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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff,

vs.

ALEX M. AZAR II et al.,

Defendants.

STATE OF CALIFORNIA, *by and through* ATTORNEY GENERAL XAVIER BECERRA,

Plaintiff,

vs.

ALEX M. AZAR II et al.,

Defendants.

COUNTY OF SANTA CLARA et al.,

Plaintiffs,

vs.

U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES et al.,

Defendants.

No. C 19-02405 WHA
Related to
No. C 19-02769 WHA
No. C 19-02916 WHA

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Hon. William Alsup
Hearing: October 30, 2019, 8:00 a.m.

Phillip Burton Federal Building & United States Courthouse, Courtroom 12, 19th Fl., 450 Golden Gate Ave., San Francisco, CA 94102

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INTRODUCTION

Defendants respectfully ask that the Court grant their motion to dismiss or, in the alternative, for summary judgment. Plaintiffs' brief is long on hyperbole, but Plaintiffs at no point articulate how the challenged regulation, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23,170 (May 21, 2019) [hereinafter Rule], meaningfully differs from the statutes that it administers (Federal Conscience Statutes), *see generally id.* at 23,264–69 (to be codified at 45 C.F.R. § 88.3). That is because, far from being a sea change, the Rule merely implements and clarifies important preexisting conscience protections enacted by Congress. Remarkably, Plaintiffs do not challenge the underlying Federal Conscience Statutes. Nor do they challenge the authority of the Department of Health and Human Services (HHS) to condition federal funds on compliance with federal law, including the Federal Conscience Statues. Together, these omissions are fatal to Plaintiffs' challenge to the Rule.

Plaintiffs' specific arguments fail for other reasons, too. The main thrust of Plaintiffs' Administrative Procedure Act (APA) challenge is that the Rule exceeds Defendants' statutory authority. But Plaintiffs' argument is belied by the delegations of authority in certain of the Federal Conscience Statutes and other statutes identified in the Rule. Plaintiffs' attack on several of the Rule's definitions fares no better because those definitions are consistent with the plain text of the Statutes and the dictionary meanings of the relevant terms. At the very least, the Rule's definitions are entitled to *Chevron* deference and are reasonable. Contrary to Plaintiffs' claim, the Rule is also entirely consistent with the provisions scattered throughout the United States Code that Plaintiffs cite. And, in promulgating the Rule, Defendants made reasonable decisions, thoroughly considering the issues raised in the comments and providing thoughtful explanations in response.

Plaintiffs' constitutional claims likewise fail. At the threshold, Plaintiffs' Spending and Establishment Clause claims are not ripe. Plaintiffs insist that the loss of "billions of dollars in federal funding" is imminent, *see* Pls.' Mem. P. & A. & Opp'n Defs.' Mot. Dismiss or Summ. J. 2, ECF No. 113 [hereinafter Pls.' Opp'n], even though several speculative events would need to occur before Plaintiffs could lose federal funding for failure to comply with the Federal Conscience Statutes. Furthermore, Plaintiffs' Spending and Establishment Clause claims fail on the merits. The funding conditions that Plaintiffs challenge flow from the Federal Conscience Statutes, which is fatal to Plaintiffs' Spending

Clause claim because Plaintiffs do not challenge those Statutes. The Rule also does not "establish" religion in any way; it protects religious beliefs only where the Federal Conscience Statutes protect religious beliefs, not to mention that most of the Federal Conscience Statutes address objections regardless of their religious or secular nature. In addition, Plaintiffs lack standing to claim violations of equal protection, due process, or free speech, and those claims are meritless besides. Nor does the Rule create separation of powers concerns.

Last, even if the Court held some aspect of the Rule unlawful—which it should not—the Rule's severability clause instructs the Court to sever the offending portion from the Rule rather than vacate the Rule entirely. Any relief, moreover, should be limited to the parties before the Court and should not extend nationwide.

I. The Rule Fits Comfortably within HHS's Authority.

As Defendants explained in their opening brief, the Federal Conscience Statutes, the housekeeping statutes, and various other statutes support the Rule. *See See* Defs.' Mot. Dismiss or Summ. J. 12–14, ECF No. 54 [hereinafter Defs.' Mem.]; *see also* 84 Fed. Reg. at 23,183–86, 23,263 (describing the various authorities). Plaintiffs respond that certain Federal Conscience Statutes lack an explicit delegation provision and that the housekeeping statutes do not support the Rule. *See* Pls.' Opp'n 27–30. As discussed below, Plaintiffs are wrong on these points. Crucially, however, Plaintiffs *do not respond* to one of Defendants' central arguments: to wit, the Rule is no different than HHS's longstanding regulatory regime of monitoring and enforcing the condition in federal awards that recipients must comply with federal law. *See* Defs.' Mem. 13–14; *see also* 84 Fed. Reg. at 23,183–84 (describing HHS's authority under federal award regulations). Accordingly, Plaintiffs have abandoned argument on this point and the Court should grant Defendants' motion with respect to this claim. *See Ramirez v. City of Buena Park*, 560 F.3d 1012, 1026 (9th Cir. 2009).

Even if the Court considers Defendants' unrebutted statutory authority argument, it should still dismiss Plaintiffs' claim. As Defendants explained in their opening brief, *see* Defs.' Mem. 13–14, pursuant to various housekeeping and other statutes, *see* 5 U.S.C. § 301, 40 U.S.C. § 121(c), 10 U.S.C. ch. 137, and 51 U.S.C. § 20113, HHS has promulgated grants and contracts regulations that correspond to or supplement the Uniform Administrative Requirements (UAR) and Federal Acquisition Regulation (FAR)

(known as the HHS UAR and HHSAR), which among other things govern the enforcement of conditions in federal awards. Under these regulations, recipients of HHS's federal awards are required to comply "with U.S. statutory and public policy requirements," 45 C.F.R. § 75.300(a), which include the Federal Conscience Statutes. HHS may, and in some cases must, audit recipients for compliance with this and other conditions. *See* 45 C.F.R. §§ 75.500–75.520. And if a recipient does not comply with a federal award's requirements, HHS may impose additional conditions or take further action, including to "[w]holly or partly suspend . . . or terminate the Federal award." 45 C.F.R. § 75.371. Furthermore, under the 2011 Rule, HHS explicitly states that it enforces the Church, Coats-Snowe, and Weldon Amendments using these procedures. *See* 45 C.F.R. § 88.2 ("OCR will coordinate the handling of complaints [based on the Church, Coats-Snowe, and Weldon Amendments] with the Departmental funding component(s) from which the entity, to which a complaint has been filed, receives funding."). The 2019 Rule simply makes explicit that under existing (and unchallenged) HHS UAR and HHSAR procedures, recipients of HHS funds must comply with the Federal Conscience Statutes and may face certain consequences if they do not.[1]

In addition to this longstanding authority, several statutory provisions explicitly grant HHS sufficient regulatory authority to promulgate the Rule. *See* 84 Fed. Reg. 23, 184–85, 23,263 (citing, *inter alia*, 42 U.S.C. §§ 1302, 18023, 18041, 18113, 263a, 1315a). And, as discussed in the definitions section *infra*, the Federal Conscience Statutes implicitly grant HHS the authority to administer them.

Plaintiffs' response—that the presence of explicit rulemaking authority in some contexts indicates the lack of delegation in others, *see* Pls.' Opp'n 29–30—is unsupported and incorrect. Although Congress has explicitly delegated enforcement authority in some contexts, the existence of explicit delegations in other statutes has no bearing on HHS's authority to ensure compliance with the Federal Conscience Statutes and this Rule under the provisions of the HHS UAR or HHSAR or the other statutes cited in the Rule. Plaintiffs have not shown that the statutes that contain explicit delegations, which were enacted in

[1] Plaintiffs incorrectly suggest that the housekeeping statutes cannot support regulations that relate to later-enacted statutes. *See* Pls.' Opp'n 29. First, such a rule would absurdly restrict HHS's ability to enforce all statutes enacted after the housekeeping statutes under the HHS UAR and HHSAR. Second, it is inconsistent with the forward-thinking purpose of the housekeeping statutes to permit an "agency to regulate its own affairs." *Chrystler Corp. v. Brown*, 441 U.S. 281, 309 (1979).

different sessions of Congress and as different public laws, are subject to inter-textual comparison as Plaintiffs would like. *See Erlenbaugh v. United States*, 409 U.S. 239, 243–44 (1972) (describing the standard for comparing different statutes). Furthermore, Plaintiffs' theory cannot be squared with longstanding precedent that "[s]ometimes the legislative delegation to an agency on a particular question is implicit." *Chevron U.S.A. Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

Plaintiffs' other response—that *United States v. Marion County School District*, 625 F.2d 607 (5th Cir. 1980), and *United States v. Mattson*, 600 F.2d 1295 (9th Cir. 1979), do not support the government's inherent authority to impose contractual assurances—is not a response to Defendants' argument at all. Defendants cited those cases for the proposition that when the government issues funds on certain conditions, it has the inherent authority to sue for a breach of those conditions. *See Marion Cty. Sch. Dist.*, 625 F.2d at 609 ("As the Supreme Court has long recognized, the United States may attach conditions to a grant of federal assistance, the recipient of the grant is obligated to perform the conditions, and the United States has an inherent right to sue for enforcement of the recipient's obligation in court."); *Mattson*, 600 F.2d at 1299 (recognizing that the government wielded "the threat of withholding funds should the states not comply with all procedural requirements").[2] The Rule does not establish or seek to establish HHS's authority to impose those conditions in the first place; rather, it explains *how* HHS enforces those conditions using existing authority.[3]

II. The Challenged Definitions Are within HHS's Statutory Authority.

The challenged definitions in the Rule reflect the unambiguous meaning of the terms in the Federal Conscience Statutes. At a minimum, they are reasonable interpretations entitled to *Chevron* deference.

A. The Highly Deferential Standard Described in *Chevron* Applies.

Plaintiffs contend that the Rule's definitions are not entitled to *Chevron* deference because

[2] Plaintiffs also overgeneralize *Mattson*'s holding. The court rejected the government's inherent authority to sue for *injunctive* relief, *see* 600 F.2d at 1297, not to withhold federal funds for failure to comply with conditions in federal awards, *see id.* at 1299, which is the dispute in this case.

[3] The Court has asked "what specific denial of abortion or sterilization scenarios are covered by the new rule, but were not covered under the federal conscience statutes." Notice re Briefing, ECF No. 135. The answer is straightforward: there are no such scenarios. As Defendants have explained, the Rule simply employs existing procedures to administer the Federal Conscience Statutes among recipients of HHS's funds; it does not add any conditions to those Statutes. And the Rule certainly does not define the term "sterilization," as the *Santa Clara* Plaintiffs suggest, *see* Santa Clara's Compl. ¶ 101, ECF No. 1.

Congress has not delegated authority to HHS to interpret the Federal Conscience Statutes. *See* Pls.' Opp'n 31. But, as explained in Defendants' opening brief and below, Congress has delegated such authority both explicitly and implicitly. *See* Defs.' Mem. 12–14. The Court thus should review Plaintiffs' challenges to the Rule's definitions under the highly deferential framework set forth in *Chevron*.

To begin with, several statutes explicitly authorize HHS to issue the Rule, which merely provides public notice of HHS's process for implementing the requirements of the Federal Conscience Statutes and the interpretations of those Statutes that HHS will employ in that process. A number of statutory provisions provide authority for HHS to promulgate the Rule, including 42 U.S.C. §§ 1302, 18023, 18041, 18113, 263a, and 1315a. *See* Defs.' Mem. 14; 84 Fed. Reg. at 23,185 (listing statutes). And other statutes that support HHS's enforcement of federal awards, 5 U.S.C. § 301; 40 U.S.C. § 121(c) (procurement contracts); 42 U.S.C. § 216 (grants), also explicitly delegate such authority. *See* Defs.' Mem. 13–14.

Yet another source of authority is the implicit delegation from the Federal Conscience Statutes themselves. Just as Congress may delegate authority to the agency explicitly, "[s]ometimes the legislative delegation to an agency on a particular question is implicit." *Chevron*, 467 U.S. at 844. Although Plaintiffs focus on whether the Rule is supported by explicit delegation provisions (and it is), implicit delegations are also common: "The power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). "[I]t can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which 'Congress did not actually have an intent' as to a particular result." *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (quoting *Chevron*, 467 U.S. at 845). To determine whether Congress has implicitly delegated authority, courts consider "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time." *See Barnhart v. Walton*, 535 U.S. 212, 222 (2002). All of these factors weigh in HHS's favor.

First, the subject of the Rule is interstitial in nature and necessary to the administration of the

Federal Conscience Statutes. In general, the Federal Consciences Statutes direct HHS to issue federal funds contingent on recipients complying with the Statutes' conditions. *See, e.g.*, 42 U.S.C. § 300a-7(c) (prohibiting recipients of certain federal funds from discriminating on certain bases). But the Statutes do not define the key terms listed in the Rule's definitions section. And even when definitions are provided, they are explicitly non-exhaustive. *See, e.g.*, 42 U.S.C. § 238n(c) (defining "health care entity" through a non-exhaustive list of examples). Furthermore, the Statutes do not explicitly detail the mechanisms to ensure that recipients comply with the Statutes' conditions. In view of the lack of private rights of action. *see* Defs.' Mem. 28, surely Congress did not intend to impose significant conditions on federal funds without also authorizing HHS to employ longstanding procedures to enforce those conditions with respect to the funds that HHS disburses and administers and, to the extent a term is ambiguous, to interpret such ambiguity. These are quintessentially interstitial questions; they are important for the administration of the Statutes, but the Statutes themselves do not answer them.

In addition, the administration of federal awards connected to the Federal Conscience Statutes is complex. "The HHS Office of the Secretary and its 11 Operating Divisions (OpDivs) administer more than 300 programs covering a wide spectrum of activities." HHS, FY 2018 *Agency Financial Report* 7 (Nov. 14, 2018), https://www.hhs.gov/sites/default/files/fy-2018-hhs-agency-financial-report.pdf. In total, "HHS is responsible for more than a quarter of all federal outlays and administers more grant dollars than all other federal agencies combined." *Id.* And the Rule, which addresses a variety of statutes that apply in different contexts, is estimated to cover 502,899 entities. *See* 84 Fed. Reg. at 23,235.

Last, HHS has significant expertise developed over years of enforcing civil rights laws in the health care context, including the Federal Conscience Statutes. HHS has promulgated regulations regarding the Federal Conscience Statutes several times. OCR has also investigated complaints of discrimination, issued notices of violations, and negotiated settlements with entities found to have violated the Federal Conscience Statutes and implementing regulations. Its staff has experience overseeing and ensuring the protection of civil rights, including protection from discrimination, such as religious discrimination. Based on this experience, HHS determined there was a need to provide more concrete and detailed guidance on how the agency intends to enforce conscience protections with respect to recipients of its federal funds.

B. The Rule's Definitions Are Consistent with the Federal Conscience Statutes

1. "Assist in the Performance"

Plaintiffs' only objection to HHS's definition of "assist in the performance" is that it is allegedly inconsistent with the Church Amendments' legislative history. However, this meager objection ignores the plain text of the statute and overstates the legislative history. First, Plaintiffs fail to respond to any of Defendants' points regarding the standard dictionary definition of "assist," *see* Defs.' Mem. 15. Instead, Plaintiffs suggest that a medical dictionary must be consulted rather than a standard dictionary. The Ninth Circuit, however, regularly consults *Merriam-Webster* at *Chevron* step one. *See, e.g.*, *Lagandaon v. Ashcroft*, 383 F.3d 983, 988 (9th Cir. 2004). Plaintiffs offer no statutory basis to deviate from this practice here.[4] Nor do they identify a contradictory definition in a medical dictionary. *See* Pls.' Opp'n 33 n.52. In addition, and as Defendants have also explained, *see* Defs.' Mem. 16, the text of the Church Amendments is not limited to individuals who *perform* certain procedures, but rather extends to individuals who *assist* in the performance: "No individual shall be required to *perform* or *assist in the performance* of any part of a health service program or research activity funded in whole or in part under a program administered by the Secretary of Health and Human Services if his *performance* or *assistance in the performance* of such part of such program or activity would be contrary to his religious beliefs or moral convictions." *See* 42 U.S.C. § 300a-7(d) (emphasis added).

The legislative history that Plaintiffs cite does not contradict the Rule's definition for several reasons. First, courts "cannot ignore clear statutory text because of legislative floor statements," *see United States v. Hall*, 617 F.3d 1161, 1167 (9th Cir. 2010), and for the reasons above, the text supports the Rule's definition. Second, Plaintiffs cite only a single comment that the Church Amendments' sponsor made on the floor of the Senate. "Floor statements are not given the same weight as some other types of legislative history, such as committee reports, because they generally represent only the view of the speaker and not necessarily that of the entire body." *See Kenna v. U.S. Dist. Ct. for the Central Dist. of Cal.*, 435 F.3d

[4] Plaintiffs' citation to extra-record declarations, *see* Pls.' Opp'n 33 n.52, is inappropriate *See infra* sec. X. In APA cases, courts cannot consult extra-record documents outside of limited circumstances, which are not present here. *See Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450–51 (9th Cir. 1996). Furthermore, it is unclear why Plaintiffs seek to use a medical dictionary with respect to only "assist in performance." That this is their only response to the commonsense meaning of "assist in the performance" suggests the weakness of their argument.

1011, 1015 (9th Cir. 2006). Although sponsors' floor statements may be given more weight than non-sponsors' floor statements, Senator Church's statement is entitled to little or no weight because the relevant House committee issued a report on the statute, which did not endorse his statement. *See* H.R. Rep. No. 93-227, at 11 (1973). At any rate, the substance of Senator Church's statement does not conflict with the Rule. Just as Senator Church did not intend, when voting for the bill, "to permit a frivolous objection from someone unconnected with the procedure," 119 Cong. Rec. 9,597 (Mar. 27, 1973), so too does the Rule exclude such unconnected persons from its definition. Rather, there must be "a specific, reasonable, and articulable connection to furthering a procedure or a part of a health service program or research activity undertaken by or with another person or entity." 84 Fed. Reg. at 23,263 (to be codified at 45 C.F.R. § 88.2).

2. "Discriminate or Discrimination"

Plaintiffs' response to the definition of "discriminate or discrimination" is remarkably bereft of legal citations or response to the *Chevron* arguments in Defendants' opening brief. Instead, Plaintiffs assert—without any acknowledgement of what the Rule actually says—that the Rule "encompasses almost any adverse employment action toward religious objectors without considering what may be legally justifiable." *See* Pls.' Opp'n 34. This is *not* what the Rule says. As explained in Defendants' opening brief, *see* Defs.' Mem. 16–17, the definition is quite clear that it provides a non-exhaustive list of what *may* constitute discrimination "as applicable to, and to the extent permitted by, the applicable statute," *see* 84 Fed. Reg. at 23,263 (to be codified at 45 C.F.R. § 88.2). Furthermore, the Rule identifies certain actions that definitively do not constitute discrimination. *See id.* (subsections (4)–(6)).

Plaintiffs also suggest that the Rule should permit additional rationales to justify adverse employment actions, pointing to Title VII. *See* Pls.' Opp'n 34. However, Plaintiffs do not identify a statutory basis to import their desired provisions of Title VII into the Federal Conscience Statutes. And again, to the extent such provisions are incorporated in the Federal Conscience Statutes, HHS recognizes them. *See* 84 Fed. Reg. at 23,263 (stating that the Rule applies the Federal Conscience Statutes).

3. "Health Care Entity"

Plaintiffs' threadbare arguments regarding HHS's definition of "health care entity" likewise do not pass muster. As Defendants explained in their opening brief, the Coats-Snowe and Weldon

Amendments as well as § 1553 identify examples of health care entities in non-exhaustive lists. *See* Defs.' Mem. 17–18. Plaintiffs suggest that these lists are exhaustive, arguing that the term "include," which proceeds each statutory list, is limiting. Although the term "include" *can* be limiting, the Supreme Court has quoted approvingly that "the word 'includes' is *usually* a term of enlargement, and not of limitation." *Samatar v. Yousuf*, 560 U.S. 305, 317 n.10 (2010) (emphasis added) (quoting 2A N. Singer & J. Singer, Sutherland on Statutory Construction § 47.7, p. 305 (7th ed.2007)); *see also Include*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/include (defining "include" as "to take in or comprise as a part of a whole or group"). Plaintiffs offer no reason why the usual definition of "includes" should not apply other than their own preference.

Furthermore, Plaintiffs have yet to explain why any of the examples of a health care entity in the definition are not, in fact, health care entities. Instead, they hyperbolically assert that the Rule's definition includes "all members of the workforce of a healthcare entity." Pls.' Opp'n 32. This assertion is not supported by the text of the Rule, which identifies specific positions covered by the Coats-Snowe and Weldon Amendments. *See* 84 Fed. Reg. at 23,264 (to be codified at 45 C.F.R. § 88.2). In fact, each item in the Rule's definition is a dictionary example of a healthcare entity.

4. "Referral or Refer For"

Finally, Plaintiffs argue that the Rule's definition of "referral" or "refer for" is inconsistent with the Federal Conscience Statutes because it is contrary to the text of the Coats-Snowe and Weldon Amendments and could have negative consequences. *See* Pls.' Opp'n 33–34. Both points can be dismissed out of hand. Plaintiffs' statutory argument is circular; they quote the Coats-Snowe and Weldon Amendments and state—without explanation—that the definition "strains the plain language of both statutes." *See* Pls.' Opp'n 33. Such a perfunctory argument leaves the Court and Defendants guessing. At a minimum, this is no response to Defendants' argument that the dictionary definition of "refer" and an intra-textual analysis of the statutes supports the Rule's definition. *See* Defs.' Mem. 19.

