals and private and public hospitals, with protection from government consequences
        - Contraceptive exemption from civil and criminal liability for individuals and private and public hospitals, with protection from government consequences
    - General conscience provision: Miss. Code Ann. § 41-41-215(5)
        - Providers or institutions may decline to comply with an instruction or health-care decision for reasons of conscience
    - Protection from discrimination for persons declining to participate in gender-transition procedures: Miss. Code Ann. § 11-62-5(1)(a)
    - Definition of religious organization: Miss. Code Ann. § 11-62-17(4)(c)
- **Missouri**:[169]
    - Religious Freedom Restoration Act: Mo. Rev. Stat. §1.302
    - RSMo. § 197.032,
        - Abortion exemption from civil liability for individuals and private and public hospitals, with protection from government consequences; not limited in medical emergencies

[166] Estelle, *Religious Liberty in the States 2022*, CENTER FOR RELIGION, CULTURE, AND DEMOCRACY, at 41.
[167] *Id.* at 42.
[168] *Id.* at 43.
[169] *Id.* at 44.

- **Montana:**[170]
  - Religious Freedom Restoration Act: Mont. Code Ann. § 27-33-101, *et seq*.
  - Exemption from participation in abortion: Mont. Code Ann. § 50-20-111
    - Abortion exemption from civil liability for individuals and private hospitals, with protection from government consequences; not limited in medical emergencies
    - Sterilization exemption from civil liability for individuals and private hospitals, with protection from government consequences
- **Nebraska:**[171]
  - Neb. Rev. Stat. §§ 28-337, -338
    - Abortion exemption from civil liability for individuals and private and public hospitals; not limited in medical emergencies
- **Nevada:**[172]
  - Unlawful to require participation in abortion: Nev. Rev. Stat. § 632.475
    - Abortion exemption from civil liability for individuals and private hospitals
- **New Hampshire:**[173]
  - NH Law Against Discrimination: N.H. Rev. Stat. Ann. § 420-C:5:
    - Prohibits discrimination from healthcare insurers toward providers on the basis of religion and other protected classes
  - Exemption for religious organizations: N.H. Rev. Stat. Ann. § 354-A:18:
    - Protects ability of religious institutions or organizations to make selections of admission or hiring based on religious belief
- **New Jersey:**[174]
  - N.J. Rev. Stat. § 2A:65A-1, A-2
    - Abortion exemption from civil and criminal liability for individuals and private and public hospitals; not limited in medical emergencies
    - Sterilization exemption from civil and criminal liability for individuals and private and public hospitals
    - Contraceptive exemption from criminal liability
- **New Mexico:**[175]
  - Religious Freedom Restoration Act: N.M. Stat. Ann. § 28-22-1, *et seq.*
  - General conscience provision: N.M. Stat. Ann. §§ 24-7A-7(E), -9(A)
    - Providers or institutions may decline to comply with an instruction or health-care decision for reasons of conscience.
    - Abortion exemption from civil and criminal liability for individuals and private and public hospitals; not limited in medical emergencies
    - Sterilization exemption from civil and criminal liability for individuals and private and public hospitals

[170] Estelle, *Religious Liberty in the States 2022*, CENTER FOR RELIGION, CULTURE, AND DEMOCRACY, at 45.
[171] *Id.* at 46.
[172] *Id.* at 47.
[173] *Id.* at 48.
[174] *Id.* at 49.
[175] *Id.* at 50.

        - Contraceptive exemption from criminal liability
- **New York:**[176]
    - N.Y. Civ. Rights Law §79-I; N.Y. Comp. Codes R & Regs. tit. 10, §405.9(b)(10)
        - Abortion exemption from civil liability for individuals and private and public hospitals; not limited in medical emergencies
- **North Carolina:**[177]
    - N.C. Gen. Stat. §§ 14-45.1(e)-(f)
        - Abortion exemption from civil liability for individuals and private and public hospitals; not limited in medical emergencies
- **North Dakota:**[178]
    - N.D. Cent. Code § 23-16-14
        - Abortion exemption for individuals and private and public hospitals; not limited in medical emergencies
- **Ohio:**[179]
    - Ohio Rev. Code Ann. § 4731.91
        - Abortion exemption from civil liability for individuals and private and public hospitals; not limited in medical emergencies
- **Oklahoma:**[180]
    - Religious Freedom Restoration Act: Okla. Stat. tit. 51, § 251, *et seq.*
    - Okla. Stat. tit. 63 § 1-741
        - Abortion exemption from civil liability for individuals and private hospitals; not limited in medical emergencies
- **Oregon:**[181]
    - Or. Rev. Stat. § 435.485, 435.475, , §106.305(8)
        - Abortion exemption from civil liability for individuals and private hospitals; not limited in medical emergencies
    - Or. Rev. Stat. § 435.225
        - Contraceptive and family planning exemption for state employees
- **Pennsylvania:**[182]
    - Religious Freedom Restoration Act: Pa. Stat. tit. 71, § 2403
    - 16 Pa. Code § 51.41(a), 16 §51.31(b)
        - Abortion exemption from civil liability for individuals and private hospitals, with protection from government consequences
        - Sterilization exemption from civil liability for individuals and private hospitals, with protection from government consequences

