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Via Federal eRulemaking Portal

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

RE: Comments on Proposed Rule: Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 83 Fed. Reg. 3880 (Jan. 26, 2018), RIN 0945-ZA03

Dear Secretary Azar:

I write today to urge the U.S. Department of Health and Human Services (HHS) to withdraw the Proposed Rule: *Protecting Statutory Conscience Rights in Health Care; Delegations of Authority*, 83 Fed. Reg. 3,880 (Jan. 26, 2018), RIN 0945-ZA03 (“Proposed Rule” or “Rule”). This Proposed Rule would impede access to care and create barriers to patients’ exercise of their rights. Further, it undermines HHS’s mission to “enhance the health and well-being of all Americans, by providing for effective health and human services.”

As California’s Attorney General, I have a constitutional duty to protect Californians, by safeguarding their health and safety, and defending the State’s laws. Cal. Const., art. V, § 13. This Rule is an unlawful attempt by the Administration to proceed without congressional authority and is in conflict with the Constitution and multiple existing laws. If implemented, it will have significant negative impacts on States; their residents, including women, LGBTQ individuals, and other marginalized populations; and numerous entities in the State that receive federal healthcare funding. Thus, I urge that the Rule be withdrawn.

Among its many problems, the Proposed Rule threatens the removal of *all* federal healthcare funds from recipients, including the State, deemed not in compliance with the Rule. Jeopardizing this funding would have significant effects on California families as these funds support public healthcare programs and public health initiatives.

The Rule would also create rampant confusion about basic patient rights and federally entitled healthcare services, while discouraging providers from providing safe, legal care. The Rule not only permits any individual, entity, or provider to deny basic healthcare services—

including emergency care—but also discharges a provider from the duties to cite evidence to support the denial of services, to notify a supervisor of the denial of services, and to provide notice or alternative options to patients that may want to seek services from another provider. There is little evidence that in drafting the Rule, HHS considered the impact to patients. 83 Fed. Reg. at 3,902; *Id.* at 3,902-3,918 (failing to mention, let alone quantify the impact of this Rule on patients). Moreover, the effects of the Proposed Rule would be widespread as it implicates “any program or activity with an *articulable connection* to a procedure, health service, health program, or research activity,” 83 Fed. Reg. at 3,923. The consequences of this overbroad Rule will disproportionately affect the most vulnerable populations, and in particular, could have a chilling effect on those seeking to exercise their constitutionally protected healthcare rights.

a. The Proposed Rule Targets the State of California and its Interests in Protecting its Residents, Healthcare Industry, and Consumer Protections

The Proposed Rule particularly aims to upend and target California’s concerted efforts to balance the rights of patients and providers. The Rule suggests that further federal guidance is needed because of an increase in lawsuits against state and local laws; however, HHS puts forth little actual evidence. In targeting California’s carefully crafted laws, the Rule tramples on the rights of patients and takes aim at California specifically.

First, the Rule references two pending federal lawsuits stemming from the California Department of Managed Health Care’s (DMHC) August 22, 2014 letters issued to health plans regarding abortion coverage. 83 Fed. Reg. at 3,889 (citing *Foothill Church v. Rouillard*, No. 2:15-cv-02165-KJM-EFB, 2016 WL 3688422 (E.D. Cal. July 11, 2016); *Skyline Wesleyan Church v. Cal. Dep’t of Managed Health Care*, No. 3:16-cv-00501 (S.D. Cal. 2016)). Then, noting that HHS’s Office of Civil Rights (OCR) previously closed three complaints against DMHC, the Rule states that OCR’s finding that the Weldon Amendment had not been violated by California law requiring that health plans include coverage for abortion “no longer reflects the current position of HHS, OCR, or the HHS office of the General Counsel.” 83 Fed. Reg. at 3,890. This reversal in the agency’s interpretation of the Weldon Amendment is apparently based on a misreading of the law, and is arbitrary and capricious. 5 U.S.C. § 706; *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 285 (1974); *Jicarilla Apache Nation v. U.S. Dep’t of Interior*, 613 F.3d 1112, 1119 (D.C. Cir. 2010). Moreover, HHS cites no authority that permits it to reverse its position in this manner. Later, the Proposed Rule—apparently referencing California’s Reproductive Freedom, Accountability, Comprehensive Care, and Transparency (FACT) Act—announces that even requiring a clinic to post notices mentioning the existence of government programs that include abortion services would be considered a referral for abortion under the Weldon Amendment and Section 1303 of the Affordable Care Act.¹ 83 Fed. Reg. at 3,895. Such a broad definition of “refer for” is