Plaintiffs' other argument—that the definition would deprive patients of information—is not only incorrect, it also is untethered from any statutory analysis. First, the Rule "do[es] not prohibit any doctor or health care entity from providing information to their patients—or referring for a medical service or treatment—if they feel they have a medical, legal, ethical, or other duty to do so." 84 Fed. Reg. at 23,200.

Rather, the Rule protects certain individuals from "being coerced by entities receiving Federal funds to violate their moral or religious convictions." *Id.* And at any rate, the meaning of the term "referral or refer for" is *legal* in nature. To the extent that Plaintiffs would like to require a health care entity to issue referrals or refer for procedures in violation of that entity's moral or religious convictions, Plaintiffs' objection is to the Federal Conscience Statutes themselves (the source of such protections), not the Rule.

III. The Rule Is Consistent with Other Provisions of Law.

A. Section 1554 of the Affordable Care Act (ACA)

Plaintiffs press on with their extraordinary claim that § 1554 of the ACA prohibits HHS from promulgating any regulation that, *inter alia*, "creates [a] barrier," "impedes [] access," or "limits the availability of health care treatment," including by allowing a health care entity with an objection to providing, for instance, an abortion, to abstain from doing so. *See* Pls.' Opp'n at 35. It is worth pausing to consider the incredible breadth of Plaintiffs' argument: if they were correct, § 1554 would render meaningless (if not completely abrogate) many Federal Conscience Statutes that touch on health care because—by respecting the conscience rights of health care entities—the Statutes allegedly "impede access" to care. And § 1554 would do this without mentioning any of the Federal Conscience Statutes and without otherwise indicating that Congress intended to limit in some cases decades-old conditions. Plaintiffs' reading of § 1554 would also mean that HHS could not condition Medicare or Medicaid funding through regulations. To suggest that Congress intended any of this is absurd.

As Defendants explained in their opening brief, there is no plausible reason to accept Plaintiffs' sweeping interpretation of § 1554. *See* Defs.' Mem. 21–22. In § 1303(c)(2) of the ACA, Congress was absolutely clear that nothing in the ACA (including § 1554) "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 willingness or refusal to provide, pay for, cover, or refer for abortion or to provide or participate in training to provide abortion." 42 U.S.C. § 18023(c)(2). That provision is fatal to Plaintiffs' argument that § 1554 somehow interferes with implementation of the Federal Conscience Statutes through the Rule. Plaintiffs' rebuttal—that § 1303(c)(2) "works together" with § 1554 because § 1303(c)(2) "does not 'create[],' 'impede[],' 'interfere[] with,' 'restrict,' or 'violate[],' healthcare rights or access," Pls.' Opp'n 36 (alterations in original)—misses the point. Congress was clear that the ACA,

including § 1554, should not have "any effect" on federal conscience protections. *See* 42 U.S.C. § 18023(c)(2).

B. Section 1557 of the ACA

Plaintiffs' § 1557 argument should also be rejected out of hand. Plaintiffs barely attempt to defend it in their brief. *See* Pls.' Opp'n 37. Putting aside that Plaintiffs can point to no actual conflict between the Rule and § 1557 in their facial challenge, Congress stated explicitly in § 1303(c)(2) of the ACA that nothing in that act (e.g., § 1557) should have "any effect" on federal conscience protections. *See* 42 U.S.C. § 18023(c)(2). Plaintiffs offer no reason to ignore Congress's clear instruction.

C. Emergency Medical Treatment and Active Labor Act

Plaintiffs claim that the Rule violates the Emergency Medical Treatment and Active Labor Act (EMTALA) because it "fails to provide for any balancing" in cases of emergency care. Pls.' Opp'n 36–37. The case that Plaintiffs cite for that proposition, however, offers no such support. In *California v. United States*, No. C 05-00328 JSW, 2008 WL 744840, (N.D. Cal. Mar. 18, 2008), the district court *rejected* the plaintiff's challenge to the Weldon Amendment. Much like Plaintiffs here, the plaintiff claimed that there was a conflict between EMTALA and the Weldon Amendment. But the district court held that there was no clear indication of a conflict, relying on the Ninth Circuit's instruction that "to the extent that statutes can be harmonized, they should be." *Id.* at *4 (citing *United States v. Trident Seafoods Corp.*, 92 F.3d 855, 862 (9th Cir. 1996)). The Court should hold no differently here.

As Defendants explained in the preamble to the Rule and in their opening brief, HHS believes the Rule can be read harmoniously with EMTALA and does not foresee any circumstance in which fulfilling the requirements of EMTALA would violate the Federal Conscience Statutes. *See* 84 Fed. Reg. at 23,183; Defs.' Mem. 23–24. OCR, moreover, "intends to read every law passed by Congress in harmony to the fullest extent possible so that there is maximum compliance with the terms of each law." 84 Fed. Reg. at 23,183. Plaintiffs may continue to abide by EMTALA's requirements without any reasonable fear that doing so would run afoul of the Federal Conscience Statutes.

D. Title X

Plaintiffs also continue to press their argument that the Rule somehow conflicts with Title X. Pls,' Opp'n 37–38. This claim fails for multiple reasons. First, Plaintiffs do not identify any portion of Title X with which the Rule allegedly conflicts. And, indeed, there is nothing in Title X that could plausibly prevent HHS from implementing the Federal Conscience Statutes. *See* Pub. L. No. 91-572, 84 Stat. 1504 (1970). Plaintiffs' argument appears to be that, because Title X grantees *may* (though are not required to) counsel women regarding pregnancy options, including abortion, those grantees will somehow violate Title X when one of their individual employees declines to provide such counseling. *See* Pls.' Opp'n 37. But that is not correct. Title X does not *require* pregnancy counseling at all, much less that every single one of a Title X grantee's employees do so, even against their conscience. There is no conflict between the Rule and Title X, and the Court should reject Plaintiffs' attempt to manufacture one.

IV. The Rule Is the Product of Reasoned Decision-making.

As Defendants explained in their opening brief, the Rule is neither arbitrary nor capricious under 5 U.S.C. § 706(1) because HHS provided "a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n, of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted); *see also* Defs.' Mem. 25–30. Plaintiffs' arguments to the contrary are meritless. HHS supported each challenged aspect of the Rule with sound and detailed reasoning, and Plaintiffs' attempt to couch their policy disagreements as an APA challenge must fail. *Pub. Citizen, Inc. v. Nat'l Highway Traffic Safety Admin.*, 374 F.3d 1251, 1263 (D.C. Cir. 2004) (rejecting an "arbitrary-and-capricious challenge [that] boils down to a policy disagreement").

A. HHS Adequately Explained Its Reasons for the Rule.

First, HHS offered a reasoned explanation for changing course from the 2011 Rule. Here, the agency proposed a new rule because "[a]fter reviewing the previous rulemakings, comments from the public, and OCR's enforcement activities," it concluded that the 2011 Rule "created confusion over what is and is not required under Federal health care conscience laws and narrowed OCR's enforcement authority." 83 Fed. Reg. at 3,887. In promulgating the Rule, HHS considered (1) recent, documented instances of alleged and demonstrated conscience discrimination, such as litigation regarding new,

potentially discriminatory laws passed by various States, (2) complaints that OCR has received in recent years, (3) comments received during the 2018–19 rulemaking,[5] (4) a survey conducted in 2009, (5) comments received in the 2008 and 2011 rulemakings, and (6) various studies and articles. *See* 84 Fed. Reg. 23175–79; *see also* Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 83 Fed. Reg. 3,880, 3,887–891 (proposed Jan. 26, 2018).

Plaintiffs assail HHS's reliance on recent complaints that OCR received to argue that the agency failed to acknowledge record evidence allegedly contradicting its assertions. *See* Pls.' Opp'n 24–25. But again, HHS considered the complaints in conjunction with all of the factors discussed above and noted that the complaints *alleged* violations of the Federal Conscience Statutes. *See* 84 Fed. Reg. at 23,245. The presence or absence of complaints does not, by itself, paint a full picture of whether individuals and entities understand their rights and obligations under the Federal Conscience Statutes; as HHS indicated elsewhere, the agency is concerned that "segments of the public have been dissuaded from complaining about religious discrimination in the health care setting to OCR as the result, at least in part, of [the agency's previous,] unduly narrow interpretations of the Weldon Amendment." 84 Fed. Reg. at 23,179.

Furthermore, although Defendants have acknowledged that many of the complaints that OCR received related to matters that are outside the scope of the Federal Conscience Statutes, a sizeable number of complaints *did* implicate the relevant Statutes and underscore the need to both clarify the scope of, and more robustly safeguard, the conscience rights protected by the Statutes.[6] While the complaints in the

[5] *See, e.g.*, Administrative Record (AR) 135,736–746, Ex. 4 (comment from a "diverse group of faith-based ministries" stating that "[f]or the wellbeing of patients and the integrity of the [health care] profession, . . . healthcare professionals must be free to practice medicine in accordance with their professional judgment and ethical beliefs" and noting "examples of violations against conscience rights in healthcare, indicating that the threat to conscience rights is rising"); AR 134,132–136, Ex. 3 (comment from Ascension, a faith-based healthcare organization, applauding HHS "for taking steps to protect the religious freedoms of all Americans, especially when it comes to healthcare workers and organizations that are called by their faith to serve *all* persons, especially those who are poor and vulnerable"); AR 139,527–529, Ex. 5 (comment from Catholic Health Association noting that "[t]he lack of implementing regulations and of clarity concerning enforcement mechanisms for [the Federal Conscience Statues] has stymied their effectiveness"); AR 133,746–758, Ex. 2 (comment from Alliance Defending Freedom supporting the proposed Rule because it seeks "to not only raise awareness of conscience rights but to put . . . teeth into federal protections for those rights"); AR 28,049–053, Ex. 1 (comment from various religious organizations stating that the proposed Rule would "help guarantee that health care institutions and professionals are not pushed into [a] Hobson's choice"). Although the AR has been filed with the Court, Defendants have attached citations to the AR to this brief for the Court's convenience.

[6] Defendants cited some complaints in their opening brief as examples, *see* Defs.' Mem. 53, and

record are not the sole reason for HHS's decision to promulgate the Rule, they represent one factor that HHS considered in determining that "there is a significant need to amend the 2011 Rule to ensure knowledge of, compliance with, and enforcement of" the Federal Conscience Statutes. 84 Fed. Reg. at 23,175.

HHS's recent investigations into complaints alleging conscience discrimination, meanwhile, do not undercut HHS's reasons for promulgating the Rule, as Plaintiffs argue, *see* Pls.' Opp'n 25 (claiming that HHS is "engaging in 'robust' enforcement of the federal conscience statutes" under its current authority (citation omitted)). A central objective of the Rule is to dispel "confusion" created in part by the 2011 Rule "over what is and is not required" under the Federal Conscience Statutes. 84 Fed. Reg. at 23,175. The Rule also clarifies for recipients of HHS funds the procedures that HHS uses to enforce the Federal Conscience Statutes. *See id.* The fact that HHS can also enforce the Statutes under the 2011 Rule does not undermine these purposes; indeed, it reveals as unfounded Plaintiffs' objections to HHS's authority to promulgate the Rule, which is based in part on the same authority as the 2011 Rule.

B. HHS Considered All Important Aspects of the Problem.

Plaintiffs also complain that HHS failed to consider the Rule's purported impact on a host of matters such as patients, providers, and the Title VII reasonable-accommodation framework, Pls.' Opp'n 16–24, 25–27. For the following reasons, these arguments fail.[7]

Impact on Patient Populations. As Defendants explained in their opening brief, HHS considered whether the Rule would harm access to care and reasonably concluded that it would not. Defs.' Mem. 27–

include others here, *see, e.g.*, AR 542,017–26, Ex. 6 (complaint that California's health insurance abortion coverage mandate violates the Weldon Amendment); AR 542,151, Ex. 7 (nursing student alleges discrimination due to request for an exemption from assisting in abortions); AR 542,229–60, Ex. 13 (complaint against Illinois statute mandating that healthcare providers exercising conscience rights to engage in compelled speech and referrals); AR 542,285, Ex. 8 (complaint against Hawaii's statutory mandate that religious-based alternative pregnancy centers must advertise for state-funded abortions); AR 542,316–24, Ex. 9 (complaint against Pennsylvania's involvement in contraception mandate litigation); AR 545,932, Ex. 12 (nurse alleges that university hospital refused to hire her for full-time faculty position because of her views regarding abortion); AR 542,337, Ex. 10 (pediatric nurse complains that hospital informed her that she could no longer work in the health department clinics if she was unwilling to participate in the provision of abortion-related services) AR 544,612–23, Ex. 11 (complaint against the University of Vermont Medical Center for deceptively coercing nurse to participate in elective abortion); AR 544,945–52, Ex. 14 (complaint by pharmacist who objects to filling birth control prescriptions).

[7] Plaintiffs improperly rely on declarations in support of their argument that the Rule violates the APA. *See infra* sec. X.

28. HHS reached this conclusion for several reasons. First, implementation and enforcement of the Federal Conscience Statutes "would help alleviate the country's shortage of health care providers," 84 Fed. Reg. at 23,180, as the Statutes make it easier for health care professionals to perform their jobs while staying true to their religious beliefs or moral convictions. Second, the agency was unaware of any data or persuasive reasoning, presented by commenters or otherwise, demonstrating that the Rule could negatively impact access to care. *See id.* at 23,180–82. As noted in the Rule, "[a]ccess to care is a critical concern" of HHS, 84 Fed. Reg. at 23,180, and HHS examined the commenters' concerns closely. *Id.* at 23,180–82, 23,253–55. The agency probed commenters' illogical assumption that "there are health care providers in underserved communities who are protected by these laws but are offering services to which they object anyway," *id.* at 23,181, and explained why it believed that the Rule would improve access to care by (1) encouraging individuals who had previously "anticipated they would be pressured to violate their consciences" to enter the health care field, *id.*; (2) preventing some health care entities from leaving the field in light of data indicating that some entities currently felt pressure to do so, *id.*; and (3) allowing an increase in the provision of health care by religious institutions, *id.*

Plaintiffs speculate about a series of far-fetched harms and claim that the agency "brushed those concerns aside." *See* Pls.' Opp'n 16–17. But they conflate the receipt of certain federal funds conditioned on protecting the conscience rights of individual and institutional health care entities with the absolute denial of care for entire swaths of the patient population. Further, neither Plaintiffs nor the comments on which they rely explain why the Rule, which does not require any entity to refuse to care for patients and which for the most part protects conscience objections to specified services such as abortion, sterilization, and assisted suicide, *see* 84 Fed. Reg. at 23,170–74, would deny treatment to the children of LGBT individuals or "curtail or eliminate reproductive healthcare and training," Pls.' Opp'n 17. *See* 84 Fed. Reg. at 23,252. Plaintiffs' objections boil down to a policy disagreement with Congress over its decision to protect health care entities that have conscience objections to performing certain services and do not warrant invalidation of the Rule.[8] *See Owner-Operator Indep. Drivers Ass'n v. Fed. Motor Carrier Safety*

[8] Plaintiffs claim that "none of the purported authorizing [Federal Conscience] statutes require" or allow HHS to conclude that certain conscience rights are "'worth protecting even if they impact [overall or individual] access to a particular service, such as abortion.'" Pls.' Opp'n 18–19 (quoting 84 Fed. Reg. at 23,182). But none of the Statutes make protection of the applicable conscience rights conditional. *See,*

Admin., 494 F.3d 188, 210–11 (D.C. Cir. 2007).

Contrary to Plaintiffs' assertions, HHS's conclusion that the benefits of the Rule outweigh its burdens is not "pure conjecture," Pls.' Opp'n 22. The agency thoroughly analyzed the Rule's benefits by considering the available evidence and identified several benefits beyond the probable increase in overall access to medical care, including an increase in the quality of care that patients receive and a decrease in unlawful discrimination. *See* 84 Fed. Reg. at 23,246–54. Regarding access to care, HHS explained that it expects the Rule "to remove barriers to the entry of certain health professionals, and to delay the exit [of others] from the field, by reducing discrimination or coercion that health professionals anticipate or experience," and supported that conclusion by relying on public comments received, academic literature, and historical support for conscience protections. *Id.* Defendants have already explained why the agency's reliance on 2009 and 2011 polls in conjunction with other evidence was not unreasonable, especially in light of a lack of "data that allows for an estimate of the effect of this rule on access to services," 84 Fed. Reg. at 23,247. *See* Defs.' Mem. It stands to reason that the Rule's clarification of the protections in the Federal Conscience Statutes would allow more health care entities with conscience objections to certain medical procedures or services to enter, or stay, in the field, thereby allowing them to provide more care to patients overall, and it is logical that "[t]he burden of not being able to receive any health care clearly outweighs the burden of not being able to receive a particular treatment" from a particular provider. 84 Fed. Reg. at 23,252.

Nor was it arbitrary or capricious for HHS to reach this conclusion in the absence of empirical data (one way or the other) on the Rule's potential impact on access to care. "[P]redictive calculations are a murky science in the best of circumstances, and the [agency] naturally has no access to infallible data." *Cablevision Sys. Corp. v. F.C.C.*, 597 F.3d 1306, 1314 (D.C. Cir. 2010). Here, HHS considered studies that "specifically found that there is insufficient evidence to conclude that conscience protections have negative effects on access to care," and Plaintiffs offer no contrary studies, in the record or elsewhere. 84

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e.g., 42 U.S.C. § 300a-7 (Church Amendments); 42 U.S.C. § 238n(a) (Coats-Snowe Amendment); Pub. L. No. 115-245, 132 Stat. 2981, 3118 (most recent iteration of the Weldon Amendment); 42 U.S.C. §§ 18081, 18023(b)(1)(A). (b)(4), 18113, 14406(1) (certain conscience protection provisions in the Patient Protection and Affordable Care Act). And while Plaintiffs point to the emergency treatment requirements in EMTALA, the Rule makes clear that HHS believes that EMTALA does not conflict with the Federal Conscience Statutes or the Rule. 84 Fed. Reg. at 23,183; *see also* 73 Fed. Reg. at 78087–88.

Fed. Reg. 23,810. Plaintiffs fail to explain why the agency should be required to perform an unworkable study in these circumstances on the specific effects of the Rule before it went into effect. *See BellSouth Corp. v. FCC*, 162 F.3d 1215, 1221 (D.C. Cir. 1999).

Impact on Providers. HHS also extensively considered the Rule's impact on providers and other affected entities. 84 Fed. Reg. 23,239–46. The agency identified several categories of potential burdens, attempted to quantify them with the available data, and considered comments suggesting that the proposed rule's notice, assurance, and certification requirements were too burdensome. *Id.*; *see also id.* at 23,217, 23241. In response to comments, the agency modified its notice provision "from a requirement to a voluntary action and to accept self-drafting of notices to provide greater tailoring to individual circumstances." *Id.* at 23,217. HHS also "exempted certain classes of recipients from" the assurance and certification requirements in § 88.4 of the Rule. *Id.* at 23,241. "The impact of the exemption means that . . . approximately 70 percent of recipients do not have to comply with the assurance and certification requirement." *Id.* As to the recipients that remain subject to the assurance and certification requirements, HHS explained that the requirements provide "important protections to persons and entities under these laws and would be consistent with requirements under other civil rights laws" because entities would be more likely to understand their obligations upon application for federal funding and be more vigilant about complying with the Federal Conscience Statutes. *Id.* at 23,213–14. HHS therefore acknowledged and factored in the reasonable burdens associated with the Rule and ultimately concluded that "the benefits . . . justify the burdens of the regulatory action." *Id.* at 23,277. Contrary to Plaintiffs' assertions, *see* Pls.' Opp'n 21–22, HHS did not disregard commenters' concerns when data was unavailable; rather, while it noted that certain burdens "cannot be fully monetized," 84 Fed. Reg. at 23,239, it considered them to the extent it could, *see id.* at 23,239–46. Plaintiffs' attacks on HHS's burden analysis attempt to elevate Plaintiffs' judgment over that of the agency and, accordingly, must fail.

Title VII. Plaintiffs also claim that HHS "substitutes Title VII's established religious-accommodation process with a process that would be fundamentally unworkable," Pls.' Opp'n 25–26, and failed to explain why it departed from Title VII's framework, *id.* at 27. Plaintiffs' complaint, however, is nothing more than a policy disagreement with the path HHS took in promulgating the Rule. As is evident from the preamble to the Rule, HHS clearly explained why it did not adopt the Title VII framework to

implement the Federal Conscience Statutes. *See* 84 Fed. Reg. at 23,190–91. For one, Title VII contains distinct protections from the Federal Conscience Statutes, and therefore HHS was not required to incorporate standards from that separate statute. HHS explained that Congress's decision to

> take a different approach in Title VII as compared to [the Federal Conscience Statutes] is consistent with the fact that Title VII's comprehensive regulation of American employers applies in far more contexts, and is more vast, variable, and potentially burdensome (and, therefore, warranting of greater exceptions) than the more targeted conscience statutes that are the subject of this rule, which are health care specific, and often procedure specific, and which are specific to the exercise of Congress's Spending Clause authority.

Id. at 23,191. HHS did, however, consider the reasonable-accommodation standard set forth under Title VII and adopted components of that standard when modifying the definition of "discrimination" in response to comments on the proposed Rule. *See id*. Thus, it can hardly be said that HHS failed to adequately consider or explain its choices vis-a-vis Title VII. Plaintiffs would simply prefer that HHS had made a different choice.