[176] Estelle, *Religious Liberty in the States 2022*, CENTER FOR RELIGION, CULTURE, AND DEMOCRACY, at 51.
[177] *Id.* at 52.
[178] *Id.* at 53.
[179] *Id.* at 54.
[180] *Id.* at 55.
[181] *Id.* at 56.
[182] *Id.* at 57.

- **Rhode Island:**[183]
  - Religious Freedom Restoration Act: R.I. Gen. Laws § 42-80.1-1, *et seq.*
  - 23 R.I. Gen. Laws § 17-11
    - Abortion exemption from civil liability for individuals; not limited in medical emergencies
    - Sterilization exemption from civil liability for individuals
- **South Carolina:**[184]
  - Religious Freedom Restoration Act: S.C. Code § 1-32-10, *et seq.*
  - S.C. Code Ann. § 44-41-50
    - Abortion exemption from civil liability for individuals and private hospitals
- **South Dakota:**[185]
  - Religious Freedom Restoration Act: SB 124 (passed in March 2021)
  - S.D. Codified Laws § 34-23A-11, -12, -13, -14
    - Abortion exemption from civil liability for individuals and private and public hospitals; not limited in medical emergencies
- **Tennessee:**[186]
  - Religious Freedom Restoration Act: § Tenn. Code 4-1-407
  - Tenn. Code Ann. § 39-15-204, -205
    - Abortion exemption for individuals and private and public hospitals; not limited in medical emergencies
    - Sterilization exemption from civil liability for individuals and private hospitals
  - Tenn. Code Ann. § 68-34-104(5)
    - Contraceptive exemption from civil liability for individuals and private hospitals
- **Texas:**[187]
  - Religious Freedom Restoration Act: Tex. Civ. Prac. & Remedies Code § 110.001, *et seq.*
  - Tex. OCC § 103.001, § 103.004
    - Abortion exemption for individuals and private hospitals
- **Utah:**[188]
  - Utah Code Ann. § 76-7-306(2),-(3)
    - Abortion exemption from civil liability for individuals and private and public hospitals; not limited in medical emergencies
- **Vermont:**[189]
  - Constitution of the State of Vermont, Art. 3:

[183] *Id.* at 58.
[184] Estelle, *Religious Liberty in the States 2022*, CENTER FOR RELIGION, CULTURE, AND DEMOCRACY, at 59.
[185] *Id.* at 60.
[186] *Id.* at 61.
[187] *Id.* at 62.
[188] *Id.* at 63.
[189] *Id.* at 64.

        - "That all persons have a natural and unalienable right, to worship Almighty God, according to the dictates of their own consciences and understandings, as in their opinion shall be regulated by the word of God . . . nor can any person be justly deprived or abridged of any civil right as a citizen, on account of religious sentiments, or peculia[r] mode of religious worship; and that no authority can, or ought to be vested in, or assumed by, any power whatever, that shall in any case interfere with, or in any manner control the rights of conscience, in the free exercise of religious worship."
- **Virginia:**[190]
    - Religious Freedom Restoration Act: Va. Code § 57-2.02
    - Va. Code Ann. § 18.2-75
        - Abortion exemption from civil liability for individuals and private and public hospitals; not limited in medical emergencies
- **Washington:**[191]
    - Wash. Rev. Code § 9.02.150, § 48.43.065(2)(a)
        - Abortion exemption for individuals and private and public hospitals; not limited in medical emergencies
        - Sterilization exemption for individuals and private and public hospitals
- **West Virginia:**[192]
    - W. Va. Code § 16-2F-7
        - Abortion exemption for individuals; not limited in medical emergencies
    - W. Va. Code § 16-11-1
        - Sterilization exemption for individuals and private and public hospitals
    - W. Va. Code § 16-2B-4
        - Contraceptive exemption for state employees
- **Wisconsin**:[193]
    - Wis. Stat. § 253.09(1),
        - Abortion exemption from civil liability for individuals and private and public hospitals; not limited in medical emergencies
        - Sterilization exemption from civil liability for individuals and private and public hospitals
    - Wis. Stat. § 253.075
        - Contraceptive and family planning exemption for state employees
- **Wyoming:**[194]
    - Wyo. Stat. Ann. § 35-6-106
        - Abortion exemption from civil liability for individuals and private hospitals; not limited in medical emergencies
    - Wyo. Stat. Ann. § 42-5-101(d)
        - Contraceptive exemption for individuals