¹ Section 1303 prohibits the use of certain Federal funds to pay for abortion coverage by qualified health plans. 42 U.S.C. § 18023(b)(2)(A). However, Section 1303 permits an issuer to charge and collect \$1 per enrollee per month for coverage of abortion services so long as the

unsupported by the plain language of these statutes, and is thus outside of HHS's delegated authority. *See infra* at 3-4.

HHS's attempt to redefine the law threatens California's sovereign and quasi-sovereign interests in regulating healthcare, criminal acts, and California-licensed entities and professionals. *See also New York v. United States*, 505 U.S. 144, 155-56 (1992); Cal. Bus. & Prof. Code §§ 101, 101.6, 125.6 (providing that a California licensee is subject to disciplinary action if he or she refuses to perform the licensed activity or aids or incites the refusal to perform the licensed activity by another licensee because of another person's sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, or immigration status); 733 (a California licensee "shall not obstruct a patient in obtaining a prescription drug or device that has been legally prescribed or ordered for that patient"); 2761; Cal. Penal Code § 13823.11(e) and (g)(4); Cal. Health & Saf. Code §§ 10123.196, 1367.25, 123420(d); Cal. Civ. Code § 51; *No. Coast Women's Care Med. Group, Inc. v. San Diego County Superior Court*, 44 Cal.4th 1145 (2008). "[T]he structure and limitations of federalism . . . allow the States great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons." *Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (internal quotation marks and citation omitted).

Furthermore, the estimated costs and benefits of the Rule do not justify it, but rather reveal it to be greatly wasteful of public funds. HHS admits that OCR has received only 44 complaints over the last 10 years of alleged instances of violations of conscience rights. 83 Fed. Reg. at 3,886. Yet, as HHS further admits, it will cost nearly \$1.4 billion over the first years to implement the Rule, and for the affected entities to comply with the new assurance and certification requirements. *Id.* at 3,902, 3,912-13. Meanwhile, HHS disclaims any ability to quantify the benefits. *Id.* at 3,902, 3,916-17.

In undercutting important patient protections and creating barriers to care, the Proposed Rule not only oversteps on policy grounds, but also has numerous legal deficiencies. Below I address many, but by no means all, of these deficiencies.

b. The Proposed Rule Exceeds Congressional Authority

As a threshold matter, the Proposed Rule exceeds the authority of the statutes it cites, and therefore violates the Administrative Procedure Act. 5 U.S.C. § 706. Nothing in the Church Amendments, the Coats-Snowe Amendment, the Weldon Amendment, or other statutes permits HHS to redefine the terms used in these underlying statutory schemes. Yet the Proposed Rule has characterized numerous terms, including "assist in the performance," "health care entity," and "referral or refer for," so broadly as to materially alter well-established statutory language.

funds are deposited in a separate account, maintained separately, and used only for abortion services.