V. Plaintiffs' Spending Clause and Establishment Clause Claims Are Not Ripe.

Plaintiffs' Spending Clause and Establishment Clause claims are not ripe. The ripeness analysis turns on whether the Court would benefit from awaiting a concrete enforcement action applying the Rule before assessing the merits of Plaintiffs' constitutional claims and whether there would be any harm to Plaintiffs in the interim. Plaintiffs cannot dispute that they have not been the subject of any enforcement action, or that multiple steps would have to occur before any loss of federal funds could come to pass. And of course if Plaintiffs did violate the Rule, and the agency's informal resolution attempts failed, and the agency took enforcement action against Plaintiffs, and all other applicable procedures were exhausted, Plaintiffs offer no reason why they could not seek judicial relief *then*.

Plaintiffs are also unsuccessful in distinguishing *NFPRHA v. Gonzales*, 468 F.3d 826, 827 (D.C. Cir. 2006), and *California v. United States*, No. C 05-00328 JSW, 2008 WL 744840, at *3 (N.D. Cal. Mar. 18, 2008). Plaintiffs argue that the definition of "discrimination" and other terms in the Rule present an "immediate regulatory burden[]" that was lacking in *NFPRHA*, Pls.' Opp'n 14, but *NFPRHA* involved a challenge to the entire Weldon Amendment, which originated various conscience-based restrictions on federal funds in the first place. To distinguish *California*, Plaintiffs suggest that there is an ongoing enforcement action against them, but the letter they cite discusses an investigation occurring directly under

the Statutes, not under the Rule. Pls.' Opp'n 5 & n.3, 15. Plaintiffs argue that they must decide now on their future course of action, but that was equally true when the Weldon Amendment was enacted prior to *NFPRHA* and *California*. And, to the extent that Defendants do not challenge the ripeness of Plaintiffs' non-constitutional claims, those claims will still be adjudicated.

VI. The Rule Does Not Violate the Spending Clause.

In their Spending Clause arguments, Pls.' Opp'n 38–42, Plaintiffs reaffirm that they do not object to the Federal Conscience Statutes and double-down on their insistence that the Rule is an unconstitutional departure from the Statutes. But Plaintiffs do not even attempt to identify an unconstitutional difference between the two. For example, Plaintiffs argue the Rule is coercive because it potentially affects a large pot of money, *id.* at 38–39, but precisely the same is true of the Federal Conscience Statutes. The Rule does not expand the Statutes—for example, it does not "bootstrap[]" the consequences of a violation of the Weldon Amendment into a violation of other provisions, *contra id.* at 39. As Defendants have explained elsewhere, the Rule is a clarifying regulation that does not alter the Statutes' substantive requirements. 84 Fed. Reg. at 23,256.

HHS's previous comments concerning the interaction of the Spending Clause and the Weldon Amendment are not relevant here, where Plaintiffs do not challenge the constitutionality of the Weldon Amendment. *Cf.* Pls.' Opp'n 39 (citing App'x 396). Indeed, HHS's sensitivity to the Spending Clause provides no reason to rush to judgment on the Rule given that it is not yet in effect and thus has never been applied in a specific factual circumstance.

The Rule, like the Federal Conscience Statutes, is unambiguous, and Plaintiffs had ample notice of the conditions attached to federal funds. As Defendants have previously explained, Defs.' Mem. 32, the standard for conditions on federal funds is not perfect clarity or perfect notice. When a condition is present but "largely indeterminate," the Spending Clause is satisfied if a state nonetheless chooses to accept the federal funds. *Mayweathers v. Newland*, 314 F.3d 1062, 1067 (9th Cir. 2002); *see also id.* ("Congress is not required to list every factual instance in which a state will fail to comply with a condition."). The question is whether the state knew the funds were conditioned. Plaintiffs do not substantively dispute this contention or assert that they did not understand that the Federal Conscience Statutes included non-discrimination requirements. It is thus irrelevant if Plaintiffs believe there is some

uncertainty concerning specific definitions or subrecipients.[9] Indeed, it is ironic that Plaintiffs object to the lack of clarity and specificity in the Rule, when the Rule provides additional clarity for funding recipients as compared to the Statutes.

Likewise, Plaintiffs argue that the funds at issue are allegedly unrelated to the conscience protections' purpose of alleviating potential conscience burdens on individual and institutional health care entities. Pls.' Opp'n at 42. If any such nexus problem existed, however, it would apply equally to the Statutes, since it is the Statutes that determine which sources of federal funds are subject to conditions. Plaintiffs do not explain how the Rule, which applies only to HHS administered, conducted, or funded programs, would somehow affect Plaintiffs' funds from the Departments of Labor and Education. *See* 84 Fed. Reg. at 23,170 (stating that the rule addresses enforcement of "Federal conscience and anti-discrimination laws applicable to the Department, its programs, and recipients of HHS funds"). To the extent that remedies under other regulations, such as the UAR, may affect other funds, those other regulations are not altered by the Rule or challenged by Plaintiffs.

Nor are the conditions on federal funds retroactive—Plaintiffs admit that they have long been aware of the funding conditions set by the Federal Conscience Statutes. This is not a case where, as in *NFIB*, the programs are being changed so dramatically that they constitute entirely new programs. *Cf. Nat'l Fed'n of Indep. Bus.* (*NFIB*) *v. Sebelius*, 567 U.S. 519, 582–83 (2012) (holding that the Medicaid statute authorized Congress to modify the statute's terms without creating Spending Clause problems, so long as the modifications did not rise to the level of creating a new program). Instead, as discussed previously, the Rule merely implements the Statutes, and Plaintiffs are incorrect that this is a shift in kind rather than degree, for the reasons previously discussed.

And of course, the Spending Clause does not bar *all* adjustments to the terms on which the federal government offers funds—if that were the case, the Supreme Court's opinion in *NFIB* would likely have been much shorter. *See NFIB*, 567 U.S. at 575, 583, 585 (noting that "[t]here is no doubt that the Act dramatically increases state obligations under Medicaid" before engaging in multiple pages of Spending Clause analysis to determine the extent of the changes).

[9] Plaintiffs do not rebut that the Rule addresses concerns about liability for sub-recipients' actions. *Compare* Defs.' Mem. at 32 (citing 84 Fed. Reg. at 23,220), *with* Pls.' Opp'n at 40 n.61.

VII. The Rule Does Not Violate the Establishment Clause.

Plaintiffs fail to reconcile the essential tension of their Establishment Clause argument: their insistence that the Rule somehow violates the Establishment Clause and their apparent concession that the Federal Conscience Statutes do not. Other than Plaintiffs' unsupported assertion that the Rule "wildly expands" the Statutes, Pls.' Opp'n 42, (which is incorrect, for the reasons stated *supra*), Plaintiffs fail to explain why the Statutes do not likewise burden third parties, elevate religion over non-religion, or entangle the government with religion.

Plaintiffs boldly argue that the Rule improperly advances certain religious beliefs, even though the Rule (and Statutes) do not endorse any religion, much less a specific religion. Both the Rule and Statutes are generally neutral between religion and non-religion.[10] *See, e.g.*, 42 U.S.C. § 238n (Coats-Snowe Amendment); Pub. L. No. 115-245, Div. B., sec. 507(d), 132 Stat. 2981 (Weldon Amendment); 42 U.S.C. § 300a-7 (Church Amendments). The fact that the government accommodates both religious and non-religious objections has long been a factor indicating that there is no Establishment Clause violation, *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 704 (1994) (collecting cases), and Plaintiffs cite no contrary case finding an Establishment Clause violation as to a statute or regulation that accommodates objections whether based on religion or not.

Plaintiffs misstate the law by asserting that the government can protect religious liberty through religious accommodations "only to alleviate substantial government-imposed burdens on religious practice." Pls.' Opp'n 45. Title VII, which Plaintiffs cite with approval elsewhere in their brief, is a clear counterexample where the government has required private entities not to discriminate based on their employee's religious beliefs. *See* Cal. Gov. Code § 12940 (likewise prohibiting employers from discriminating against employees based on religious creed). Plaintiffs cite cases discussing RFRA, Pls.' Opp'n 46, but RFRA is not a ceiling on the government's power to accommodate religious freedom.

Plaintiffs assert—without support—that the Rule "protects certain denominations' religious

[10] And the handful of Federal Conscience Statutes that are limited to religious objectors, *see, e.g.*, 42 U.S.C. §§ 1320a-1(h) (referring to religious nonmedical health care institutions), are not challenged by Plaintiffs. In any event, the Establishment Clause does not prevent the government from accommodating religion. *See, e.g., Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 335 (1987).

beliefs in opposition to religious freedom and LGBT rights," Pls.' Opp'n 46, and suggest—again, baselessly—that the Rule is HHS's attempt to "favor[]" the Jewish faith over other traditions, Pls.' Opp'n 46. This is an astonishingly wrong argument. On its face, the Rule explains its purpose to protect the conscience rights, both religious and non-religious, of entities covered by the Federal Conscience Statutes. Under Plaintiffs' flawed logic, a federal requirement that school lunch include fruits and vegetables would violate the Establishment Clause by "favoring" Seventh-day Adventism, Jainism, or other faith groups that encourage vegetarianism. Finally, the Church Amendments, and thus the Rule in implementing them, equally protect entities from discrimination based on choosing to *perform* abortions and choosing *not* to perform abortions, *see, e.g.*, 42 U.S.C. § 300a-7(c)(1), further demonstrating that the Rule does not, as Plaintiffs suggest, favor particular religious beliefs.

And of course if any of these contentions were correct (and they are not), they would apply equally to the Statutes, which originate the conditions on federal funds and control which services are affected. For the same reasons, the Rule does not coerce anyone to adhere to purportedly favored religious practices, or entangle the government with religion. Pls.' Opp'n 46–47.

Plaintiffs continue to argue that the Establishment Clause bars *any* burdens on a third party, but Supreme Court precedent forecloses this extreme view. "[In *Gillette*,] the Court upheld a military draft exemption, even though the burden on those without religious objection to war (the increased chance of being drafted . . .) was substantial. And in *Corporation of Presiding Bishop*, the Court upheld the Title VII exemption even though it permitted employment discrimination against nonpractitioners of the religious organization's faith." *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist.*, 512 U.S. at 725. Instead, potential burden is one factor that the court may consider to determine if an accommodation strays into the unlawful fostering of religion. *See Amos*, 483 U.S. at 334–35. Here, as previously discussed, the Rule does not improperly foster religion because it also protects non-religious objections, and because it merely encourages entities not to discriminate against health care providers based on the providers' conscience decisions. *Cf. Chrisman*, 506 F.2d at 311 (concluding that a provision of the Church Amendments satisfied the Establishment Clause without analyzing the burden on third parties).

Contrary to Plaintiffs' view, the problem that the Supreme Court identified in *Estate of Thornton v. Caldor*, 472 U.S. 703 (1985), was not the burden on third parties, but rather that the statute offered a

benefit only to the religiously inclined. In *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), the Supreme Court discussed tax exemptions for religious and nonreligious organizations that had been upheld and explained, citing *Thornton*, that "were [the] benefits confined to religious organizations . . . we would not have hesitated to strike them down for lacking a secular purpose and effect." *Id.* at 11, s*ee also Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144–46 & n.11 (1987) (citing *Thornton* as an example of an impermissible religious preference and upholding an award of unemployment benefits to a religious objector when the benefits were available to the religious and non-religious alike because "the provision of unemployment benefits generally available within the State to religious observers . . . neutrally accommodate[s] religious beliefs and practices, without endorsement"). Here, the Establishment Clause is not violated because the Statutes and Rule address both religious and non-religious objections. Nor does the Rule "require[] Plaintiffs to accede to all religious objections." Pls.' Opp'n 43. Many conceivable religious objections would not be covered by any of the Federal Conscience Statutes, and, thus, would not be covered by the Rule.

VIII. The Rule Does Not Violate Equal Protection or Due Process.

Plaintiffs lack third-party standing to bring facial equal protection and due process challenges to the Rule, and in any event fail to state a claim.

Plaintiffs now assert that they bring their Equal Protection, Due Process, and Free Speech claims through the Santa Clara physician-plaintiffs, and claim an unequivocal right to do so. Pls.' Opp'n 11. Plaintiffs rely on *Singleton v. Wulff*, 428 U.S. 106, 117 (1976), which concerned the rights of "physicians who perform nonmedically indicated abortions," *id.* at 108, to assert rights on behalf of pregnant "women patients as against governmental interference with the abortion decision," *id.* at 106. But Plaintiffs attempt to extend that case to circumstances well beyond its ken.[11] None of the Santa Clara physician-plaintiffs appear to be "physicians who perform nonmedically indicated abortions," *id.* at 108; *Santa Clara v. HHS*, 19-cv-2916, Compl. ("Santa Clara Mem.") ¶¶ 29–46, ECF No. 1; *see also Santa Clara v. HHS*, 19-cv-

[11] As the *Singleton* court emphasized, "[u]nless the 'provider of services' that he has in mind enjoys with his 'client' a confidential relationship such as that of the doctor and patient, unless the 'client's' claim is imminently moot, as the pregnant woman's technically is, the standing issue in such a future case will not be definitively controlled by this one." *Singleton*, 428 U.S. at 118 n.6 (plurality op.).

2916; *see also* Decl. of Colleen McNicholas ¶ 6, ECF No. 36-14 at 3–4, and none of them plead that their specific patients' claims may be "imminently moot" in the way that pregnant, abortion-seeking women's claims can be, thus potentially necessitating the physicians' assertion of their patients' rights.[12] *Singleton*, 428 U.S. at 115–16; *see also* Santa Clara Compl. ¶¶ 29–46. Thus, *Singleton* and its progeny do not control, nor do Plaintiffs identify any other binding precedent that would allow them to raise claims on behalf of third-party patients in this case. *See* Pls.' Opp'n 11–12.

Even if the Santa Clara Plaintiffs had standing, their claims, which would essentially require this Court to treat the Federal Conscience Statutes themselves as invalid, fail. Plaintiffs narrow their previously sweeping Equal Protection claim to challenge only the Rule's purported "targeting [of] transgender patients' transition-related health care needs for religious and moral objection," Pls.' Opp'n 47; *compare with* Santa Clara Compl. ¶ 245. But the Rule's provisions apply regardless of whether a patient is transgender, and thus, they do not treat individuals unequally. Indeed, in their opening brief, Defendants explained that Plaintiffs' Equal Protection claim fails because the Rule does not create suspect classes, facially infringe on any fundamental right, or evince purposeful discrimination. Defs.' Mem. 37–38. Plaintiffs offer no response to these arguments in their opposition.

Plaintiffs do suggest that the Rule targets transgender patients by characterizing "medically-necessary healthcare procedures sought by transgender patients to treat gender dysphoria as 'sterilization,'" Pls.' Opp'n 47, but the Rule does no such thing. The Rule does not define the term "sterilization"—for purposes of the Church Amendments or otherwise. *See generally* 45 C.F.R. § 88.1–88.10. Instead, the agency explained that it would consider the issue of whether the Federal Conscience Statutes "apply to sterilizations performed in the context of gender dysphoria," if necessary, "on a case-

[12] Regarding transgender patients, on whose behalf Plaintiffs appear to raise their Equal Protection and Free Speech claims, Plaintiffs attempt to extend the imminent-mootness prong described in *Singleton* to cases in which transgender patients seek gender-transition treatments. They do so by improperly relying on facts asserted in a declaration submitted by a putative expert attached to their opposition brief. *See infra* sec. X. The declaration, moreover, generally predicts that some "[g]ender dysmorphic patients who are assigned a male sex at birth but identify as female and lack access to appropriate care are often so desperate for relief that they may resort to life-threatening attempts at auto-castration . . . ." Decl. of Randi Ettner ¶ 22, ECF No. 75. This generalized statement about decisions that *some* gender dysmorphic patients *may* take is insufficient to show that any claims that the Santa Clara physician-plaintiffs' specific patients have are "imminently moot,.L." *Cf. Kowalski v. Tesmer*, 543 U.S. 125, 131 (2004).

by-case basis." 84 Fed. Reg. 23,205. Plaintiffs' claim based on a non-existent definition is meritless.[13]

Finally, contrary to Plaintiffs' assertions, Pls.' Opp'n 47–48, the Rule clearly bears a rational relationship to the government's interest in preventing conscience discrimination as set forth in the Federal Conscience Statutes. *See* 84 Fed. Reg. 23,175; *see also Erotic Serv. Provider Legal Educ. & Research Project v. Gascon*, 880 F.3d 450, 457 (9th Cir. 2018), *amended*, 881 F.3d 792 (9th Cir. 2018) ("Rational basis review is highly deferential to the government, allowing any conceivable rational basis to suffice.").

As for their Due Process challenge, Plaintiffs attempt to escape the Supreme Court's decision in *Rust v. Sullivan*, 500 U.S. 173, 193 (1991), with no more than a cursory sentence claiming that they have made a "specific showing" of undue burden and a level of harm "failing any level of scrutiny." Pls.' Opp'n 50–51. But contrary to Plaintiffs' assertions, they have not shown that the Rule facially violates any fundamental right,[14] *see* Pls.' Opp'n 49–50; even if the Court could consider Plaintiffs' declarations (and it cannot, *see infra* sec. X), those declarations at most speculate about the Rule's potential downstream effects.[15] That is not enough to sustain a facial, substantive due process challenge. *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 780 (9th Cir. 2014) ("To succeed on their facial challenge, the plaintiffs must show that the [challenged rule is] unconstitutional in all . . . applications."); *United States v. Salerno*, 481 U.S. 739, 745 (1987). And *Rust* makes cleal#ed00 U.S. at 201, let alone a duty to fund health care entities that discriminate against those who object to abortion or other similar services or procedures on conscience grounds. That such regulations "do not impermissibly burden a woman's Fifth Amendment rights is

[13] The Court has asked "whether the word 'sterilization' as used in the Church Amendments was intended to cover transgender medical operations and/or gender reassignment surgery." ECF No. 135. As noted above, HHS did not address that question in the Rule and has not otherwise taken a position on whether the Church Amendments intended to cover such procedures. The Court thus need not resolve the issue here, on this facial challenge, since Plaintiffs challenge only the Rule itself.

[14] Nor do Plaintiffs establish that "gender identity[] and self-definition" are fundamental rights for the purposes of Due Process analysis. *But see Karnoski v. Trump*, 926 F.3d 1180, 1201 (9th Cir. 2019) (applying intermediate scrutiny to a government policy that excluded transgender individuals).

[15] *See, e.g.*, Second Decl. of Colleen McNicholas ¶ 27, ECF No. 87 ("To the extent that [the Rule] discourages entities like Trust Women from offering any services to which our employees, volunteers, or contractors may possibly object and threatens to remove or even claw back funding from entities that do not comply with such broad requirements, it is unworkable and could force Trust Women and other providers across the country to drastically alter the care we offer to patient or close entirely."); Decl. of Elizabeth Barnes ¶ 20, ECF No. 60 ("The Rule creates an opening for anti-wwwws to infiltrate and incapacitate our clinic by . . . creating threats to security as well as the basic right of the patient to non-judgmental supportive care . . . .").

evident" from a whole line of cases predating *Rust*, and Plaintiffs offer no meaningful reason to stray from this established jurisprudence. *Id.*

I. The Rule Does Not Violate the Free Speech Clause.

Even assuming that the Santa Clara physician-plaintiffs have standing to raise a Free Speech challenge to the Rule on behalf of their patients—which they do not—the Rule does not unconstitutionally burden their patients' speech. As Defendants explained in their opening brief, the Rule imposes *no* burdens or other restrictions on patients' speech and merely ensures health care entities' compliance with the funding restrictions in the Federal Conscience Statutes.[16] Defs.' Mem. 35–36. Here again, Plaintiffs fail to grapple with the Supreme Court's decision in *Rust*, dismissing the case because it purportedly did not involve patient rights and instead weaving together inapposite case law to make their point. Pls.' Opp'n 51–52. But the plaintiffs in *Rust* did claim that the regulations at issue "violate[d] the 'free speech rights of private health care organizations that receive Title X funds, of their staff, *and of their patients*' by impermissibly imposing 'viewpoint-discriminatory conditions on government subsidies,'" *Rust*, 500 U.S. at 192 (emphasis added), and the Court in turn explained that there was "no question" that the regulations were constitutional, *id.* "To hold that the Government unconstitutionally discriminates on the basis of viewpoint when it chooses to fund a program dedicated to advance certain permissible goals, because the program in advancing those goals necessarily discourages alternative goals, would render numerous Government programs constitutionally suspect." *Id.* at 194.

IX. The Rule Creates No Separation of Powers Concerns.

Plaintiffs' arguments concerning the separation of powers, Pls.' Mem. at 52–54, continue to misapprehend the Rule by suggesting that the Rule changes the amount of money or funding sources that the Federal Conscience Statutes could affect. As previously explained, the Rule does not change the Statutes' substantive requirements and thus does not newly link funds tied by statute to the Church Amendments (for example) to violations of the Weldon Amendment (for example) or *vice versa*.

[16] Nor do Plaintiffs plead that "deterrence [of protected speech] was a substantial or motivating factor in the [agency's] conduct." *Mendocino Envtl. Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1300 (9th Cir. 1999).

X. The Court May Not Consider Plaintiffs' Extra-Record Materials.

The Court should reject Plaintiffs' improper attempt to create a new record for the purposes of this litigation by submitting declarations and other materials to bolster their merits arguments. The APA provides that, "[i]n making the [] determinations [regarding the lawfulness of agency action], the court shall review the whole record," 5 U.S.C. § 706, and the Supreme Court has long held that the whole record is limited to "the full administrative record that was before the Secretary at the time he made his decision," *Citizens to Pres. Overton Park Inc. v. Volpe*, 401 U.S. 402, 420 (1971). *See also Camp v. Pitts*, 411 U.S. 138, 142 (1973) (holding that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court"); *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743–44 (1985) ("The task of the reviewing court is to apply the appropriate APA standard . . . to the agency decision based on the record the agency presents to the reviewing court.").