[190] Estelle, *Religious Liberty in the States 2022*, CENTER FOR RELIGION, CULTURE, AND DEMOCRACY, at 65.
[191] *Id.* at 66.
[192] *Id.* at 67.
[193] *Id.* at 68.
[194] *Id.* at 69.

The Department is bound by the Tenth Amendment to respect these state laws, which were enacted before the 2022 Rule was proposed or introduced. The Department must clarify that it is not seeking to preempt these robust protections.

The Department should also retain the religious freedom and conscience laws listed in the 2020 Rule.[195] Many additional healthcare conscience statutes included in the current Rule apply in the healthcare context because they address health insurance, pregnancy conditions, Medicaid and other funded programs. These provisions include:

- Section 1553 of the Patient Protection and Affordable Care Act (42 U.S.C. § 18113) providing assisted suicide exemptions
- Section 1441 of the Affordable Care Act on exemption to Individual mandate of health insurance (42 U.S.C. § 18081)
- Section 1303 of the Patient Protection and Affordable Care Act (42 U.S.C. § 18023)
- The Coats-Snowe Amendment (42 U.S.C. § 238n)
- The Church Amendments (42 U.S.C. § 300a-7)
- The Religious Freedom Restoration Act (42 U.S.C. § 2000bb et seq.)
- The Weldon Amendment (Consolidated Appropriations Act, 2019, Pub. L. 115-245, Div. B sec. 209 and sec. 506(d) (Sept. 28, 2018)),
  Medicare counseling referral 42 U.S.C. 42 U.S.C. § 1395w–22(j)(3)(B)
- Section 1311 certificates of exemption (42 U.S.C. § 18031)
- Advance Directives exemptions (42 U.S.C. § 14406)
- 42 U.S.C. § 1396u–2(b)(3)(B) - Medicaid counseling referral exemption
- 22 U.S.C. § 7631 - PEPFAR exemption
- 42 U.S.C. § 290bb–36 - Mental Health Suicide Program Exemptions
- 42 U.S.C. § 280g–1(d) - Children Hearing and Screening
- 42 U.S.C. § 5106i – Child Abuse Prevention and Treatment Act
- 42 U.S.C. § 1396s - Pediatric Vaccine Non-Preemption of State

The current Section 92.6(b) clarifies which conscience and religious freedom laws apply.[196] The Department's language from the 2020 Rule properly interpreted the scope of the agency's authority not to invalidate by imposing or requiring the departure or contradiction of legal standards, and it listed nine federal statutes which are not contradicted by or superseded by Section 1557. This list included several protections for religious liberty: the Coats-Snowe Amendment, the Church Amendments, and RFRA. This provision also included a catchall provision for "any related, successor, or similar Federal laws and regulations."[197] The new proposed Rule improperly removes this provision, which makes it insufficient and vague because it fails to identify any particular statutes or explain how they should interact with Section 1557.

[195] 45 C.F.R. § 92.6(b).
[196] *Id.*
[197] 87 Fed. Reg. 37205.

The Department should remove the "lesser standard" provision in proposed Section 92.3, because the statutory language does not use the term "lesser standard" or adopt that rule of construction.[198] Restricting the Department's authority to "limit" the rights, remedies, procedures, or legal standards is not the same as the agency's proposals to "expand" the rights beyond the bounds of the limited discretionary authority given to the Office for Civil Rights and its Director. When Congress has defined a legal standard, the agency may not take a limited interpretation below the lowest bound, because that would be illegal. The agency does not have the authority to impose a ratchet in one direction. The only "additional protections" are limited to those provided in "State laws," which are detailed above. This rule of construction is again a restriction on the Department's authority to preempt state law. It would be unreasonable to interpret this restriction on power of the federal government as a grant of *additional* authority to the agency over states by redefining bases of discrimination. It should also be noted that the statutory provision protecting the "rights" of "individuals aggrieved" expressly includes victims of *religious* discrimination.[199]

IV. The Department Must Comply with the Affordable Care Act.

The only legal "authority" that the Department relies on for this regulatory action is 42 U.S.C. § 18116 (Section 1557), so the Department is bound by principles of textualism to adhere to this text as written by Congress, and not depart from it in exercising legislative power instead of its administrative power under the Constitution. Part (b) is a rule of construction which restricts the Department's interpretative authority under Section 1557, and does not delegate authority to the agency to "invalidate" rights, remedies, procedures, or legal standards.