For example, contrary to the implementing statutes, the Proposed Rule suggests that “assist in the performance” encompasses participating in “any” program or activity with an “articulable connection” to a procedure, health service, health program, or research activity, including “counseling, referral, training, and other arrangements for the procedure, health service, health program, or research activity.” 42 Fed. Reg. at 3,923. Only the Church Amendments refer to “assist in the performance” of an activity, and nothing in that statutory scheme envisions the broad definition in the Proposed Rule. 42 U.S.C. § 300a-7. That Congress specifically references “to counsel” in a separate Church Amendment provision, “training” in the Coats-Snowe Amendment, and “refer for” in the Weldon Amendment confirms that the Proposed Rule’s definition of “assist in the performance” should not include these additional activities. Reading and interpreting the statutes in these ways will allow for unlawful refusals of care.

Similarly, “health care entity” is defined in the Coats-Snowe Amendment, the Weldon Amendment, and the Affordable Care Act, yet the Proposed Rule goes beyond these definitions to include “health care personnel,” as distinct from a “health care professional,” such as a doctor or nurse. 42 Fed. Reg. at 3,924. Therefore, it appears that, under the Proposed Rule, even someone like a receptionist at a doctor’s office could refuse to provide services, including making an appointment for a patient, based on his or her moral objections. By expanding “health care entity” to cover personnel, “health care professional” is rendered superfluous, contrary to the rules of statutory interpretation. Additionally, the Proposed Rule’s definition of “health care entity” is overbroad, given that it includes “a plan sponsor, issuer, or third-party administrator, or any other kind of health care organization, facility, or plan.” 42 Fed. Reg. at 3,924. In short, the Rule’s redefinition of “health care entity” is arbitrary and capricious, as it runs counter to OCRs’ previous, well-reasoned interpretation of the term.

The Proposed Rule’s definition of “referral or refer for” is particularly broad, suggesting that “any method,” even posting of notices, would be considered a “referral.” 42 Fed. Reg. at 3,924. These new exceptions created by the Rule are not envisioned by any federal statute, and would permit healthcare professionals to elude the scope of state laws protecting a patient’s rights to healthcare services.

c. The Proposed Rule is Contrary to Law

The Rule also violates the U.S. Constitution in several respects, including conflicting with the Spending Clause, the Due Process Clause, the Establishment Clause, and Separation of Powers. Furthermore, the Rule conflicts with several federal statutes. 5 U.S.C. § 706.

The Proposed Rule violates the Spending Clause because it (a) coerces states and their entities to follow the Proposed Rule or lose billions of dollars in federal funds; (b) is vague and does not provide adequate notice of what specific action or conduct, if engaged in, will result in the withholding of federal funds; (c) constitutes post-acceptance conditions on federal funds; and (d) is not rationally related to the federal interest in the particular program that receives federal funds. See *NFIB v. Sebelius*, 567 U.S. 519, 582-83 (2012); *Pennhurst State Sch. and Hospital v.*

Halderman, 451 U.S. 1, 17 (1981) (If Congress desires to condition the States' receipt of federal funds, it "must do so unambiguously . . . enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation"); *South Dakota v. Dole*, 483 U.S. 203 (1987); *Massachusetts v. United States*, 435 U.S. 444, 461 (1978) (plurality op.) (conditioning federal grants illegitimate if unrelated "to the federal interest in particular national projects or programs"). The Rule is tantamount to "a gun to the head." *NFIB*, 567 U.S. at 581. If California opts out of complying with the Rule (or even "[i]f there appears to be a failure or threatened failure to comply"), it "would stand to lose not a relatively small percentage" of its existing federal healthcare funding, but all of it. *Id.*; 83 Fed. Reg. at 3,931.

It violates the Due Process Clause, as well, because it is unconstitutionally vague and permits OCR to immediately withhold billions of federal funding, if there "appears to be a failure" to comply, or just an apparent "threatened" failure to comply, and there is no review process. 83 Fed. Reg. at 3,931; see *Mathews v. Eldridge*, 424 U.S. 319, 349 (1976) ("The essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it.") (internal alterations and quotations omitted); *Goldberg v. Kelly*, 397 U.S. 254 (1970). To satisfy due process, the law must (1) "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly," and (2) "provide explicit standards for those who apply them." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). This Proposed Rule does not meet either of these requirements.