Ninth Circuit decisions reflect these same principles that the court should ordinarily not consider extra-record evidence when evaluating the merits of claims brought under the APA. *See, e.g.*, *Jet Inv., Inc. v. Dep't of Army*, 84 F.3d 1137, 1139 (9th Cir. 1996). The Ninth Circuit "allows for a court to review material outside of the administrative record" in only "four narrow circumstances." *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. Zinke*, 889 F.3d 584, 600 (9th Cir. 2018). Those narrow exceptions are as follows: (1) where the extra record-evidence is necessary to determine whether the agency has considered all relevant factors and has explained its decision; (2) where the agency has relied on documents not in the record; (3) where supplementing the record is necessary to explain technical terms or complex subject matter; or (4) where plaintiffs make a showing of agency bad faith. *Id.* The scope of these exceptions is "constrained, so that the exception does not undermine the general rule." *Lands Council v. Powell*, 395 F.3d 1019, 1039 (9th Cir. 2005). Otherwise, "[w]ere the federal courts routinely or liberally to admit new evidence when reviewing agency decisions, it would be obvious that the federal courts would be proceeding, in effect, *de novo* rather than with the proper deference to agency processes, expertise, and decisionmaking." *Id.* Plaintiffs bear the burden of demonstrating that the administrative record is inadequate. *Animal Def. Council v. Hodel*, 840 F.2d 1432, 1437 (9th Cir. 1988).

None of the Ninth Circuit's recognized exceptions applies here, nor have Plaintiffs claimed that any exception applies. Defendants provided the administrative record to Plaintiffs on July 22, 2019, and

then supplemented it—mostly with materials that were already publicly available—on August 19, 2019. Plaintiffs therefore had ample opportunity to seek to supplement the administrative record or to identify any deficiencies if they believed it to be incomplete. But Plaintiffs have not done so.

Instead, Plaintiffs baldly flout the longstanding rule limiting review to the administrative record. For example, Plaintiffs rely in several instances on declarations to attempt to support their arguments that the Rule is arbitrary and capricious. *See* Pls.' Opp'n 17; *id.*at 19 & n.36. Plaintiffs cite to the declarations of Darrel Cummings and Sarah Henn to describe certain emergency experiences among their patients. *See* Pls.' Opp'n 17. Dr. Cummings or Dr. Henn could have described those circumstances by submitting comments during the rulemaking, but because they did not, the Court cannot consider their statements now. Plaintiffs also submit the declaration of Randie Chance for his description of complaints contained in the administrative record. *See* Pls.' Opp'n 24. But the complaints in the record speak for themselves, and Dr. Chance's analysis was not before the Secretary when he made his decision. It is therefore not properly part of the Court's merits analysis. Plaintiff also include a declaration from Dr. Wendy Chavkin for her perspective on HHS's citation in the Rule to an article she authored. *Id.* 13, 19, 24. But Dr. Chavkin's article also speaks for itself, and to the extent Dr. Chavkin identifies other potentially relevant articles to consider, she or other commenters could have identified the same articles in comments submitted to the agency during the rulemaking process.

The Court should also limit its review to the administrative record on Plaintiffs' constitutional claims. As Plaintiffs acknowledge, the APA provides the private right of action necessary for Plaintiffs to assert constitutional claims for equitable relief with respect to final agency action. *See* Pls.' Opp'n 13 n.21 ("[T]he APA provides a single cause of action challenging final agency action."); *see also* 5 U.S.C. § 706(2)(B) (permitting judicial review of agency action "contrary to constitutional right, power, privilege, or immunity"). Section 706 of the APA, by its plain language, restricts the review of constitutional claims to the administrative record. A contrary rule—one of admitting exception for constitutional claims—would "incentivize every unsuccessful party to agency action to allege . . . constitutional violations to trade in the APA's restrictive procedures" for the Federal Rules of Civil Procedure. *Jarita Mesa Livestock Grazing Ass'n v. U.S. Forest Serv.*, 58 F. Supp. 3d 1191, 1238 (D.N.M. 2014). Defendants, moreover, are aware of no Ninth Circuit decision recognizing an exception to the

record review rule for constitutional claims. And many district courts have rejected requests to create any such exception. *See, e.g.*, *Jiahao Kuang v. U.S. Dep't of Defense*, 2019 WL 293379, at *2-3 (N.D. Cal. Jan 23, 2019); *Moralez v. Perdue*, 2017 WL 2265855, at *3 (E.D. Cal. May 24, 2017). The Court should therefore reject Plaintiffs' improper attempt to support their constitutional claims with extra-record material. *See, e.g.*, Pls.' Opp'n 41 & nn. 63–65 (citing declarations for Plaintiffs' Spending Clause claim); *id.* at 43 (citing declarations for Plaintiffs' Establishment Clause claim).

The Ninth Circuit confirmed this principle in *Fence Creek Cattle Co. v. U.S. Forest Service*, in which it affirmed the judgment of the district court to limit review to the administrative record even though the plaintiff had alleged violations of "constitutional due process guarantees." 602 F.3d 1125, 1131 (9th Cir. 2010). The court of appeals reiterated that "expansion of the administrative record" is permitted only in "four narrowly construed circumstances," discussed above. *See id*. Accordingly, and as a district court helpfully summarized, "when a constitutional challenge to agency action requires evaluating the substance of an agency's decision made on an administrative record, that challenge must be judged on the record before the agency." *Bellion Spirits, LLC v. United States*, 335 F. Supp. 3d 32, 43 (D.D.C. 2018). No matter how Plaintiffs frame this case, this Court will ultimately "evaluat[e] the substance of an agency's decision," *id.* That evaluation should rest on the administrative record alone, as the APA requires.

Because none of the Ninth Circuit's exceptions applies, the Court should not consider extra-record material when evaluating the merits of Plaintiffs' claims. Defendants acknowledge, of course, that Plaintiffs have flooded the docket with declarations purporting to establish alleged harm that will result from the Rule. Defendants disagree fervently with those allegations for the reasons explained in the preamble to the Rule, among others. However, because review in this case is properly limited to the administrative record, and because the appropriate time for Plaintiffs to comment on the alleged impact of HHS's proposals was during the rulemaking process, Defendants do not address the factual allegations in Plaintiffs' declarations. Nor is it necessary for the Court to address those allegations in order to resolve the legal questions at issue in the parties' cross motions for summary judgment. *See, e.g.*, *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001) ("As we have repeatedly recognized [ ], when a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal. The entire case on review is a question of law." (internal quotation omitted)).

XI. Any Relief Accorded to Plaintiffs Should Be Limited.

For all the reasons described above, and in Defendants' opening brief, the Rule is lawful and therefore should not be vacated. Plaintiffs insist, however, that, if the Court finds that any part of the Rule is invalid, it must strike down the Rule in its entirety, rather than respect the agency's clear intent that portions of the Rule found to be invalid should be severed from the remainder. *See* Pl.'s Opp'n 40; *see also* 84 Fed. Reg. at 23,272. Plaintiffs fault Defendants for providing only a "conclusory severance argument." Pl.'s Opp'n 40. But Plaintiffs ignore that it is *Plaintiffs'* burden—not Defendants'—to explain why any portion of a lawfully promulgated regulation should not be allowed to go into effect. *Cf. Alaska Airlines v. Donovan*, 766 F.2d 1550, 1560 (D.C. Cir. 1985) ("[T]he burden is placed squarely on the party arguing against severability to demonstrate that Congress would not have enacted the provision without the severed portion."). It is therefore Plaintiffs whose severability analysis is lacking. In any event, portions of the Rule can clearly operate independently from each other. For example, if the Court were to strike down any particular definition in the Rule (which it should not, for the reasons explained above), the remaining definitions and other provisions of the Rule could continue to operate independently.

Finally, although the Rule is lawful for the reasons Defendants have explained, if the Court were to disagree, any relief must be limited to the specific Plaintiffs before the Court. Plaintiffs insist that nationwide relief is the "usual" remedy under the APA. But Plaintiffs ignore the Supreme Court's recent instruction to the contrary. In *Gill v. Whitford*, 138 S. Ct. 1916 (2018), the Court explained that any remedy "must be tailored to redress the plaintiff's particular injury." *Id.* at 1934. Vacating the Rule on a nationwide basis would go far beyond what is necessary to address Plaintiffs' particular alleged injury, and nationwide relief would effectively stop courts in other jurisdictions assessing similar challenges from evaluating those separate claims. *See* Defs.' Mem. 38–39.[17]

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' motion and deny Plaintiffs' motion.

Dated: September 26, 2019 Respectfully Submitted,

[17] Defendants previously explained that, even if the Court were to set aside any or all of the Rule, the Court should make clear in its order that the relief does not prevent HHS from continuing to investigate violations of, and to enforce, federal conscience and anti-discrimination laws under the existing 2011 Rule or the Federal Conscience Statutes themselves. *See* Defs.' Mem. 40. Plaintiffs did not respond and therefore have conceded the point.

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Attorneys for Defendants

Exhibit 1

March 16, 2018

Submitted Electronically

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

Subj: Protecting Statutory Conscience Rights in Health Care, Dep't of Health & Human Services, Office for Civil Rights, RIN 0945-ZA03

Dear Sir or Madam:

On behalf of the United States Conference of Catholic Bishops ("USCCB"), National Association of Evangelicals, Southern Baptist Ethics & Religious Liberty Commission, Catholic Medical Association, Christian Legal Society, and Family Research Council, we submit the following comments on the proposed rule to protect conscience rights in health care. 83 Fed. Reg. 3880 (Jan. 26, 2018).

We strongly commend the Department for publishing these proposed regulations and we urge their adoption. For over four decades, through enactments such as the Church Amendment (42 U.S.C. § 300a-7), Congress has sought to ensure that health care institutions and professionals will not have to choose between abandoning medicine and violating their conscience, particularly with respect to abortion and sterilization. The proposed regulations will implement these and other longstanding federal statutory protections, and thereby help guarantee that health care institutions and professionals are not pushed into this Hobson's choice.

1. **The Proposed Regulations Are Much Needed and Long Overdue.**

The preamble provides ample documentation of the record of violations of the federal conscience statutes in the United States. 83 Fed. Reg. at 3887-89. Sadly, hostility to conscience rights in health care is not only continuing, but increasing, as demonstrated by the rise in the rate of complaint filings. *Id*. at 3887 (noting 34 complaints between November 2016 and mid-January 2018, compared to 1.25 complaints per year from 2008 until November 2016); *see also* Jessie Hellmann, *New HHS Office that Enforces Health Workers' Religious Rights Received 300 Complaints in a Month*, THE HILL, Feb. 20, 2018 (noting that "[m]ore than 300 individuals filed a complaint with [HHS] over the last month"), http://thehill.com/policy/healthcare/374725-hhs-new-office-that-enforces-religious-moral-rights-of-health-workers.

Some states and local governments and advocacy groups seem to have grown more determined in their opposition to federal conscience laws. Ironically, many of these groups speak of "choice" and non-discrimination, but their objective is precisely the opposite, the elimination of choice and the imposition of rules that force people to participate in these procedures, as well as the targeted exclusion of those whose religious convictions impel and shape their provision of medical care. Many advocates speak as if the conscience laws were the invention of the current administration. They are not. Three of the most important protections—the Church, Coats-Snowe, and Weldon amendments—go back to 1973, 1996, and 2004, respectively.

Though these laws have been on the books for years, legislators and advocates are becoming more emboldened to violate them. There are reports this year of efforts to pass a bill in Maine "that would require all nurse practitioners to provide the abortion pill to patients upon request" in violation of the Church and Weldon amendments. Jessie Hellmann, *Planned Parenthood Announces Nationwide Push for Abortion, Birth Control Legislation*, THE HILL (Feb. 13, 2018), http://thehill.com/policy/ healthcare/373619-planned-parenthood-announces-nationwide-push-or-abortion-birth-control. Washington State legislators have passed a bill that would require health plans to cover abortion if they cover maternity care, in violation of the Weldon amendment. Washington State Substitute Sen. Bill 6219 (Mar. 3, 2018), http://lawfilesext.leg.wa.gov/biennium/2017-18/Pdf/Bills/Senate%20Passed%20Legislature/6219-S.PL.pdf#page=1.

We commend the Department for proposing these regulations, which are much needed and long overdue.

2. The Proposed Regulations' Broad Interpretation of Conscience Laws Is Consistent with the Remedial Purpose of the Statutes They Enforce.

Proposed section 88.1 states that "[c]onsistent with their objective to comprehensively protect the conscience and associated anti-discrimination rights of persons, entities, and health care entities, the statutory provisions and the regulatory provisions contained in this part are to be interpreted and implemented broadly to effectuate their protective purposes." 83 Fed. Reg. at 3923. Similarly, proposed section 88.9 states that the regulations "shall be construed in favor of a broad protection of free exercise of religious beliefs and moral convictions, to the maximum extent permitted by the terms of the Federal health care conscience and associated antidiscrimination statutes implemented by the Constitution." *Id.* at 3931.

We agree with HHS that such a broad construction is warranted. Courts and administrative agencies have long recognized that non-discrimination laws should be construed broadly to give full effect to their remedial purposes. *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967) (it is a "familiar canon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes"); *see*, *e.g.*, *Disabled in Action v. Southeastern Pa. Transp. Auth.*, 539 F.3d 199, 208 (3d Cir. 2008) (the Americans with Disabilities Act "'is a remedial statute, designed to eliminate discrimination against the disabled in all facets of society,' and as such, 'it must be broadly construed to effectuate its purposes'"). It is entirely appropriate, therefore, that HHS adopt a broad construction here.

Consistent with rules of construction referenced in sections 88.1 and 88.9, the proposed regulations define particular statutory terms with commendable breadth. To take a few examples, in proposed section 88.2, the Department defines the phrase "assist in the performance" to include any "articulable connection to a procedure, health service, health program, or research activity…." 83 Fed. Reg. at 3923. In the same section, "refer" is defined to mean the provision of "any information … by any method" pertaining to a health care service, activity, or procedure. *Id.* at 3924. The term "discrimination" is defined in terms of any action having any adverse effect, including the withholding or revocation of funds. *Id.* at 3923-24. These and other definitions in section 88.2 are helpfully detailed and will provide much needed guidance as to the meaning of the conscience statutes.

Regarding the proposed regulations' definitions, we have one remaining comment. We are aware of at least one instance in which a State agency declined to follow the Weldon amendment because that particular agency was not a direct recipient of federal funds, even though the State was a recipient of such funds. HHS should make clear in the regulations that when federal law forbids discrimination by a State that receives federal funds (as in the case of the Weldon amendment), and a particular State receives such funds, then *all* government agencies and offices of that State are obliged to follow the non-discrimination rule. Otherwise States, contrary to Congress's intent, could avoid federal nondiscrimination laws simply by creating separate agencies and offices that do not directly receive federal funds, which thereafter could violate conscience protection laws with impunity.

Subject to this recommendation, we urge HHS to adopt the proposed sections 88.1, 88.2, and 88.9 in the final rule.

3. The Proposed Regulatory Requirements Correctly Mirror the Requirements of the Statutes They Enforce.

Proposed section 88.3 sets out the requirements of the conscience statutes. This provision closely tracks, and often borrows verbatim from, the statutes they are designed to enforce. We commend HHS for its careful attention and adherence to the statutory text, and we urge the Department to adopt the proposed section 88.3 in the final rule.

4. The Proposed Regulations Properly Require Assurances and Certifications of Compliance.

Assurances and certifications are a long-established means of ensuring knowledge of, and compliance with, federal funding requirements. We agree that those requirements are properly imposed here because, as the Department notes, it will help ensure that funded entities understand and recognize that they must abide by the conscience laws and regulations. 83 Fed. Reg. at 3928-29, proposing 45 C.F.R. § 88.4. Posting and notice requirements are a common regulatory feature of nondiscrimination statutes. We agree with the proposed notice and compliance requirements here. 83 Fed. Reg. at 3929-30, proposing 45 C.F.R. §§ 88.5, 88.6.

We urge HHS to adopt the proposed sections 88.4, 88.5, and 88.6 in the final rule.

5. The Proposed Regulations Provide Critical Enforcement Mechanisms.

Proposed section 88.7 is perhaps the most important part of the proposed regulation because it provides means of enforcing the conscience laws and regulations. Section 88.7(j)(3) is particularly helpful in spelling out the various means by which OCR will enforce the conscience regulations, to include withholding funds, referring the matter to the Attorney General, or taking other remedies that may be legally available.

It is noteworthy and laudatory that the Department has delegated to OCR "full enforcement authority over a significantly larger universe of Federal statutes" than was previously the case. 83 Fed. Reg. at 3891. We commend the Department for this more inclusive approach.

We urge HHS to adopt the proposed section 88.7 in the final rule.

6. The Administration Has Taken an Important Step in Correcting an Earlier Misinterpretation of the Weldon Amendment.

We agree with, and commend, the Department for acknowledging that its interpretation of the Weldon amendment under the previous administration was incorrect. The Department now correctly acknowledges that the text of the Weldon amendment is controlling, and that there

is nothing in the text of the amendment that would limit its enforcement to insurers or only to those with religious or moral objections. 83 Fed. Reg. at 3890-91.

Conclusion

We strongly commend the Department for taking these necessary steps to implement and enforce the federal conscience laws in health care.

Sincerely,

Leith Anderson
President
National Association of Evangelicals

Anthony R. Picarello, Jr.
Associate General Secretary &
General Counsel
U.S. Conference of Catholic Bishops

Galen Carey
Vice President, Government Relations
National Association of Evangelicals

Michael F. Moses
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Co-Chair, Ethics Committee
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David Christiansen
Vice President of Government Affairs
Family Research Council

Travis Weber, J.D., LL.M.
Director of the Center for Religious Liberty
Family Research Council

Exhibit 2

ALLIANCE DEFENDING FREEDOM
FOR FAITH. FOR JUSTICE.

March 26, 2018

VIA Federal eRulemaking Portal

U.S. Department of Health and Human Services
Office for Civil Rights RIN 0945-ZA03/
Docket ID No. HHS-OCR-2018-0002

RE: Proposed Rule on Protecting Statutory Conscience Rights in Health Care

Dear Secretary Azar:

On behalf of Alliance Defending Freedom ("ADF"), we offer the following comments on the Department of Health and Human Services's ("HHS") proposed rule to protect the statutory conscience rights of those involved in the healthcare industry. 83 Fed. Reg. 3880 (Jan. 26, 2018).

INTRODUCTION

ADF is a national and international nonprofit legal organization that litigates cases implicating religious freedom, marriage and the family, and the sanctity of human life. A necessary and integral part of this work involves defending the right to conscience of business owners, creative professionals, university students and employees, religious entities, nonprofit organizations, and most notable here, medical practitioners and allied healthcare professionals. We have extensive experience defending clients whose lives have been thrown into turmoil—and whose right to conscience has been subverted—by those who are either unaware or willfully dismissive of the full panoply of extant federal conscience protections. This combination of ignorance and repudiation has unfortunately caused many conscientious medical practitioners to needlessly suffer threats to their livelihoods and affronts to their religious beliefs and practices. Moreover, these ordeals have only

15100 N. 90th Street Scottsdale, AZ 85260 Phone: 800.835.5233 Fax: 480.444.0028 AllianceDefendingFreedom.org

been made worse by the fact that heretofore there has been very little recourse available to these medical practitioners to remedy these violations. Indeed, for far too long, the many federal conscience protections available to medical practitioners have been treated as aspirational at best, and sometimes even as dead letters. ADF therefore offers the following comments in strong support for HHS's proposed regulations, which seek to not only raise awareness of conscience rights but to put some real teeth into federal protections for those rights, by providing for vigorous enforcement against offending entities and individuals.

I. Because the Right to Conscience is Imperiled Now More Than Ever Before, It is Critical That These Proposed Regulations—In Their Fullest Form—Be Enacted As Soon as Practicable.[1]

The right to conscience was central to the founding of the American Republic.[2] James Madison deemed it an "unalienable right,"[3] "the most sacred of all property,"[4] and Thomas Jefferson concurred, noting that conscience "could not [be] submit[ted]" to governmental oversight or authority.[5] This same right of conscience has also been essential to the practice of medicine for millennia, as evidenced by the Hippocratic Oath[6] and medicine's status as an autonomous profession concerned with doing right and avoiding wrong.[7]

It is therefore not surprising that soon after the United States Supreme Court announced a right to elective abortion, Congress and the vast majority of state

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[1] A comprehensive treatment of issues surrounding conscience and the medical practitioner, including the historical and philosophical underpinnings for the right, contemporary threats to conscience, the many reasons it should and must be protected, and suggested ways to protect conscience, can be found in ADF's recently published article, Kevin Theriot & Ken Connelly, *Free to Do No Harm: Conscience Protections for Healthcare Professionals*, 49 Ariz. St. L.J. 549 (2017).

[2] Lynn D. Wardle, "*Conscience Exemptions,"* 14 Engage: J. Federalist Soc'y Prac. Groups 77, 78-79 (2013) (explaining that protecting "conscience was one of the essential purposes for the founding of the United States of America and one of the great motivations for the drafting of the Bill of Rights").

[3] James Madison, Memorial and Remonstrance Against Religious Assessments (1785), in Selected Writings of James Madison 21-27 (Ralph Ketcham ed. 2006).

[4] James Madison, Property (1792), in Madison supra, note 2, at 223.

[5] Thomas Jefferson, Notes on the State of Virginia 265 (1782).