The proposed Rule violates Section 1554 of the Affordable Care Act, 42 U.S.C. § 18114, which prevents the Secretary from promulgating any regulation that—

> (1) "creates any unreasonable barriers to the ability of individuals to obtain appropriate medical care;
> (2) impedes timely access to health care services;
> (3) interferes with communications regarding a full range of treatment options between the patient and the provider;
> (4) restricts the ability of health care providers to provide full disclosure of all relevant information to patients making health care decisions;
> (5) violates the principles of informed consent and the ethical standards of health care professionals; or
> (6) limits the availability of health care treatment for the full duration of a patient's medical needs."[200]

The proposed Rule would violate these provisions by restricting the ability of healthcare providers to provide full disclosure about the potential risks and ethical problems with certain forms of treatment, violating the ethical standards of healthcare professionals with religious or

[198] 87 Fed. Reg. 47911.
[199] 87 Fed. Reg. 47841; *see* 18 U.S.C. § 18116(a) referring to 42 U.S.C. § 2000e-2, which expressly prohibits discrimination on the basis of religion.
[200] 42 U.S.C. § 18114.

philosophical objections to participating in gender-transition procedures, and impeding timely access to healthcare by driving some religious providers out of the market altogether.

A. The proposed Rule violates the ACA by dramatically expanding the scope of covered entities.

The Department has dramatically expanded the number of covered entities to include individuals and entities never before under the Department's scope of authority under Section 1557 or the underlying statutes. For example, the proposed Rule adds recipients of pass-through funding, advance tax credit, cost-sharing entities, Section 1332 waivers, Medicare reimbursements, Medicaid, and fee-for-service CHIP programs.

The Department does not calculate the number of new entities that would be added as "covered entities" under Section 1557 by its broadened scope. The Department makes the vague claim that "the costs of the proposed rule are small relative to the revenue of covered entities . . . and because even the smallest affected entities would be unlikely to face a significant impact," but the Department does not provide any more detail to prove this claim.[201]

The Department cannot certify that the proposed Rule will not have a significant economic impact on a substantial number of small entities. The Department has violated the Civil Rights Restoration Act by not limiting its covered entities to those principally engaged in healthcare. The interpretation of this statute is overbroad and will burden providers who are newly covered by this regulation.

B. The proposed Rule conflicts with the ACA by defining "protected class" differently.

The proposed Rule's interpretation of sex as non-binary is in direct conflict with the ACA, which uses binary terminology such as "he or she" in employment nondiscrimination provisions.[202] The drafters of the ACA did not use terminology to include other pronouns of other gender identities than male or female, more than two genders, or protected genders under civil rights of the ACA. Section 1557 must be interpreted consistently with the ACA.

The drafting of the proposed Rule is confusing and inconsistent because of its addition of new protected classes related to gender identity and sexual orientation. In the preamble, the Department adds additional protected bases to Section 1557, but such definitions do not appear in the rule text or the underlying statutes. Sometimes the Department uses the term "sex" but other times it uses different terminology. That inconsistency makes the rule difficult to understand and, if enacted, difficult to apply and enforce.

In proposed Section 92.101(a)(2), the Department identifies additional protected classes to include "sex stereotypes," "sex characteristics," "intersex traits," "sexual orientation," "gender

[201] 87 Fed. Reg. 47899.
[202] Section 1558, Affordable Care Act, 29 U.S.C. § 218C.

identity," "pregnancy," and pregnancy "related conditions."[203] And the Department also adds a catchall "not limited to." The preamble also lists "nonbinary," "gender nonconforming" "genderqueer" and "genderfluid", "transgender," and "LGBT+."[204] In the preamble, the agency also provides a definition of "+": "We use "+" in this acronym to indicate inclusion of individuals who may not identify with the listed terms but who have a different identity with regards to their sexual orientation, gender identity, or sex characteristics."[205] Yet none of these terms appear anywhere in the enacted rule text of Section 1557, or in *Bostock*, on which the Department attempts to rely. In *Bostock*, the only term the Court used is "transgender," and the Court expressly did not create "one catchall protected class covering all conduct correlating to 'sexual orientation' and 'gender identity.'"[206] When defining "transgender" in the preamble (but not the rule text), the Department adds additional undefined terms that are confusing: "nonbinary, genderqueer, or gender nonconforming."[207] These terms differ from the language used in other portions of the ACA. The Department needs to provide further definitions, or at the very least, explain the reasons for its changes in language.