The Rule also constitutes an undue burden on a woman's decision to terminate her pregnancy before viability. See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) (plurality op.). The net effect of this rule will result in women being denied access to crucial information and even necessary treatment, including lawful abortions.

The Proposed Rule violates the Establishment Clause by accommodating religious beliefs to such an extent that it places an undue burden on third parties—patients. *Estate of Thornton v. Caldor*, 472 U.S. 703, 710 (1985); *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005) ("[A]n accommodation must be measured so that it does not override other significant interests"); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 557 (1992). Furthermore, the Proposed Rule constitutes excessive government entanglement with religion. *Larkin v. Grendel's Den*, 459 U.S. 116, 122-27 (1982); *Williams v. California*, 764 F.3d 1002, 1015 (9th Cir. 2014); see also *Larson v. Valente*, 456 U.S. 228, 244 (1982); *Kiryas Joel Village Sch. Dist. v. Grument*, 512 U.S. 687, 703 (1994) ("[G]overnment should not prefer . . . religion to irreligion").

Last, the Proposed Rule violates the Separation of Powers. U.S. Const. art. I, § 8, cl. 1; *Dole*, 483 U.S. at 206; *Clinton v. City of New York*, 524 U.S. 417, 438 (1998). Although Congress may attach conditions to receipt of federal funds, the executive branch cannot "amend[] parts of duly enacted statutes" after they become law, including to place conditions on

receipt of federal funds. *Clinton*, 524 U.S. at 439. HHS's attempt to broaden those statutes is thus a violation of the Separation of Powers.

In addition to these Constitutional violations, the Proposed Rule conflicts with several federal statutes and is written so broadly it could implicate others. First, the Proposed Rule clashes with several provisions of the Affordable Care Act, most notably section 1554, which prohibits the Secretary of HHS from creating barriers to healthcare, and section 1557, which prohibits discrimination in health programs or activities. 42 U.S.C. §§ 18114, 18116 (2015). Second, the Proposed Rule fails to reconcile its provisions with Title VII and the body of case law that has developed with regard to balancing religious freedoms and consumer rights. 42 U.S.C. § 2000e-2(e); *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 830 (9th Cir. 1999); *Peterson v. Hewlett Packard Co.*, 358 F.3d 599, 606-607 (9th Cir. 2004); *Opuku-Boateng v. State of California*, 95 F.3d 1461 (9th Cir. 1996). Third, the Proposed Rule contravenes Title X of the Public Health Services Act, 42 U.S.C. §§ 300-300a-6, which provides federal funding for family-planning services. Lastly, the Proposed Rule disregards the Emergency Medical Treatment & Labor Act (EMTALA), commonly known as the Patient Anti-Dumping Act, enacted by Congress in response to growing concern about the provision of adequate medical services to individuals, particularly the indigent and the uninsured, who sought care from hospital emergency rooms. 42 U.S.C. § 1395dd(a) (1986); *Jackson v. East Bay Hosp.*, 246 F.3d 1248, 1254 (9th Cir. 2001) (citation omitted).

To reiterate, the Proposed Rule fails to account for its potential impact on States and their citizens. The Rule will have damaging, irreparable repercussions for certain patient populations including women, LGBTQ individuals, and others. Even if OCR concludes, after an investigation, that a provider should have provided certain services that were denied for claimed religious or moral reasons, it will be too late for the patient who was wrongly deprived of that necessary care. As California knows from experience, OCR could take years to conduct an investigation; however, any correction at the end of that process would be inadequate for the patient whose healthcare has been compromised. This will be made worse by providers who are fearful of the federal government's enforcement of the Rule and threatened loss of funds, and who instead of treating a patient or providing a referral, will simply chose not to provide particular services, reducing access to care.

For the reasons set forth above, California strongly opposes the Proposed Rule and urges that it be withdrawn.

Sincerely,



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