[6] *See* Alliance Defending Freedom, *Legal Guide For Medical Professionals—Conscience Protections for People of Faith* 1 (2016), available at https://adflegal.org/HealthcareGuide (describing the genesis of the Oath and its importance in moving medicine toward a profession that "reverence[s] human life").

[7] Edmund D. Pellegrino, *Toward a Reconstruction of Medical Morality*, The American Journal of Bioethics, 6(2): 65–71, 2006 (stating that "[m]edicine is a moral enterprise . . . conducted in accordance with a definite set of beliefs about what is right and wrong").

legislatures saw fit to provide explicit protections for conscience.[8] In fact, the Supreme Court itself indicated in *Roe v. Wade*, and its companion case *Doe v. Bolton*, that the right to be free from governmental interference in procuring an elective abortion did not entail the power to compel another to provide that procedure against his or her will.[9]

Yet despite its unquestionable pedigree as a paramount right, conscience today is under siege, tolerated by many in the political and cultural ascendancy only when the reason for its exercise "conforms to their own agenda."[10] Opponents to conscience in medicine, for instance, claim that its assertion "obstruct[s] access to goods and services," [11] and constitutes an abdication of the medical practitioner's duty.[12] Some have argued, for instance, that physicians with moral objections to certain procedures should simply avoid practicing in a field that implicates their objections.[13] Others have concluded that "health care professionals should be admonished that conscientious objections based on personal beliefs, as opposed to professional ethics, will entail consequences."[14] A group of philosophers and bioethicists recently expounded upon this pronouncement by proposing that those medical practitioners who exercise a right to conscience "should be required to compensate society and the health system for their failure to fulfil their professional obligations." [15] Still others have gone so far as to claim that "[a] doctor's conscience has little place in the delivery of modern medical care." [16]

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[8] *See Legal Guide For Medical Professionals* at 6 (describing the legislative "flurry" in the wake of *Roe*).
[9] *See Roe v. Wade*, 410 U.S. 113, 144 n.38 (1973) (quoting AMA resolutions confirming that "no party to the procedure [abortion] should be required to violate personally held moral principles"); *Doe v. Bolton*, 410 U.S. 179, 197–98 (1973) (noting that under the challenged law that "a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure").
[10] Stephen J. Genuis & Chris Lipp, *Ethical Diversity and the Role of Conscience in Clinical Medicine* at 6, International Journal of Family Medicine, Volume 2013 (Article ID 587541), available at https://www.hindawi.com/journals/ijfm/2013/587541/.
[11] Douglas Nejaime, Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 Yale L.J. 2516, 2566 (2015).
[12] *See, e.g.*, Julian Savalescu, *Conscientious Objection in Medicine*, BMJ 294, 294 (2006) (arguing that "[c]onscience . . . can be an excuse . . . invoked to avoid doing one's duty").
[13] Julie Cantor, *Conscientious Objection Gone Awry — Restoring Selfless Professionalism in Medicine*, 360 NEW ENG. J. MED. 1484, 1485 (2009) ("Qualms about abortion, sterilization, and birth control? Do not practice women's health.").
[14] Martha S. Swartz, "*Conscience Clauses*", 6 YALE J. HEALTH POL'Y, L. & ETHICS at 277.
[15] *Consensus Statement on Conscientious Objection in Healthcare*, PRACTICAL ETHICS (Aug. 29, 2016), http://blog.practicalethics.ox.ac.uk/2016/08/consensus-statement-on-conscientious-objection-in-healthcare/.
[16] Julian Savalescu, *Conscientious Objection in Medicine*, BMJ 294, 294 (2006).

Perhaps most alarming, even professional medical associations now question the role of conscience in the provision of medical care. The Committee on Ethics of the American College of Obstetricians and Gynecologists (ACOG), for instance, has opined that physicians have a duty to either refer for abortion and other related procedures or, in the alternative, when such referral is not feasible, "provide medically indicated and requested care regardless of the provider's personal moral objections," up to and including abortion.[17] Additionally, after the Bush Administration sought to bolster federal conscience protections in 2008 (as discussed in HHS's proposed regulations), the American Medical Association, along with the American Psychological Association, the American Nurses Association, and the American Society of Pediatrics submitted comments in opposition, claiming that "[d]octors who follow their consciences might violate their 'paramount responsibility and commitment to serving the needs of their patients.'"[18]

States too have proven less than solicitous of protecting the conscience rights of medical practitioners. In response to the aforementioned Bush Administration attempts to shore up federal conscience protections, thirteen state attorneys general signed a letter denouncing the regulations,[19] and seven states later filed suit to block them.[20] More recently, Illinois—which otherwise had provided broad protection for medical conscience—amended its Healthcare Right of Conscience Act to require medical practitioners and institutions to provide abortion referrals.[21] Vermont medical regulatory agencies attempted to construe Act 39, the state's recently enacted assisted suicide law, to require medical professionals to counsel (or refer for counseling) their terminal patients for physician-assisted suicide.[22] And California passed AB 775, which requires licensed medical centers offering free, pro-life

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[17] AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, COMMITTEE ON ETHICS, THE LIMITS OF CONSCIENTIOUS REFUSAL IN REPRODUCTIVE MEDICINE 5 (2007).

[18] William L. Saunders & Michael A. Fragoso, *Conscience Protection in Health and Human Services*, 10 Engage: J. Federalist Soc'y Prac. Groups, July 2009, at 117 (quoting AMA comments, available at http://www.plannedparenthood.org/files/AMA_et__al__ Comments.pdf).

[19] *See* Saunders and Fragoso, *Conscience Protection* at 117 (citing Press Release, Terry Goddard Urges Proposed Abortion Rule Be Withdrawn (Sept. 24, 2008), available at https://www.azag.gov/press-release/terry-goddard-urges-proposed-abortion-rule-be-withdrawn) ("The proposed regulation completely obliterates the rights of patients to legal and medically necessary health care services in favor of a single-minded focus on protecting a health care provider's right to claim a personal moral or religious belief.").

[20] *Id.* (describing complaint allegations)

[21] *See* Complaint, *Pregnancy Care Center of Rockford v. Rauner*, Circuit Court of the Seventeenth Judicial Circuit (Winnebago Cty., Ill.), Case No. 2016MR000741 (August 5, 2016).

[22] *See* Complaint, *Vermont Alliance for Ethical Healthcare v. Hoser*, No. 16-cv-00205 (Dkt. No. 1, Jul. 19, 2016, D. Vt.).

assistance to pregnant women to post a disclosure informing those women that California provides free or low-cost abortion and contraception services, along with a phone number for those services.[23]

The scope and depth of these attacks on conscience emanates from a crabbed and myopic conception of the medical practitioner as a sort of public utility who must dole out any demanded service regardless of any moral qualms he or she may have, and regardless of any concerns based on his or her professional judgment.[24] Unfortunately, in our experience, extant federal conscience protections have proven incapable of combatting this pernicious trend to date, principally because they lack meaningful enforcement mechanisms, frequently cover only a limited range of procedures and healthcare personnel, and often garner little respect from courts in any event.[25] The travails of our clients prove that federal conscience protections, although many in number and often long on the statute books, have heretofore been relatively incapable of protecting the very rights to conscience they were crafted to vindicate.

Cathy Cenzon-DeCarlo

Cathy Cenzon-DeCarlo is a devout Catholic who works as a surgical nurse at Mt. Sinai Hospital in New York City.[26] Because it is her religious belief that abortion is the unwarranted taking of a human life, she explicitly expressed to the hospital her unwillingness to participate in abortion and completed paperwork to that effect upon beginning her tenure there. That agreement was willfully ignored by hospital officials

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[23] *See* Appellant's Opening Brief at 10-16, *National Institute of Family and Life Advocates v. Harris*, No. 16-55249 (9th Cir., Mar. 17, 2016).

[24] *See* R. Alta Charo, *The Celestial Fire of Conscience--Refusing to Deliver Medical Care*, 352 New Eng. J. Med., 2471, 2473 (2005) (comparing the practice of medicine to "a kind of public utility" where exercising the right to conscience constitutes "an abuse of the public trust"); Martha S. Swartz, "*Conscience Clauses" or "Unconscionable Clauses": Personal Beliefs Versus Professional Responsibilities*, 6 YALE J. HEALTH POL'Y, L. & ETHICS 269, 277 (2006) (arguing that the "monopolistic nature of health care professionals' state-granted licenses" obliges them "to provide requested medical care that is not medically contraindicated, is not outside generally accepted medical or professional ethics, and is not illegal").

[25] *See* Lynn D. Wardle, *Protection of Health-Care Providers' Rights of Conscience in American Law: Present, Past, and Future*, 9 Ave Maria L. Rev. 1, 27-28, 44 (2010) (discussing the narrow focus of many conscience protections and pointing out that "private individuals in health-care professions have little means for vindicating and redressing violations of their personal rights of conscience," and "current legislative conscience clauses provide very few meaningful mechanisms for ascertaining compliance").

[26] *See* Complaint, *Cenzon-DeCarlo v. Mt. Sinai Hospital*, No. 09-cv-3120 (Dkt. No 1, Jul. 21, 2009, E.D.N.Y.).

when they compelled Cathy to assist in the abortion of a 22-week old preborn baby on Saturday, May 24, 2009. Rather than accommodate Cathy, hospital officials threatened her with charges of "insubordination and patient abandonment" if she did not immediately assist in the abortion, despite the fact that the case did not even involve emergency circumstances.[27] Unfortunately, despite the existence of federal protections which were designed precisely to protect her in this situation, most notably the Church Amendment, Cathy was unable to prevail upon her supervisors to relent. She was compelled to assist in the abortion because she was unable to sustain the loss of her job or her nursing license. When she later filed suit against the hospital in federal court, the action was dismissed because the court found that she had no private right of action, and thus no right to bring the action in the first place, a ruling which was affirmed by the Second Circuit Court of Appeals.[28] Cathy was instead beholden to the federal bureaucracy to pursue the complaint her attorneys filed with HHS, which finally investigated the incident after a delay but did not ultimately resolve it. Although Mt. Sinai eventually revised its policies to respect conscience rights, Cathy's ordeal inflicted upon her emotional and psychological trauma that have left lasting scars to this day. Her ordeal also shows that federal conscience protections—even when they are clearly applicable to the situation at hand—will do little to actually prevent egregious abuses without meaningful enforcement mechanisms and a knowledge on the part of healthcare facilities that HHS will enforce the regulations swiftly and consistently.

The Stormans Family and Ralph's Thriftway

The Stormans family owns and operates Ralph's Thriftway, a fourth-generation grocery store and pharmacy in Olympia, Washington.[29] As Christians they object to participating in the destruction of human life. They refrain from stocking or dispensing Plan B or ella in their pharmacy, as the FDA has confirmed that both medications can prevent implantation and therefore destroy a human embryo. If they receive a request for these types of medications, they commonly refer customers to one of the more than 30 nearby pharmacies that regularly stocks and dispenses them. Unsurprisingly, because these pharmacies are all within five miles of Ralph's, no one has ever been denied timely access to these medications. Moreover, referrals are a commonplace of the pharmacy practice and are supported by the American Pharmacists Association and more than 30 other medical and pharmacy associations. Referral is also legal in every state—except Washington.

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[27] *Id.* at ¶¶ 97-123.
[28] *Cenzon-DeCarlo v. Mount Sinai Hosp.*, 626 F.3d 695, 698-99 (2d Cir. 2010).
[29] *See Stormans, Inc. et al., v Selecky*, Findings of Fact and Conclusions of Law at ¶ 1-2, 11-12 (W.D. Wa. 07-cv-05374 RBL, Feb. 22, 2012).

That is because in 2007—after Governor Christine Gregoire and Planned Parenthood had restocked the Washington State Pharmacy Commission with their supporters—the Commission enacted a rule prohibiting conscience-based referrals. As a result, the Stormans had to bring suit to protect their right to conscience, and after years of litigation, a federal district court ruled that the new regulations—which permitted referrals for almost every conceivable reason save for conscience—violated the Free Exercise Clause of the First Amendment to the United States Constitution.[30] Unfortunately, the Ninth Circuit Court of Appeals eventually reversed the trial court, and the United States Supreme Court declined to hear the appeal, making Washington the only state that currently bans conscience referrals for pharmacists.[31]

This case stands as a sign that states, along with advocacy groups and even certain medical associations themselves, will often sacrifice conscience in exchange for what they consider to be political gain. This case also signals that to the extent existing federal protections do not protect such abuses, they should be accordingly expanded. Although this may not be the prerogative of HHS's proposed regulations, it bears mentioning here that the current regulations not only need to be vigorously enforced, as suggested by HHS, but also expanded.[32]

Trinity Health

Trinity Health operates 93 hospitals and 120 continuing care facilities throughout the U.S., and is particularly dedicated to serving impoverished communities. [33] It provides healthcare in accordance with Roman Catholic teaching, hewing to the Ethical and Religious Directives issued by the United States Conference of Catholic Bishops.[34] Those directives state that "[a]bortion (that is, the directly intended termination of pregnancy before viability or the directly intended destruction of a viable fetus) is never permitted."[35] These same directives, however, permit Catholic hospitals like those in Trinity Health's network to take steps to save the life

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[30] *Stormans, Inc. v. Selecky*, 524 F. Supp. 2d 1245 (W.D. Wash. 2007), *vacated and remanded,* 586 F.3d 1109 (9th Cir. 2009).

[31] *See Stormans v. Wiesman*, 794 F.3d 1064 (9th Cir. 2015); *Stormans v. Wiesman*, 136 S. Ct. 2433 (June 28, 2016) (J. Alito, dissenting) (stating that the case "is an ominous sign" because "[i]f this is . . . how religious liberty claims will be treated in the years ahead, those who value religious freedom have cause for great concern").

[32] For an example of a model conscience act that would do just that, *see Free to Do No Harm*, 49 Ariz. St. L.J. at 601-05.

[33] http://www.trinity-health.org/about-us.

[34] *Id.*

[35] See Ethical and Religious Directives for Catholic Health Care Services at ¶ 45, available at http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services-fifth-edition-2009.pdf.

of the mother, even if such steps may unintentionally and indirectly result in harm to her unborn baby.[36]

Despite these protections, the ACLU sued Trinity Health in October 2015, claiming that its convictions presented a threat to women who might—for "health reasons"—need an abortion and might only have access to Trinity Health's hospital network. The ACLU specifically alleged that Trinity Health's refusal to intentionally perform abortions violated the Emergency Medical Treatment and Active Labor Act and the Rehabilitation Act.[37] But in essence what the ACLU really wanted was to compel Trinity Health to reject its Catholic beliefs and commit abortions.[38] A federal district court eventually dismissed the case for lack of standing, but attacks on institutions like Trinity Health will likely continue unabated without more vigorous enforcement of extant federal conscience protections. It is much to be hoped that such enforcement, to include penalties for noncompliance, will prevent such frivolous claims from detracting from the saving work of these institutions going forward.

Julea Ward

Julea Ward was enrolled as a student in a graduate counseling program at Eastern Michigan University ("EMU"). As part of her practicum course, Julea was assigned a potential client seeking assistance for a same-sex relationship. Julea knew that she could not affirm the client's relationship without violating her religious beliefs about extramarital sexual relationships, so she asked her supervisor how to handle the matter. Consistent with ethical and professional standards regarding counselor referrals, Julea's supervisor advised her to refer the potential client to a different counselor. Julea followed that advice and the client received the requested counseling

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[36] *Id.* at ¶ 47.

[37] *See* Amended Complaint, *ACLU v. Trinity Health Corporation*, No. 15-CV-12611 (GAD-RSW) (E.D. Mich. Oct. 1, 2015).

[38] Indeed, in another recent case, the ACLU sued Dignity Health—the nation's fifth largest health care provider, which operates Catholic hospitals in California, Nevada, and Arizona — because one of its hospitals, Mercy Medical Center, refused to perform a requested tubal ligation on a patient following a C-section delivery, which procedure is not in keeping with the dictates of Catholic doctrine. *See* www.dignityhealth.org/about-us (providing information regarding Dignity Health); www.nbcnews.com/news/us-news/fight-over-tubal-ligation-heads-court-california-n496516 (detailing ACLU's suit against Dignity Health and Mercy Medical Center). Notwithstanding the sincerity and longstanding clarity of Catholic doctrine on this point, and notwithstanding the great cost—the ACLU still seeks to compel Mercy Medical Center to violate its conscience, and characterizes the expansion of "Catholic hospital chains" as "interference with the doctor-patient relationship" which "presents a real threat to women's ability to access basic healthcare across the country." ACLU of Northern California, *Chamorro v. Dignity Health*, available at www.aclunc.org/our-work/legal-docket/chamorro-v-dignity-health-religious-refusals.

without incident—indeed, the client was not in the least negatively impacted, and never even knew of the referral.

Notwithstanding these facts, EMU informed Julea soon thereafter that her referral violated the American Psychological Association's nondiscrimination policy. EMU also told Julea that the only way she could stay in the counseling program would be if she agreed to undergo a "remediation" program, the purpose of which was to help her "see the error of her ways" and change her "belief system" as it related to providing counseling for same-sex relationships. Julea was unwilling to violate or change her religious beliefs as a condition of getting her degree, and therefore she refused "remediation." At a subsequent disciplinary hearing, EMU faculty denigrated Julea's Christian views and asked several uncomfortably intrusive questions about her religious beliefs. Among other things, one EMU faculty member asked Julea whether she viewed her "brand" of Christianity as superior to that of other Christians, and another engaged Julea in a "theological bout" designed to show her the error of her religious thinking. Following this hearing, in March 2009, EMU formally expelled Julea from the program, basing its decision on the APA's nondiscrimination policy.

Julea filed suit against EMU officials and eventually won a unanimous victory from the Sixth Circuit Court of Appeals. Despite that ultimate victory, however, Julea should never have been put through the humiliation and trouble she received at the hands of school administrators. But neither compliance with applicable professional standards nor federal conscience protections were able to protect her against the arbitrary and punitive measures inflicted upon her by school administrators. They clearly had no trepidation that any untoward consequences would flow from their actions. HHS has asked for comments regarding "[c]onscience protections for objections to counseling and referral for certain services in Medicaid or Medicare Advantage." While the substantive objection at issue in Julea's case may or may not be covered by Medicare or Medicare Advantage, it is not difficult to predict that situations may arise in which counselors are indeed asked to counsel for the very things to which they morally object which are covered under those rubrics, and absent meaningful enforcement of federal conscience protections, counselors will be left to endure the very type of abuses Julea did, for no good reason. HHS's dedication to expanding the awareness of those protections, and its avowed intention to finally enforce them with vigor, is therefore a very welcome sign.

Foothill Church

Foothill Church, Shepherd of the Hills, Calvary Chapel Chino Hills, and Skyline Wesleyan Church are nonprofit, Christian churches located in California. They believe and teach that elective abortion violates the Bible's command against the intentional destruction of human life, and their religious beliefs prohibit them from participating in or supporting elective abortion in any way. Although the churches previously could structure their employee health insurance coverage consistent with their religious beliefs about life, that all changed on August 22, 2014, when the California Department of Managed Health Care ("DMHC") mandated health care plans cover all legal abortions.

DMHC sent letters to private health insurers in the state, informing them that a 40-plus-year-old state law—specifically, the Knox-Keene Health Care Service Plan Act and its requirement that health care plans cover "basic health care services"—mandates coverage for all legal abortions, including elective ones. This new interpretation and application of the Knox-Keene Act, which was issued without advance notice or opportunity to comment, followed meetings and conversations with abortion advocates who were upset that two religious universities—Loyola Marymount University and Santa Clara University—had removed elective abortion coverage from their employee health care plans.

In imposing the new abortion-coverage requirement, DMHC claimed that it had reviewed plan documents and determined that language limiting or excluding coverage for abortion was present in products "covering a very small fraction of California health plan enrollees." That survey of plan documents, however, showed that health plans restricting abortion coverage were offered only to religious organizations. Because DMHC made the abortion-coverage requirement effective immediately, and did not include any religious exemption, unrestricted abortion coverage was injected into the employee health care plans of churches and religious organizations all across California.

To vindicate their rights of conscience and free exercise of religion, the churches filed a complaint with HHS-OCR on October 9, 2014, alleging that DMHC's abortion-coverage requirement violates the Weldon Amendment. On June 21, 2016, however, HHS-OCR closed its investigation without taking further action. Having been told that the Weldon Amendment offers them no real protection, the churches have been forced to engage in time-consuming and arduous litigation over

the constitutionality of DMHC's actions.[39] This litigation is ongoing, and the churches' prospect of obtaining a lasting remedy still remains uncertain. But it is possible and even probable that HHS's proposed regulations would have obviated the need for such litigation.

II. The Regulations Should—Consistent With Applicable Law—Define as Broadly as Possible the Range of Medical Practitioners/Allied Health Professionals and Medical Procedures Covered by Extant Federal Conscience Protections.

Joseph Story, one of our nation's earliest and most prominent Supreme Court justices, said that the "rights of conscience are . . . beyond the just reach of any human power. They . . . [must] not be encroached upon by human authority."[40] Consistent with this vision, the right to conscience should take a back seat to no one's ideological agenda or social imperative. That is why the model of the medical practitioner as mere public utility or vending machine is unsustainable—it is inconsistent with the traditional Hippocratic practice of medicine, benefits neither practitioners nor society in general, and is an affront to the very idea of the inviolability of conscience that animated the founding of the nation. If conscience is to mean anything, it must be guarded closely under all circumstances, regardless of whether the reason for a conscience objection meets with the favor of the regnant worldview.