C. The proposed Rule includes new mandatory conduct requirements that unconstitutionally impose on religious liberty.

The proposed Nondiscrimination Policy in Section 92.8(b) is problematic because it requires all covered entities to implement written nondiscrimination policies that impact a variety of areas.[208] Religious individuals and organizations have robust rights to free speech which are protected by the First Amendment as well as federal and state laws. The nondiscrimination policy regarding "pregnancy, sexual orientation, gender identity, and sex characteristics" unconstitutionally constrains freedom of speech about these topics and freedom of association with a group or religion that takes a position on these issues.[209]

If the proposed Rule is enacted, religious organizations, which have been expressly exempted under Title IX regarding issues such as sex-segregated facilities and are exempt under Title III of the ADA, will have to adopt new policies that may affect their faith-based internal decisions regarding single-sex facilities.

The Department tries to distinguish the Title IX exemptions and their applicability in healthcare versus education by making claims about how individuals make choices related to healthcare. They elevate secular considerations of "availability, convenience, urgency, geography, cost, insurance network restrictions."[210] This ignores important choices based on religion and ethics, especially in African American communities which rely more heavily on faith-based

[203] 87 Fed. Reg. 47858.
[204] 87 Fed. Reg. 47858.
[205] 87 Fed. Reg. 47831, n.77.
[206] *Bostock*, 140 S. Ct. at 1737; *State of Texas v. EEOC*, No. 74 Civ. 2:21-CV-194-Z (N.D. Tex. Oct. 1, 2022), at 6.
[207] 87 Fed. Reg. 47831, n.75.
[208] 87 Fed. Reg. 47914.
[209] 87 Fed. Reg. 47914.
[210] 87 Fed. Reg. 47840.

healthcare options.[211] Contrary to the agency's contention in its preamble that the choice of healthcare providers is "unrelated to the question of whether the healthcare provider is controlled by or affiliated with a religious organization,"[212] many persons of faith specifically choose healthcare providers who share their faith. Similarly, many religious Americans choose to work for employers who provide benefits consistent with their faith, or intentionally pursue training on sexual or medical health at religiously affiliated healthcare institutions.

Members of religious orders, such as the Little Sisters of the Poor and the Religious Sisters of Mercy, take vows of membership in single-sex religious communities or houses of worship. Many of these organizations provide health insurance for their employees or others. These organizations and their members often have deeply held religious commitments to celibacy or consecrated single life, abiding by sincerely held beliefs and tenets regarding human sexuality, marriage, abortion, homosexual conduct, contraception, and sterilization.[213]

In proposed Section 92.7, the Department is also coercing covered entities to designate a Section 1557 coordinator to administer policies on sexual orientation, gender identity, and termination of pregnancy. However, this implicates the authority to hire co-religionists, which is robustly protected under constitutional law and Title VII.[214] Many religious organizations require their employees to abide by statements of faith or religious codes of conduct, and this ability is critical to ensure the effective operation of the organization and preservation of its sincere religious identity. Requiring religious organizations to hire Section 1557 coordinators who may have fundamentally different beliefs and viewpoints would compromise these core religious liberties.

In sum, the proposed Rule violates RFRA, the First Amendment, the ACA, and it causes conflict with state laws and federal court decisions. We urge the Department to reconsider its proposed Rule and protect religious liberty for healthcare providers, institutions, and the millions of Americans who choose and rely on faith-based medical care.

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[211] Louis Brown, *Eliminating medical conscience rights threatens human dignity and the freedom to love*, THE HILL (Apr. 29, 2022), https://thehill.com/opinion/healthcare/3471359-eliminating-medical-conscience-rights-threatens-human-dignity-and-the-freedom-to-love/.

[212] 87 Fed. Reg. 47840.

[213] *See, e.g., Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2375–76 (2020) (The Little Sisters "are an international congregation of Roman Catholic religious [women]" who have operated homes for the elderly poor in the United States since 1868. . . . They feel called by their faith to care for their elderly residents regardless of "faith, finances, or frailty." . . . Consistent with their Catholic faith, the Little Sisters hold the religious conviction "that deliberately avoiding reproduction through medical means is immoral."); *see also Forms of Consecrated Life*, U.S. CONFERENCE OF CATHOLIC BISHOPS, https://www.usccb.org/beliefs-and-teachings/vocations/consecrated-life/forms-of-consecrated-life.

[214] *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020); *Hosanna-Tabor Evangelical Lutheran Church and Sch. v. EEOC*, 565 U.S. 171 (2002).

Sincerely,

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