The unfortunate travails of our clients and the patent hostility increasingly shown toward conscience by certain doctors, philosophers, bioethicists, professional organizations, and even states indicates that the task of protecting medical conscience is an urgent one. HHS has, commendably, recognized this in its proposed regulations. ADF believes that HHS's plan to "more effectively and comprehensively enforce Federal health care conscience and associated anti-discrimination laws" will go a long way toward remedying many of the infirmities present in the current system. 83 Fed. Reg. at 3881. In ADF's experience, far too often in the past medical practitioners had no idea that they are protected by federal laws; healthcare facilities were either unaware, or willfully dismissive of, their obligations to protect conscience; and HHS itself has often been hamstrung in its ability to effectively enforce these regulations. The new proposed regulations, by providing for "outreach and . . . technical assistance," requiring the maintenance of compliance records, compelling cooperation

[39] Given ADF's experience in the *Foothill* case, HHS is rightly concerned that absent more expansive interpretations of federal conscience protections, including the Weldon Amendment, many may be "dissuaded from complaining about religious discrimination in the health care setting to OCR." 83 Fed. Reg. at 3891.

[40] Joseph Story, Commentaries on the Constitution of the United States § 1870 (1833).

with the Office for Civil Rights's "investigations, reviews, or enforcement actions," and requiring that federal funding recipients provide notice to individuals and entities regarding extant conscience protections and "associated anti-discrimination rights," are just what is needed to effectuate the intent behind these conscience protections. *Id.* ADF further believes that HHS's greatly increased—and comprehensive—enforcement mechanisms, which propose to "use enforcement tools otherwise available in civil rights law," places the right to conscience where it properly belongs, given its historical pedigree as a right central to the founding of our nation and central to the proper practice of medicine for millennia. *Id.* at 3880.

Put simply, then, ADF believes that HHS's new proposed regulations represent an excellent regulatory blueprint for achieving the goal of finally protecting the right to conscience of medical professionals, at least as to those statutory conscience protections currently on the books.[41] With this general approbation in mind, ADF offers two modest suggestions in closing. Because increasing advances in science and medical capabilities almost certainly guarantee that conflicts of conscience will continue to grow in frequency, more healthcare personnel and more medical procedures will be implicated in the present or the very near future.[42] HHS should therefore resist any attempt by prospective commenters to dilute the expansive definitions advanced in its proposed regulations—those definitions should include

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[41] Of course, as detailed in its *Free to Do No Harm: Conscience Protections for Healthcare Professionals*, 49 Ariz. St. L.J. 549, 601-605 (2017), ADF strongly believes that extant federal conscience protections need to be greatly expanded to cover more practitioners and assistants and more medical procedures or services, given the ever-increasing universe of potentially problematic medical procedures and services we are seeing in our day-to-day practice. For instance, ADF believes that Congress should modify existing statutory protections to provide for a private right of action for aggrieved individuals, along with greatly expanding the range of individuals and medical procedures covered in law. ADF realizes that that it is not the province of a regulatory agency like HHS to unilaterally impose such changes in its proposed regulations, but mentions the need for such changes here in the hopes that HHS's proposed regulations will prove to be a precursor for the necessary changes and expansions to come. *See* supra at n. 32.

[42] *See* Wardle, *Present, Past, and Future*, 9 Ave Maria L. Rev. at 2–3 (2010) (listing a panoply of modern medical procedures and medications that may implicate conscience objections, including "human stem cell research; cloning; genetic engineering (including gender pre-selection); DNA screening and medical treatment for various genetic disorders; surgical abortion (by a variety of procedures including so-called "partial-birth abortion"); pharmaceutical abortion (by such pills as RU-486 and the "morning after pill" (MAP)); sterilization; capital punishment; assisted suicide; sex-change procedures; provision of contraceptives to minors; and provision of assisted reproduction technologies"); Edmund D. Pellegrino, *The Physician's Conscience, Conscience Clauses, and Religious Belief: A Catholic Perspective*, 30 Fordham Urb. L.J. 221, 244 (2002) (predicting that "[a]s medical technology endows humans with ever greater power . . . crises of conscience will surely increase for those who hold religious beliefs about human life, its creation, and ending").

each and every category of practitioner and allied health professional (including institutions), along with every medical procedure or healthcare service, that are conceivably encompassed by extant federal conscience protections. HHS should also resist any attempts to render its proposed notice provisions, enforcement mechanisms, and available penalties less effective—the trend toward viewing conscience as an acceptable right only when it comports with one's worldview is ultimately unsustainable and must be rejected in favor of a system that steadfastly enforces conscience as a paramount right

CONCLUSION

ADF commends HHS for promulgating these proposed regulations, and appreciates its recognition that it is long past due that the federal statutory protections for conscience be widely broadcast and properly enforced. The comprehensive regulations proposed by HHS are in ADF's estimation an excellent start toward reviving the primacy of conscience, not only in medicine, but more broadly as a right worth protecting in all spheres of life. ADF expects that by robustly protecting the conscience of the medical practitioner and allied health professionals, HHS will illustrate that conscience and the practice of medicine are not part of a zero sum game—indeed, it is possible to both protect this paramount right and at the same time ensure that the medical needs of all patients are met with skill and all necessary speed.

Sincerely,

Kevin H. Theriot

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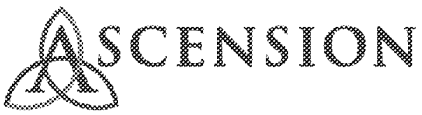
Exhibit 3



March 27, 2018

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

Submitted electronically to: http://www.regulations.gov

RE: Docket HHS-OCR-2018-0002, Protecting Statutory Conscience Rights in Health Care; Delegations of Authority

Dear Secretary Azar:

On behalf of Ascension, I welcome the opportunity to submit input on the proposed rule entitled, *Protecting Statutory Conscience Rights in Health Care; Delegations of Authority*[1], which seeks to ensure that no persons or entities in the practice of healthcare are subjected to practices or policies that violate conscience, coerce, or discriminate, in violation of applicable Federal laws. We applaud the Department of Health and Human Services (HHS) and the Office for Civil Rights (OCR) for taking steps to protect the religious freedoms of all Americans, especially when it comes to healthcare workers and organizations that are called by their faith to serve *all* persons, especially those who are poor and vulnerable.

Ascension is a faith-based healthcare organization dedicated to transformation through innovation across the continuum of care. As the largest non-profit health system in the U.S. and the world's largest Catholic health system, Ascension is committed to delivering compassionate, personalized care to all, with special attention to persons living in poverty and those most vulnerable. In FY2017, Ascension provided more than $1.8 billion in care of persons living in poverty and other community benefit programs. Ascension includes approximately 165,000 associates and 40,000 aligned providers. Ascension's Healthcare Division operates more than 2,600 sites of care – including 153 hospitals and more than 50 senior living facilities – in 22 states and the District of Columbia, while its Solutions Division provides a variety of services and solutions including physician practice management, venture capital investing, investment management, biomedical engineering, facilities management, clinical care management, information services, risk management, and contracting through Ascension's own group purchasing organization.

[1] OCR, *Protecting Statutory Conscience Rights in Health Care; Delegations of Authority*, 83 Fed. Reg. 3880 (Jan. 26, 2018).

Faith-based organizations are a crucial component of our nation's healthcare system, with one in six hospital patients being cared for in Catholic hospitals each year. We are not only ensuring access to care for those most in need – we are on the forefront of driving delivery system transformation toward value-based care and promoting healthy communities. Our providers and facilities serve all comers, most especially those persons who are vulnerable and at the margins of society.

To that end, Ascension's Mission has not changed since we were founded nearly 20 years ago:

> Rooted in the loving ministry of Jesus as healer, we commit ourselves to serving **all persons** with special attention to those who are poor and vulnerable. Our Catholic health ministry is dedicated to spiritually-centered, holistic care which sustains and improves the health of individuals and communities. We are advocates for a compassionate and just society through our actions and our words. (Emphasis added.)

We envision a strong, vibrant Catholic health ministry in the United States which will lead to the transformation of healthcare. We work daily to ensure service that is committed to health and well-being for our communities and that responds to the needs of individuals throughout the life cycle. Our core Values include service of the poor, integrity, wisdom, creativity, dedication, and reverence – which we define as respect and compassion for the dignity and diversity of life.

With our Mission, Vision, and Values always at the forefront of everything we do, we are committed to improving quality of care and addressing rising costs while improving patient and provider satisfaction. Upholding and enforcing the religious freedoms granted by law and our Constitution to both individuals and faith-based institutions will provide an important new protection for all mission-driven healthcare providers. Ensuring that providers can practice medicine and serve their communities in a manner consistent with their faith allows these individuals and organizations to continue providing high quality care for all persons, especially those living in poverty and the most vulnerable among us.

As a ministry of the Catholic Church, Ascension adheres to Catholic moral teaching and the *Ethical and Religious Directives for Catholic Health Care Services* (ERDs).[2] The ERDs recognize first and foremost that "The Catholic health care ministry is rooted in a commitment to promote and defend human dignity; this is the foundation of its concern to respect the sacredness of every human life from the moment of conception until death. The first right of the human person, the right to life, entails a right to the means for the proper development of life, **such as adequate health care**… [and a] just health care system will be concerned both with promoting equity of care—to assure that the right of each person to basic health care is respected—and with promoting the good health of all in the community."[3] This right inures to all persons and we treat all patients who come to our doors. However, the Federal healthcare

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[2] *See,* United States Conference of Catholic Bishops, *Ethical and Religious Directives for Catholic Health Care Services (Fifth Edition)*, 2009, Part One, n. 5. Available at: http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services-fifth-edition-2009.pdf

[3] *Ibid.* (Part One, Introduction).

provider conscience protection statutes have long recognized that there are certain procedures that do not and never will comply with our beliefs about human dignity and the common good or the ERDs.

We therefore appreciate that OCR has taken steps to streamline enforcement of the Federal healthcare provider conscience protection statutes and offer the following comments and recommendations for your consideration.

As a member of the Catholic Health Association (CHA), we associate ourselves closely with their comments. We think it important to emphasize our commitment to serve all by quoting specifically from CHA's comments, which state this commitment so well:

> Our members are committed to providing health care services to any person in need of care, without regard to race, color, national origin, sex, age, or disability, or any other category or status. Every individual seeking health care should always be treated with kindness and respect, and failure to do so because of discomfort with or animus against an individual on any basis is unacceptable.

Ascension wholeheartedly endorses this statement of inclusion.

Definitions

Consistent with CHA's comments, Ascension supports the proposed definition of health care entity. We believe the expansive definition and use of an illustrative, rather than exhaustive, list will allow Catholic healthcare entities to diversify if they so choose. In particular, we support inclusion of the term "plan sponsor" in this definition, which will ensure that faith based entities sponsoring a health plan are not put in the untenable position of funding services or procedures that otherwise violate their religious beliefs. We also support the proposed definition of "referral", which similarly ensures Catholic entities can maintain compliance with Catholic moral teaching and the ERDs that "Catholic health care institutions are not to provide abortion services, even based upon the principle of material cooperation."[4]

Assurance and Certification of Compliance Requirements

For the reasons noted above, we support application of existing assurance and certification requirements to the Federal health care conscience and associated anti-discrimination laws. We agree that this requirement – which is analogous to those that apply with respect to other civil rights laws – provides a demonstrable way of ensuring applicants for Federal funding know of, and attest that they will comply with, applicable Federal health care conscience and associated anti-discrimination laws.

While we support the acknowledgment by covered entities of their obligations, we strongly encourage HHS to ensure that the final rule does not increase administrative burden more than

[4] *Ibid.* (Part Four, n. 45).

a *de minimis* amount by leveraging existing approaches. We support building this requirement into the HHS-690 Form, which currently identifies several Federal civil rights statutes with which applicants and recipients must assure compliance. We believe adding the Federal health care conscience and associated anti-discrimination laws to the HHS-690 Form makes sense without adding undue burden.

Notice Requirement

Again, consistent with CHA's comments, we support the proposed requirement that the Department and each recipient must post the specified notice text on the Department's and recipient's website(s), and in a physical location of each Department and recipient establishment where notices to the public and notices to their workforce are customarily posted. We ask, however, that HHS clarify whether and to what extent such notice will be subject to translation requirements.

Compliance Requirements

While we do not oppose the proposed requirement that applicable entities maintain complete and accurate records evidencing compliance with Federal health care conscience and associated anti-discrimination laws, and afford OCR, upon request, reasonable access to such records and information in a timely manner, we would urge OCR to more clearly specify the parameters envisioned around document retention in order to support compliance. Specifically, OCR should provide clarification on how long such records should be maintained, in what form and manner OCR expects them to be retained, and any other specifics that might assist entities in providing OCR with the appropriate amount and kind of documentation desired.

In addition, we agree with the American Hospital Association's (AHA's) comment that it may be unnecessary to require recipients to report reviews, investigations, and complaints to any component of the Department from which it receives funding and to require recipients seeking new or renewed funding to report reviews, investigations, and complaints from the prior five years. OCR and other parts of HHS will already have access to the investigative history, and the goal of this regulation should be to maximize compliance while minimizing administrative cost and burden. Consistent with the Administration's commendable desire to provide regulatory relief to the private sector, we encourage the Department to achieve its and our goal of universal compliance by choosing the least burdensome method possible to encourage such compliance.

Enforcement Authority

Consistent with CHA's comments, we support the proposal to give OCR discretion to use a variety of different enforcement mechanisms with respect to the Federal health care conscience and associated anti-discrimination laws, up to and including restricting funds for noncompliant entities in whole or in part. We strongly believe OCR should have the authority to pursue intermediate sanctions as well, and the proposed rule would make that explicit. We believe any entity which is accused of a violation of the Federal health care conscience and associated anti-discrimination laws should have the opportunity to dispute such allegations before any action is

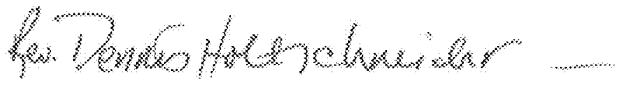
taken to suspend, terminate, or preclude future Federal funding – especially given that such funds are often used to care for poor and vulnerable populations.

In alignment with both CHA and AHA, Ascension similarly supports implementation of appropriate due process for those who are alleged to have violated conscience rights laws prior to the suspension, termination, or preclusion of Federal funding. Notice, hearing, and appeal procedures similar to those established for other civil rights laws, like Title VI, would be entirely appropriate.

Conclusion

Ascension thanks you for the opportunity to comment on the proposed regulatory revisions. If you have any questions, please contact Peter Leibold, Chief Advocacy Officer, at peter.leibold@ascension.org or 202.898.4680.

Sincerely,



Reverend Dennis H. Holtschneider, C.M.
Executive Vice President and Chief Operations Officer
Ascension

Exhibit 4

NATIONAL CATHOLIC BIOETHICS CENTER

FIRST LIBERTY

Thomas More SOCIETY

THEALLIANCE

Via Electronic Submission

March 27, 2018

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: Public Comment Supporting Proposed Rule "Protecting Statutory Conscience Rights in Health Care," RIN 0945-ZA03

To Whom It May Concern:

On behalf of the National Catholic Bioethics Center, the National Association of Catholic Nurses, U.S.A., Thomas More Society, the Christian and Missionary Alliance, the Alliance Community for Retirement Living, Town and Country Manor, Shell Point Retirement Community, and Chapel Pointe, First Liberty Institute[1] submits the following comments in support of the proposed rule entitled "Protecting Statutory Conscience Rights in Health Care." 83 Fed. Reg. 3880 (Jan. 26, 2018). We are a diverse group of faith-based ministries supportive of religious and conscience rights in healthcare.

[1] First Liberty Institute is a non-profit law firm dedicated to defending and protecting religious freedom for all Americans.

We applaud the Department of Health and Human Services ("the Department") for creating its new Division on Conscience and Religious Freedom as well as for promulgating a proposed rule designed to protect conscience rights in healthcare. For the wellbeing of patients and the integrity of the profession, doctors, nurses, and other healthcare professionals must be free to practice medicine in accordance with their professional judgment and ethical beliefs. Without conscience protections such as this rule, healthcare professionals throughout the country risk discrimination for refusing to perform, facilitate, or refer for procedures that they believe are unethical.

The proposed rule is designed to implement twenty-five currently existing federal statutory conscience rights, including the Church Amendments[2], the Coats-Snow Amendment[3], the Weldon Amendment[4], and Section 1553 of the Affordable Care Act[5]. These statutes primarily provide conscience protections for those who hold religious or moral objections to abortion, sterilization, or euthanasia. The proposed rule ensures that presently existing laws protecting healthcare providers are implemented and enforced by the Department.

We write to emphasize the importance of this rule in preventing discrimination against healthcare professionals. We begin by explaining that it is the responsibility of the Department to ensure that existing conscience protections are enforced. We continue by exploring the constitutionality of the proposed rule. We conclude by documenting examples of violations against conscience rights in healthcare, indicating that the threat to conscience rights is rising.

I. The Department's Responsibility to Ensure Conscience Protections Are Implemented

Over the past five decades, twenty-five federal laws protecting conscience rights in healthcare have been enacted into law. These have been enacted by Democratic administrations and Republican administrations, and many have enjoyed bipartisan support.[6]

However, for the past several years, these statutes have not been vigorously enforced.[7] Perhaps due to a lack of enforcement, there has been a rise in intolerance toward individuals seeking to exercise their conscience rights and a general lack of awareness about the conscience rights of healthcare practitioners. The sharp increase in administrative complaints over the past

[2] 42 U.S.C. § 300a-7.
[3] 42 U.S.C. § 238n.
[4] *See, e.g.*, Consolidated Appropriations Act, 2017, Pub. L. 115-31, Div. H, sec. 507(d), 131 Stat. 135.
[5] 42 U.S.C. § 18113.
[6] For example, the Coats-Snowe Amendment was signed into law by President Clinton in 1996.
[7] For example, the previous administration proposed rescinding an administrative rule protecting conscience rights, 74 Fed Reg. 10207 (Mar. 10, 2009), and promulgated a final rule that struck most of the initial rulemaking. 76 Fed. Reg. 9968 (Feb. 23, 2011).

year shows that without an administrative enforcement mechanism, coercions of conscience may continue unchecked.

Administrative enforcement is necessary to ensure that existing conscience statutes carry the force of law. Some courts have held that certain conscience protections, such as the Church Amendments, lack a private right of action.[8] Thus, individuals whose conscience rights have been violated may not be able to seek redress in court. Instead, they are dependent upon agency enforcement of conscience rights.

Even in instances where there exist private rights of action, the burden of litigation and the fear of retaliation may deter many individuals from seeking to vindicate their rights in the court system. Administrative enforcement of conscience rights can help to assuage these concerns and encourage compliance with the law.

II. Constitutionality of the Proposed Rule

The proposed rule fully comports with the requirements of the First Amendment to the United States Constitution by ensuring that existing federal conscience protections are enforced. The First Amendment protects our freedom of conscience in addition to our freedom of religion.[9] In fact, the Supreme Court of the United States has stated that an "individual's freedom of conscience" is "the central liberty that unifies the various Clauses in the First Amendment."[10] The Court has recognized that it is important to "preserv[e] freedom of conscience to the full."[11]

Conscience protection laws are common, particularly in the realm of healthcare law. In the wake of *Roe v. Wade*, the federal government and state governments passed a number of laws respecting the right not to be compelled to facilitate abortions.[12] At the same time, the Supreme Court repeatedly recognized that the substantive due process requirements created in *Roe v. Wade* did not require objecting states or local governments to pay for or promote abortions.[13] Neither did the ruling require taxpayers pay for abortions.[14]

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[8] *See, e.g.*, *Cenzon-DeCarlo v. Mount Sinai Hosp.*, 626 F.3d 695 (2d Cir. 2010).
[9] The first draft of the First Amendment, other states' constitutions, and other founding documents refer to the sacred right of conscience as synonymous or closely related to the right of religious freedom. *See* Daniel L. Dreisbach & Mark David Hall, *The Sacred Rights of Conscience: Selected Readings on Religious Liberty and Church-State Relations in the American Founding*, Indianapolis, IN: Liberty Fund Press, 2009.
[10] *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 341 n.2 (1987) (Brennan, J., concurring) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 50 (1985)).
[11] *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 646 (1943).
[12] *See* Denise M. Burke & Anna Franzonello, *Healthcare Rights of Conscience: A Survey of Federal and State Law*, http://www.aul.org/wp-content/uploads/2012/04/survey-fed-state-law.pdf.
[13] *Beal v. Doe*, 432 U.S. 438, 445-46 (1977); *Maher v. Roe*, 432 U.S. 464, 477 (1977); *Poelker v. Doe*, 432 U.S. 519, 521 (1977).
[14] *See Harris v. McRae*, 448 U.S. 297, 326 (1980)

As with all other civil rights protected by federal law, religious and conscience rights are often protected through anti-discrimination regulations. For instance, the Department of Justice has promulgated regulations protecting individuals against race discrimination implementing the Title VI of the Civil Rights Act of 1964,[15] and the Department of Education has promulgated regulations protecting against sex discrimination implementing Title IX of the Education Amendments of 1972.[16] Statutes such as the Church Amendments operate in a similar way as other civil rights statutes, by protecting individuals against discrimination including coerced violations of deeply held beliefs against abortion. This proposed rule adopts the enforcement procedures for other civil rights laws and applies them to existing federal law respecting conscience rights.

III. Conscience Rights are Incompatible with Compelled "Referrals"

The provider, physician, or practitioner who refuses to perform an objectionable procedure for reasons of religious or moral conviction should never be compelled to "refer" the requesting person to an alternative provider, physician, or practitioner known or believed to provide the objectionable procedure.

Many healthcare professionals consider referrals for an objected-to procedure the moral equivalent of having done the objected-to procedure oneself. To them, it is tantamount to arranging for someone else to do what one considers to be immoral.[17]

Recently, healthcare professionals in Vermont brought a lawsuit in order to ensure that they were not compelled to refer suicide-seeking patients to physicians known to perform "assisted suicide"—in direct violation of their religious or moral conviction. After much effort, the Vermont physicians obtained a stipulated agreement that they would not have to refer for physician assisted suicide.[18] Retaining clear and strong prohibitions against required referrals eliminates the need for conscientious healthcare professionals to resort to litigation.

Because of the moral weight of referrals, the proposed rule gives an appropriately broad definition of the term "referral":

> *Referral* or *refer for* includes the provision of any information (including but not limited to name, address, phone number, email, website, instructions, or description) by any method (including but not limited to notices, books, disclaimers, or pamphlets, online or in print), pertaining to a health care service, activity, or procedure, including related to availability, location, training, information resources, private or public funding or financing, or directions that could provide any assistance in a person obtaining, assisting, training in, funding,

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[15] 42 U.S.C. § 2000d.
[16] 20 U.S.C. § 1681.
[17] *Transfer of Care vs. Referral: A Crucial Moral Distinction*, THE NATIONAL CATHOLIC BIOETHICS CENTER (May 1, 2015), https://www.ncbcenter.org/resources/news/transfer-care-vs-referral-crucial-moral-distinction/ (noting that a patient always retains the right to be transferred to an alternate provider of the patients selection).
[18] Consent Agreement and Stipulation, *Vermont Alliance for Ethical Healthcare, Inc. v. Hoser*, No. 5:16-cv-205 (D. Vt., May 3, 2017).

> financing, or performing a particular health care service, activity, or procedure, where the entity or health care entity making the referral sincerely understands that particular health care service, activity, or procedure to be a purpose or possible outcome of the referral.[19]

The current broad scope of referral should be maintained in order to allow healthcare professionals to best abide by their own professional and ethical judgment. No one should be forced to refer against their conscience.

IV. Examples of Widespread Discriminatory Conduct Violating Conscience Rights in Healthcare

The Department wrote that it is seeking information, including any facts, surveys, audits, or reports, about the occurrence or nature of coercion, discriminatory conduct, or other violations of the Federal health care conscience and associated anti-discrimination laws. We would like to provide the following examples of discrimination against religious health care practitioners in response to the Department's request.

First Liberty Institute has represented or advised multiple healthcare professionals or organizations seeking to freely exercise their religious conscience rights without discrimination:

- First Liberty represented Dr. Byron Calhoun, a medical doctor who was discriminated against because of his pro-life volunteer work. Dr. Calhoun is a West Virginia University School of Medicine Professor and Vice Chairman of the Department of Obstetrics and Gynecology at the West Virginia University Hospital's Charleston Division. He volunteered his personal time to act as a national medical advisor for the National Institute of Family and Life Advocates, a pro-life advocacy group, due to his religious convictions on the sanctity of life. After Dr. Calhoun's involvement received media attention, the university threatened him with a written, professional reprimand. However, after First Liberty intervened, the university withdrew its threat of reprimand for engaging in pro-life activities, and the university claimed it never officially filed the reprimand against Dr. Calhoun, despite having provided him with a copy.[20]

- First Liberty represented a Catholic health educator who was terminated after being previously granted a conscience protection in the form of a minor religious accommodation. The accommodation allowed her to focus on teaching about chronic health conditions and exempted her from personally teaching about contraceptive use. She was told to "put aside" her "personal beliefs" and teach the class or be terminated, even though other employees had volunteered to teach the birth control class. After First Liberty

[19] 83 Fed. Reg. 3880, 3924.
[20] For more information, *see* https://firstliberty.org/cases/calhoun/.

filed an EEOC charge, an amicable resolution was reached that respected free speech and religious liberty.[21]

- First Liberty Institute represented three faith-based pregnancy resource centers ("PRCs") and filed a lawsuit challenging a 2010 Austin law requiring PRCs that oppose abortion and certain forms of birth control to post false and misleading signs at their front entrances. A federal district court held that Austin's ordinance was unconstitutionally vague, and Austin was forced to pay almost a half-million dollars as a result of their violation of the PRCs' constitutional rights.[22]

- First Liberty protected multiple clients' conscience rights through litigation against the HHS Abortifacient Mandate (the "Mandate"). First Liberty sought and received injunctive relief from the Mandate's requirement that client churches and faith-based ministries facilitate the coverage and dispensation of abortifacients that violated the sincerely held religious beliefs of Insight for Living Ministries, The Christian and Missionary Alliance Foundation, Inc. d/b/a Shell Point Retirement Community, The Alliance Community for Retirement Living, Inc., The Alliance Home of Carlisle Pennsylvania d/b/a Chapel Pointe at Carlisle, Town and Country Manor of the Christian and Missionary Alliance, Simpson University, and Crown College.[23]

- First Liberty filed an amicus brief in support of the Stormans family, who operate Ralph's Thriftway in Olympia, Washington, and hold religious beliefs against dispensing abortion-causing drugs. The Ninth Circuit ordered the pharmacy to dispense these drugs. The Stormans appealed to the Supreme Court to protect their right to follow their conscience rather than be forced to be complicit in ending a human life. The amicus brief was signed by forty-three (43) members of Congress. The Supreme Court declined to hear the case.[24]

- First Liberty attorneys counseled a Texas physician who declined to refill the Viagra® and Levitra® prescriptions for an unmarried man based on sincerely held religious beliefs but immediately provided a referral to two urologists who would refill the prescription. After reviewing the patient's complaint, the evidence, the jurisprudence arising under the Texas Religious Freedom and Restoration Act, the Texas Medical Board determined that the allegations did not violate the Medical Practice Act.

[21] For more information, *see* https://firstliberty.org/cases/palma/.
[22] *Austin Lifecare, Inc. v. City of Austin*, No. A-11-CA-875-LY (W.D. Tex. June 23, 2014).
[23] For more information, *see* https://firstliberty.org/cases/hhs-mandate/.
[24] *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009).

- First Liberty attorneys have counseled myriad other healthcare practitioners, professionals, and organizations regarding rights of conscience vis-à-vis abortion, contraception, fertility treatments, hormone therapies, and end-of-life medical directives.

In addition to the cases and controversies cited above, the following examples evince the pervasive and growing discrimination and hostility against religious healthcare practitioners or conscience rights generally:

Abortion

- In 2018, Washington state legislature passed a bill (SB 6219) requiring insurance plans to provide coverage for abortions if they provide coverage for maternity care. It also requires coverage of sterilizations and contraceptives, including abortion-inducing drugs. The bill has not yet been signed by the governor.[25]

- Baltimore's city council passed an ordinance that compelled limited-service PRCs, such as those maintained by religious organizations, to post signs stating that they do not provide or make referrals for abortion or birth control services. Claiming the church's free speech, free exercise of religion, and equal protection rights were violated, the Roman Catholic Congregation, Inc., and the Greater Baltimore Center for Pregnancy Concerns, Inc., sued the city. In 2018, the Fourth Circuit affirmed a decision holding the law unconstitutional.[26]

- In 2016, Illinois amended its Health Care Right of Conscience Act to require doctors and other healthcare personnel to explain the benefits of abortions, contraceptives, and sterilizations, even if such procedures are contrary to his or her conscience. Several doctors and clinics in Illinois filed a lawsuit challenging the new law. A state judge and a federal judge have issued preliminary injunctions against the amendment.[27]

- The American Civil Liberties Union ("ACLU") sued Trinity Health Corp., a Catholic hospital group with eighty-six hospitals in twenty-one states, because the Catholic hospitals would not violate their religious beliefs by performing abortions. A federal judge dismissed the lawsuit, holding that the ACLU had no standing to sue the Catholic hospitals.[28]

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[25] *SB 6219*, WASHINGTON STATE LEGISLATURE (last viewed Mar. 26, 2018), available at http://app.leg.wa.gov/billsummary?BillNumber=6219&Year=2017.
[26] *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, No. 16-2325 (4th Cir. Jan. 5, 2018).
[27] *The Pregnancy Care Center of Rockford v. Rauner*, No. 2016-MR-741 (Ill. Ckt. Ct., Dec. 20, 2016); *Nat. Inst. of Family & Life Advocates v. Rauner*, No. 3:16-cv-50310 (N.D. Ill. July 19, 2017).
[28] *Am. Civil Liberties Union v. Trinity Health Corp.*, No. 15-cv-12611 (E.D. Mich., Apr. 11, 2016).

- In 2014, California issued a new interpretation of the Knox-Keene Act requiring all organizations, including churches with religious objections to abortion, to provide insurance coverage for abortion if they cover maternity services. Three churches filed a lawsuit against the California Department of Managed Health Care challenging the requirement that the churches violate their religious beliefs by providing coverage for abortions.[29]

- The University of Medicine and Dentistry of New Jersey adopted a policy that requires all nursing students to participate in abortion procedures, even if it is against their religious convictions. A group of nurses filed suit against the university in November 2011, alleging Fourteenth Amendment and medical personnel rights violations. The case settled, and the nurses may now refuse to participate in abortions for religious reasons.[30]

- A nurse at Mount Sinai Hospital in New York was forced to participate in a late-term abortion against her conscience and religious convictions. She was threatened with severe penalties including termination and loss of license if she refused to participate in the abortion. Following a request from her attorneys, the U.S. Department of Health and Human Services investigated the hospital for civil rights violations. Mount Sinai Hospital now has a policy that no person can be forced to participate in an abortion against that person's conscience.[31]

- The Department's rule implementing Section 1557 of the Affordable Care Act declined to include a religious conscience exemption and instead required religious practitioners to sue in order to vindicate their conscience rights. The rule interpreted sex discrimination to include discrimination based upon "termination of pregnancy" or gender identity, which could be interpreted to require doctors to perform abortions or gender transitions, even if they do not believe it to be in the best interest of the patient and even if doing so would violate the doctor's religious beliefs. A group of religious health care systems and states filed a lawsuit, which resulted in an injunction against the rule.[32]

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[29] *Foothill Church v. Rouillard*, No. 2:15-cv-02165 (E.D. Cal., Oct. 23, 2017).
[30] *See* Seth Augenstein, *UMDNJ, 12 Nurses Settle Lawsuit Claiming They Were Forced to Assist with Abortions*, NJ.COM (DEC. 22, 2011), http://www.nj.com/news/index.ssf/2011/12/umdnj_settles_with_nurses_over.html.
[31] *Cenzon-DeCarlo v. Mount Sinai Hosp.*, 626 F.3d 695 (2d Cir. 2010).
[32] *Franciscan All., Inc. v. Burwell,* No. 7:16-cv-108 (N.D. Tex., filed Aug. 23, 2016); *see also The Jurisprudence of the Body: Conscience rights in the Use of the Sword, Scalpel, and Syringe*, 21 TEX. REV. LAW & POL. 409 (2017).

- After a patient gave birth to a healthy baby, she complained that a doctor at Mercy Regional Medical Center had advised her to consider abortion. In response, the Catholic hospital's chief medical officer instructed the doctor not to recommend abortions in order to uphold the hospital's religious, pro-life stance. The ACLU demanded that the state Department of Public Health and Environment investigate and end the hospital's policy.[33]

- The American Civil Liberties Union ("ACLU") filed a lawsuit in 2016 against the U.S. Department of Health and Human Services as part of an effort to force Roman Catholic relief agencies to refer immigrants for abortions and contraceptives, in violation of Catholic religious beliefs.[34]

- California passed the Reproductive FACT Act, which requires pro-life pregnancy centers to display notices advertising California programs that provide state-subsidized abortions. Several lawsuits have been filed challenging the Reproductive FACT Act, and several pro-life pregnancy centers have announced that advertising abortions violates their religious beliefs and they would either close or refuse to obey such a law. The case is currently pending before the Supreme Court of the United States.[35]

Sterilization

- The American Civil Liberties Union ("ACLU") on behalf of Rachel Miller threatened to sue a Dignity Health Catholic hospital in Redding, California. The hospital initially refused to allow a doctor to conduct a sterilization procedure in its facilities because Catholic doctrine teaches that voluntary sterilization is gravely immoral. After the ACLU threatened to sue, the hospital allowed the procedure to go forward.[36]

Contraceptives and Abortion-Inducing Drugs

- Dr. Doris Fernandes, a Catholic physician working in Philadelphia's District Health Center, was fired for refusing to prescribe contraceptives or abortion-causing drugs. Patients seeking these drugs would be transferred to another physician at the clinic. In 2013, Dr. Fernandes was terminated after refusing to obey an order to begin prescribing

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[33] *See ACLU: Durango Hospital Illegally Bans Abortion Discussion*, CBS Denver (Nov. 13, 2013), http://denver.cbslocal.com/2013/11/13/aclu-durango-hospital-illegally-bans-abortion-discussion/.
[34] *Am. Civil Liberties Union of N. Cal. v. Burwell*, No. 3:16-cv-03539 (N.D. Cal., filed June 24, 2016); *see also Am. Civil Liberties Union of Mass. v. Sebelius*, No. 1:09-cv-10038-RGS (D. Mass., Mar. 23, 2012) (involving a similar case out of Massachusetts).
[35] *Nat. Inst. of Family & Life Advocates v. Becerra*, No. 16-1140.
[36] Bob Egelko, *Catholic Hospital Backs Down on Tubal Ligation Refusal*, SF GATE (Aug. 24, 2015), https://www.sfgate.com/health/article/Catholic-hospital-backs-down-on-tubal-ligation-6463205.php.

contraceptives. Following a lawsuit, Dr. Fernandes received a settlement in which the city agreed to respect the deeply held religious beliefs of medical providers.[37]

- For six years, Walgreens accommodated Pharmacist Dr. Philip Hall's deeply held religious beliefs, including his strong objection to the dispensation of abortion-inducing drugs. When customers asked for these drugs, he either referred them to another pharmacist there or another nearby pharmacy. However, in August 2013, Walgreens attempted to coerce Hall to violate his religious beliefs. After he was fired, Hall filed a lawsuit in federal court to protect his religious freedom. The case settled.[38]

- Pharmacists Luke Vander Bleek and Glen Kosirog filed a lawsuit after Governor Rod Blagojevich issued an "Emergency Rule" stating that pharmacists cannot refuse to fill prescriptions for emergency contraceptives. After a five year legal battle, an Illinois judge ruled that the "Emergency Rule" violated the First Amendment and the Illinois Religious Freedom Restoration Act.[39]

- An Illinois state trial court issued a temporary restraining order protecting a Catholic-owned business from state law requiring contraceptive coverage in its health care plans to employees. The court held that the law imposes a substantial burden on the free exercise of religion.[40]

- Eight faculty members of Belmont Abbey College filed a complaint with the Equal Employment Opportunity Commission ("EEOC") because the college declined to provide coverage for contraceptives in accordance with Catholic teachings. After initially ruling in support of the college, the EEOC then reversed its opinion and declared the college had engaged in sex discrimination by denying oral contraceptives to its female employees.[41]

- A pharmacist was fined over $20,000 and had restrictions placed on his license after he refused to give a patient oral contraceptives because their use is against his religious beliefs as a Roman Catholic.[42]

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[37] *Fernandes v. City of Philadelphia,* No. 2:14-cv-05704 (E.D. Pa., filed Oct. 7, 2014).
[38] *Hall v. Walgreen Company*, No. 2:14-cv-00015 (M.D. Tenn. Feb. 19 2015).
[39] *Morr-Fitz, Inc. v. Blagojevich*, No. 2005-495 (Ill. Ck. Ct. Apr. 5, 2011).
[40] *Yep v. Ill. Dep't of Ins.*, No. 2012 CH 5575 (Dupage Co. IL Cir. Ct., Jan. 15, 2013).
[41] *See* Patrick J. Reilly, *Look Who's Discriminating Now*, WALL STREET JOURNAL (Aug. 13, 2009), https://www.wsj.com/articles/SB10001424052970203863204574346833989489154.
[42] *Noesen v. Dep't. of Regulation & Licensing*, 311 Wis. 2d 237 (Wis. Ct. App. 2008).

V. Conclusion

As the Department considers modifications to the rule, we urge the Department to continue to provide broad protections for religious freedom. Healthcare practitioners must be free to work in a way that is consistent with their ethical beliefs and professional judgments in order to be able to provide the best care to their patients. This proposed rule serves to protect First Amendment religious freedom rights, healthcare professionals' capacity to uphold the tenets of the Hippocratic Oath, and the ethical integrity of the medical profession.

Thank you for your consideration of these comments.

Respectfully submitted,

Michael D. Berry
Deputy General Counsel
First Liberty Institute

Stephanie N. Taub
Senior Counsel
First Liberty Institute

Marie T. Hilliard, JCL, PhD, RN
Director of Bioethics and Public Policy
The National Catholic Bioethics Center

Diana Ruzicka, RN, MSN, MA, MA, CNS-BC
President
National Association of Catholic Nurses, U.S.A.

Tom Brejcha
President and Chief Counsel
Thomas More Society

Andrew M. Bath
Executive Vice President and General Counsel
Thomas More Society

John P. Stumbo
President
The Christian and Missionary Alliance

Bill Anderson
Executive Director
The Alliance Community for Retirement Living

Dirk DeWolfe
Executive Director
Town and Country Manor

Martin Schappell
President and CEO
Shell Point Retirement Community

Deborah M. Sprague
Executive Director
Chapel Pointe

Exhibit 5

A Passionate Voice for Compassionate Care

March 27, 2018

Department of Health and Human Services
Office for Civil Rights
Attn: Conscience NPRM
RIN 0945-ZA03
Room 509F Herbert H. Humphrey Building
Washington, DC 20201

REF: RIN 0945-ZA 03
Protecting Statutory Conscience Rights in Health Care; Delegations of Authority: Proposed Rule, 83 Fed. Reg. 3880, January 26, 2018

Dear Sir or Madam:

The Catholic Health Association of the United States (CHA) is pleased to submit these comments in support of the referenced proposed rule to implement, enforce and promote awareness of existing Federal laws protecting conscience rights in the context of health care.

CHA is the national leadership organization of the Catholic health ministry, representing more than 2,000 Catholic health care sponsors, systems, hospitals, long-term care facilities and related organization across the continuum of care. CHA represents the largest not-for-profit provider of health care services in the nation:

- 1 in 6 patients in the United States is cared for in a Catholic hospital each year
- More than 5 million admissions to Catholic hospitals each year, including one million Medicaid admissions
- All 50 states and the District of Columbia are served by Catholic health care organizations
- Approximately 750,000 individuals are employed in Catholic hospitals

As a Catholic health ministry, our mission and our ethical standards in health care are rooted in and inseparable from the Catholic Church's teachings about the dignity of each and every human person, created in the image of God. Access to health care is essential to promote and protect the inherent and inalienable worth and dignity of every individual. These values form the basis for our steadfast commitment to the compelling moral implications of our heath care ministry and have driven CHA's long history of insisting on and working for the right of everyone to affordable, accessible health care. As lawmakers were developing the health care reform package that culminated in the passage of the Affordable Care Act, we made clear that our vision

1875 Eye Street NW, Ste. 1000 Washington, DC 20006 *phone* 202.296.3993 *fax* 202.296.3997 **www.chausa.org**

for health care demanded that everyone receive the same level and quality of care, without limits or variation based on age, race, ethnicity, or financial means, or one's health, immigration or employment status. Our members are committed to providing health care services to any person in need of care, without regard to race, color, national origin, sex, age, or disability, or any other category or status. Every individual seeking health care should always be treated with kindness and respect, and failure to do so because of discomfort with or animus against an individual on any basis is unacceptable. At the same time, we firmly believe that organizations and individuals should not be required to participate in, pay for, provide coverage for or refer for services that directly contradict their deeply held religious or moral beliefs and convictions.

For over two hundred years, individual and institutional Catholic health care providers have carried out this mission in a manner consistent with our religious and moral convictions, the source of both our work and the limits on what we will do. For the past several decades we have had the explicit protection of federal laws which defend our right to provide health care in accord with our convictions. CHA has long supported and worked for the enactment of conscience clause protections such as the Church Amendments, Section 245 of the Public Health Service Act, the Weldon Amendment and the Affordable Care Act. Legal protections such as these are essential for the continuation of both our own ministry and our nation's commitment to freedom of religion and of conscience. The lack of implementing regulations and of clarity concerning enforcement mechanisms for these laws has stymied their effectiveness. We welcome the proposed rule, which effectively reflects the intent and content of the underlying laws, and offer the following comments.

- **Definition of "health care entity" and "referral"**

We support the proposed definition of "health care entity." Including the terms "sponsor" and "third party administrator" clarifies that the Weldon amendment protections for provider-sponsored organizations, health maintenance organizations and health insurance plans are not limited only to the issuers of such plans but extend to the plan sponsors and third-party administrators. We also welcome the definition of "referral or refer for," which makes clear that providers cannot be compelled in any way to assist in the procurement of services which their religious and moral convictions would prevent them from performing.

- **Minimizing Administrative Burden**

The proposed rule would require certain recipients to submit written assurances and certifications of compliance with federal health care conscience and anti-discrimination laws. We believe this is appropriate and consistent with the requirements of other civil rights laws. The preamble notes that this requirement would be implemented through "modified versions of the applicable civil rights clearance forms … or similar forms that may be developed and implemented in the future." (83 Fed.Reg. 3896). We urge OCR to implement this requirement by amending the

existing forms relevant recipients are already required to submit, in order to minimize the administrative burden on recipients.

- **Compliance and Enforcement**

As indicated above, the lack of effective and reasonable enforcement mechanisms has been an obstacle to ensuring that the conscience protections intended by Congress in laws such as the Church Amendments, Section 245 of the Public Health Service Act, the Weldon Amendment and the Affordable Care Act have been fully realized. We support the broad range of enforcement options included in the proposed rule. We endorse the expressed preference for informal settlement among the parties when there appears to have been a failure to comply. When the withholding of federal funds is an appropriate enforcement option, we agree that there should be flexibility to suspend funding in whole or in part. We also believe it is important to establish meaningful due process measures, including forms of notice, hearing and appeal, when OCR finds a compliance violation that cannot be resolved informally.

- **Further clarification**

We suggest that the final rule provide further clarification in two areas.

We support the requirement to post notices concerning Federal health care conscience and associated anti-discrimination laws, and request clarification on what language translation requirements apply to such notices.

Certain conscience laws, such as the Weldon amendment, forbid States receiving federal funds from discriminating against health care entities because they decline to participate in certain services or procedures. The final rule should clarify that once a State receives federal funds, the non-discrimination requirement applies to all agencies and offices of the State whether or not the specific agency or office in question itself receives federal funds.

Thank you for the opportunity to provide comments on the proposed rule implementing key Federal conscience protections. If you should have any questions about these comments or would like additional information, please do not hesitate to contact Kathy Curran, Senior Director, Public Policy, at 202-296-3993.

Sincerely,

Sr. Carol Keehan, DC
President and CEO

Exhibit 6

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

DEPARTMENT OF HEALTH AND HUMAN SERVICES

OFFICE FOR CIVIL RIGHTS (OCR)

CIVIL RIGHTS DISCRIMINATION COMPLAINT

YOUR FIRST NAME	YOUR LAST NAME
[redacted]	[redacted]
H[redacted]L PHONE (Please include area code)	W[redacted]ONE (Please include area code)
[redacted]	
STREET ADDRESS	CITY
[redacted]	[redacted]
ST[redacted] ZIP	E-MAIL ADDRESS (If availa[redacted]
[redacted] [redacted]	[redacted]

Are you filing this complaint for someone else? ☐ Yes ☒ No

If Yes, whose civil rights do you believe were violated?

FIRST NAME	LAST NAME

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

☐ Race / Color / National Origin ☐ Age ☐ Religion ☐ Sex

☐ Disability ☒ Other (specify): Federal Weldon Amendment conscience protections

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

PERSON/AGENCY/ORGANIZATION

State of California - Department of Managed Health Care

STREET ADDRESS	CITY
980 Ninth Street, Suite 500	Sacramento

STATE	ZIP	PHONE (Please include area code)
California	95814	

When do you believe that the civil right discrimination occurred?

LIST DATE(S)

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

contravention of the federal Weldon Amendment by a California state government agency action. We believe that abortion is a grave moral evil and object to being morally complicit in abortion through the provision of insurance coverage for abortion to our employees. [Provide any relevant information about your church] On August 22, 2014, the California Department of Managed Health Care (DMHC) notified all private health care insurers in the state, including those through whom we purchase our employee plan, that all health care plans issued in California must immediately cover elective

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

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

SIGNATURE	DATE *(mm/dd/yyyy)*
[redacted]	10/09/2017

Filing a complaint with OCR is voluntary. However, without the information requested above, OCR may be unable to proceed with your complaint. We collect this information under authority of Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of1973 and other civil rights statutes. We will use the information you provide to determine if we have jurisdiction and, if so, how we will process your complaint. Information submitted on this form is treated confidentially and is protected under the provisions of the Privacy Act of 1974. Names or other identifying information about individuals are disclosed when it is necessary for investigation of possible discrimination, for internal systems operations, or for routine uses, which include disclosure of information outside the Department of Health and Human Services (HHS) for purposes associated with civil rights compliance and as permitted by law. It is illegal for a recipient of Federal financial assistance from HHS to intimidate, threaten, coerce, or discriminate or retaliate against you for filing this complaint or for taking any other action to enforce your rights under Federal civil rights laws. You are not required to use this form. You also may write a letter or submit a complaint electronically with the same information. To submit an electronic complaint, go to OCR's web site at: **www.hhs.gov/ocr/civilrights/complaints/index.html**. To mail a complaint see reverse page for OCR Regional addresses.

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

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

☐ Braille ☐ Large Print ☐ Cassette tape ☐ Computer diskette ☐ Electronic mail ☐ TDD

☐ Sign language interpreter (specify language): _____

☐ Foreign language interpreter (specify language): _____ ☐ Other: _____

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

FIRST NAME	LAST NAME
HOME / CELL PHONE (Please include area code)	WORK PHONE (Please include area code)

STREET ADDRESS	CITY

STATE	ZIP	E-MAIL ADDRESS (If available)

Have you filed your complaint anywhere else? If so, please provide the following. (Attach additional pages as needed)

PERSON/AGENCY/ORGANIZATION/ COURT NAME(S)

DATE(S) FILED	CASE NUMBER(S) (If known)

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

ETHNICITY (select one)

☐ Hispanic or Latino

☐ Not Hispanic or Latino

RACE (select one or more)

☐ American Indian or Alaska Native ☐ Asian ☐ Native Hawaiian or Other Pacific Islander

☐ Black or African American ☐ White ☐ Other (specify): _____

PRIMARY LANGUAGE SPOKEN (if other then English) _____

How did you learn about the Office for Civil Rights?

☐ HHS Website/Internet Search ☐ Family/Friend/Associate ☒ Religious/Community Org ☐ Lawyer/Legal Org ☐ Phone Directory ☐ Employer

☐ Fed/State/Local Gov ☐ Healthcare Provider/Health Plan ☐ Conference/OCR Brochure ☐ Other (specify): _____

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

Region I - CT, ME, MA, NH, RI, VT
Office for Civil Rights, DHHS
JFK Federal Building - Room 1875
Boston, MA 02203
(617) 565-1340; (617) 565-1343 (TDD)
(617) 565-3809 FAX

Region II - NJ, NY, PR, VI
Office for Civil Rights, DHHS
26 Federal Plaza - Suite 3312
New York, NY 10278
(212) 264-3313; (212) 264-2355 (TDD)
(212) 264-3039 FAX

Region III - DE, DC, MD, PA, VA, WV
Office for Civil Rights, DHHS
150 S. Independence Mall West - Suite 372
Philadelphia, PA 19106-3499
(215) 861-4441; (215) 861-4440 (TDD)
(215) 861-4431 FAX

Region IV - AL, FL, GA, KY, MS, NC, SC, TN
Office for Civil Rights, DHHS
61 Forsyth Street, SW. - Suite 16T70
Atlanta, GA 30303-8909
(404) 562-7886; (404) 562-7884 (TDD)
(404) 562-7881 FAX

Region V - IL, IN, MI, MN, OH, WI
Office for Civil Rights, DHHS
233 N. Michigan Ave. - Suite 240
Chicago, IL 60601
(312) 886-2359; (312) 353-5693 (TDD)
(312) 886-1807 FAX

Region VI - AR, LA, NM, OK, TX
Office for Civil Rights, DHHS
1301 Young Street - Suite 1169
Dallas, TX 75202
(214) 767-4056; (214) 767-8940 (TDD)
(214) 767-0432 FAX

Region VII - IA, KS, MO, NE
Office for Civil Rights, DHHS
601 East 12th Street - Room 248
Kansas City, MO 64106
(816) 426-7277; (816) 426-7065 (TDD)
(816) 426-3686 FAX

Region VIII - CO, MT, ND, SD, UT, WY
Office for Civil Rights, DHHS
999 18th Street, Suite 417
Denver, CO 80202
(303) 844-2024; (303) 844-3439 (TDD)
(303) 844-2025 FAX

Region IX - AZ, CA, HI, NV, AS, GU, The U.S. Affiliated Pacific Island Jurisdictions
Office for Civil Rights, DHHS
90 7th Street, Suite 4-100
San Francisco, CA 94103
(415) 437-8310; (415) 437-8311 (TDD)
(415) 437-8329 FAX

Region X - AK, ID, OR, WA
Office for Civil Rights, DHHS
701 Fifth Avenue, Suite 1600, MS - 11
Seattle, WA 98104
(206) 615-2290; (206) 615-2296 (TDD)
(206) 615-2297 FAX

Burden Statement

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

HHS-699 (7/09) (BACK)

COMPLAINANT CONSENT FORM

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

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

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

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

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

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

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

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

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

- I am also aware of the obligations of OCR to honor requests under the Freedom of Information Act (FOIA). I understand that it may be necessary for OCR to disclose information, including personally identifying information, which it has gathered as part of its investigation of my complaint.

- In addition, I understand that as a complainant I am covered by the Department of Health and Human Services' (HHS) regulations which protect any individual from being intimidated, threatened, coerced, retaliated against, or discriminated against because he/she has made a complaint, testified, assisted, or participated in any manner in any mediation, investigation, hearing, proceeding, or other part of HHS' investigation, conciliation, or enforcement process.

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

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

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

Signature: [redacted] Date: 10/09/2017

Please sign and date if submitting this form by email because submission by email represents your signature.

Name (Please print): [redacted]

Address: [redacted]

Telephone Number: [redacted]

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

Privacy Act

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

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

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

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

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

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

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

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

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

PROTECTING PERSONAL INFORMATION IN COMPLAINT INVESTIGATIONS

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

HOW DOES OCR PROTECT MY PERSONAL INFORMATION?

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

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

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

CAN I SEE MY OCR FILE?

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

CAN OCR GIVE MY FILE TO ANY ONE ELSE?

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

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

CAN ANYONE ELSE SEE THE INFORMATION IN MY FILE?

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

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

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

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

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

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

OR

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

contravention of the federal Weldon Amendment by a California state government agency action. We believe that abortion is a grave moral evil and object to being morally complicit in abortion through the provision of insurance coverage for abortion to our employees. [Provide any relevant information about your church] On August 22, 2014, the California Department of Managed Health Care (DMHC) notified all private health care insurers in the state, including those through whom we purchase our employee plan, that all health care plans issued in California must immediately cover elective abortions under DMHC's interpretation of California state law (See DMHC's letter to insurers of August 22, 2014 https://www.dmhc.ca.gov/Portals/0/082214letters/abc082214.pdf). Because no religious exemption exists from the DMHC order of August 22, 2014, our church's staff health insurance plans must include elective abortion coverage without our authorization and over our objections. All the health plans offered to our church included full and unrestricted coverage for direct abortion without limitation. Having no alternative, we were compelled to enroll in a plan that covers all abortions for all plan participants. This development is morally and religiously unacceptable to our faith ministry, as it burdens our conscience rights by compelling us to fund, through our premium payments, abortion on demand for our employees. Since 2005, the Weldon Amendment in federal law (Section 507 of the Consolidated Appropriations Act, 2017, Pub L. No 115-31 (May 5, 2017)) requires States to maintain neutrality on abortion by prohibiting precisely the sort of coercive, discriminatory, and divisive action the DMHC has taken with its abortion insurance mandate. Specifically, DMHC is "subject[ing]" our "health insurance plan" "to discrimination," by denying approval for a plan that omitted abortion coverage, solely "on the basis that the [plan] does not ... provide coverage of ... abortions." We request that this Office enforce the terms of the Weldon Amendment and prevent California from discriminating against us in violation of this federal law. DMHC is immediately forcing our Church to offer our employees a health plan that includes coverage of abortion, in violation of our deeply-held religious and moral convictions, and forcing us to consider cancellation of these plans. We ask that you act urgently to remedy this violation of our rights.

Exhibit 7

THOMAS MORE
Law Center

[redacted]
President and Chief Counsel
Admitted to Michigan

December 4, 2017

VIA FED EX OVERNIGHT
US AIRBILL NO. 8099 2085 0046

[redacted]
Chief of Staff, Office of Civil Rights
U.S. Department of Health and Human Services
200 Independence Avenue, SW
[redacted] HHH Building
Washington, D.C. 20201

Re: [redacted] *v. Duke University and Duke University Health System, Inc.*, Case No. [redacted] CCE-JEP (M.D.N.C.)

Dear Mr. Bell:

As we have discussed previously, the Thomas More Law Center represents [redacted] with respect to charges of unlawful religious discrimination and retaliation against her employer, Duke University Health System, Inc., as well as Duke University (collectively, "Duke").

We recently filed a civil action on behalf of [redacted] against Duke in the United States District Court for the Middle District of North Carolina. A copy of our complaint accompanies this letter. The complaint sets out Ms. Pedro's claims in detail, but the relevant facts are summarized here.

[redacted] is a devout Catholic nurse with many years of experience in nursing. In August 2016, she began work in the Emergency Department of Duke University Hospital in Durham, North Carolina. During orientation, one of the nurses providing training stated that Duke does not allow employees a religious accommodation with regard to abortion and explained that even if a nurse has a religious objection to abortion, she must still participate in aborting a baby because Duke categorically refuses to grant this religious accommodation.

In October 2016, [redacted] requested a religious accommodation with respect to vaccinations. That request was promptly granted. In the process, however, Duke (including two of [redacted] supervisors in the Emergency Department) became aware of her strong pro-life religious views. At this point, [redacted] contends that Duke began harassing and discriminating against her, as described in her complaint.

Additionally, on December 7, 2016, [redacted] made a second request for religious accommodation, which included (among other things) an explicit request to be excused from assisting with or participating in abortions. Unlike her first request, which Duke promptly granted, [redacted] never received a final response to this second request in spite of numerous inquiries and assurances that a decision would be forthcoming. At the end of December 2016, Duke placed [redacted] on paid administrative leave for reasons [redacted] contends were pretextual and without basis.

[redacted] complaint alleges that Duke intended to force her out of her job rather than grant her second request for religious accommodation, including her request to be excused from assisting in abortions. Indeed, despite the fact that she continues to be on an unpaid personal leave of absence from Duke, [redacted] has never received a *final* decision as to her second request for religious accommodation.[1]

Accordingly, because of Duke's potential violation of federal laws that the Office of Civil Rights enforces, we write to respectfully inform your office of these issues. Please do not hesitate to contact us if we can provide any further information, answer any questions, or otherwise be of assistance. I may be reached at your convenience on my cell phone at (336) 707-8855 and by email at tbrooks@thomasmore.org.

Respectfully,

[redacted]

Senior Trial Counsel

[1] In late January 2017, Duke offered to let [redacted] return to work under a *temporary* grant of the accommodation request—ostensibly until Duke could decide whether it presented an undue hardship. Even at that time, however, Duke stated that a final decision would be reached within a couple weeks, but no such decision ever came.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

[redacted], Plaintiff,	)	
v.	)	Case No. 1:17-cv-985
DUKE UNIVERSITY and DUKE UNIVERSITY HEALTH SYSTEM, INC.,	)	COMPLAINT AND JURY DEMAND
Defendants.	)	

Plaintiff [redacted] hereby brings this action against Duke University and Duke University Health System, Inc., including their respective employees, agents, successors, and assigns (collectively, "Defendant Duke"), and alleges upon information and belief as follows:

INTRODUCTION

1. At its heart, this case presents a simple yet important question: Must a devout Catholic abandon fundamental tenets of her faith if she wishes to be employed as a nurse at Duke University Hospital? Despite the fact that Defendant Duke has answered "yes" to this question, federal and state civil rights laws say otherwise. Therefore, Plaintiff [redacted]o brings this action to vindicate her rights under the law.

2. An employee does not forfeit her right to practice her religion and abide by the tenets of her faith when she enters the workplace.

3. To the contrary, federal and state laws generally prohibit discrimination on the basis of religion.

4. Title VII specifically prohibits discrimination on the basis of religion, which includes "all aspects of religious observance and practice, as well as belief[.]" 42 U.S.C. § 2000e(j).

5. Therefore, under Title VII, an employer is required to reasonably accommodate an employee's sincerely held religious beliefs and religious practices, unless doing so would impose an undue hardship.

6. [redacted] has worked as a nurse for close to a decade.

7. Because of her Catholic faith, she objects to assisting in abortions, dispensing birth control and contraceptives, and receiving as well as administering vaccines. [redacted] employer, Defendant Duke, discriminated against her because of these religious beliefs and practices.

8. Furthermore, after [redacted] made known her religious beliefs and requested religious accommodations, Defendant Duke subjected her to a degrading series of actions designed to punish and retaliate against her for engaging in federally-protected activity.

9. The accommodations requested in this case by [redacted] would not have imposed an undue hardship on Defendant Duke.

10. In fact, this complaint is filed more than ten months after [redacted] made the second of two requests for religious accommodation, and

Defendant Duke has *still* not responded to [redacted] with a final decision as to her second request or otherwise provided an explanation as to how the request presented an undue hardship.

11. Defendant Duke has engaged in a course of conduct that was designed to discriminate and retaliate against [redacted] because of her religion and her federally-protected activities, all with the intent of forcing her out of her job with Defendant Duke.

12. Defendant Duke's conduct toward [redacted] likewise violated her rights under other federal and state laws, as described more fully herein.

13. Therefore, [redacted] hereby sues under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as well as the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *et seq.*, and North Carolina statutory and common law.

THE PARTIES

14. Plaintiff [redacted] is a devout Catholic nurse, who currently resides in New York City.

15. In August 2016, [redacted] began work as a nurse for Defendant Duke in the Emergency Department of Duke University Hospital in Durham, North Carolina. At some point after Defendant Duke hired [redacted] it became aware that [redacted] is a devout Catholic.

16. [redacted] is currently on a personal leave of absence for medical reasons from Defendant Duke as a result of injuries Defendant Duke caused.

17. Defendant Duke University is incorporated under the laws of the State of North Carolina with its principal place of business located in Durham, North Carolina.

18. Defendant Duke University employs in excess of 500 employees and is subject to the requirements of Title VII of the Civil Rights Act of 1964.

19. Defendant Duke University is an entity capable of being sued under both federal and North Carolina law.

20. Defendant Duke University Health System, Inc., is incorporated under the laws of the State of North Carolina with its principal place of business located in Durham, North Carolina.

21. Defendant Duke University Health System, Inc., employs in excess of 500 employees and is subject to the requirements of Title VII of the Civil Rights Act of 1964.

22. Defendant Duke University Health System, Inc., is an entity capable of being sued under both federal and North Carolina law.

23. Upon information and belief, at all times relevant to this complaint, Defendant Duke University acted as the parent corporation of Defendant Duke University Health System, Inc.

24. At all times relevant to this complaint, Defendant Duke University provided centralized human resources, labor relations, and legal personnel to Defendant Duke University Health System, Inc.

25. Additionally, upon information and belief, the relevant activities of Defendant Duke University and Duke University Health System, Inc., have been so interrelated and overlapping in terms of management, control, ownership, operations, finances, decisionmakers, and personnel policies and decisions as to constitute a "single employer" or "integrated enterprise."

26. With respect to the allegations contained herein, Defendant Duke University and Defendant Duke University Health System, Inc., acted as alter egos of one another.

27. Duke University Hospital in Durham, North Carolina, is owned, operated, and controlled by Defendant Duke.

28. Defendant Duke is legally responsible for the actions of those employed by Defendant Duke at Duke University Hospital as well as all of the other individuals identified in this complaint as employees or agents of Defendant Duke.

JURISDICTION AND VENUE

29. This Court has federal question jurisdiction over [redacted] claims under federal law pursuant to 28 U.S.C. §§ 1331 and 1343 as well as 42 U.S.C. § 2000e-5(f)(1).

30. [redacted] state law claims are properly before this Court pursuant to 28 U.S.C. § 1332 due to diversity of citizenship between the parties and the fact that the amount in controversy exceeds $75,000 and also pursuant to 28 U.S.C. § 1367(a) because [redacted] tate law claims are so related to the claims in the action that are within the Court's original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution.

31. On August 1, 2017, the EEOC mailed [redacted] a Right to Sue letter.

32. This complaint has been timely filed.

33. [redacted] has complied with all applicable requirements for administrative exhaustion of her claims.

34. Venue is properly laid in this court pursuant to 28 U.S.C. § 1391(b)(1) and (b)(2) because it is a judicial district in which the defendants reside as well as a judicial district in which a substantial part of the events or omissions giving rise to the claims occurred.

FACTS

[redacted] *is a Devout Catholic and Thus Cannot Participate in the Taking of Innocent Human Life*

35. [redacted] takes seriously adherence to the tenets of her Catholic faith.

36. She attends daily Mass and prays the Rosary of the Unborn, on which the Blessed Mother promises that every "Hail Mary" prayed with Love saves a baby from abortion, along with many other Catholic prayers and devotions on a daily basis.

37. Until recently being evicted from her home due to an inability to pay her rent, she kept a miraculous image of the Blessed Mother on her wall above a home shrine she made alongside the American flag presented to her father at his retirement from the National Guard.

38. As part of the exercise of her Catholic faith, [redacted] strives to follow the Ten Commandments, which forbid—among other sins—murder.

39. According to the official *Catechism of the Catholic Church*, to which [redacted] adheres, abortion violates the Commandment that prohibits killing. The *Catechism* states: "Human life must be respected and protected absolutely from the moment of conception."

40. The *Catechism* also states: "Formal cooperation in an abortion constitutes a grave offense. The Church attaches the canonical penalty of excommunication to this crime against human life." In Catholicism, excommunication is the most severe penalty the Church can impose and results in, among other things, being prohibited from participating in public worship and receiving any of the Sacraments of the Church.

41. Furthermore, in his encyclical *Evangelium Vitae*, Pope Saint John Paul II condemned abortion as "a most serious and dangerous crime" that "always constitutes a grave moral disorder, since it is the deliberate killing of an innocent human being."

42. In accordance with her Catholic faith, [redacted] cannot participate in the taking of innocent, unborn human life through complicity with or participation in abortion.

43. Abortion is the intentional termination of an innocent human life.

44. Numerous other Christian denominations in the United States share the same respect for human life at all stages of development as the Catholic Church on the issue of abortion, including the Eastern Orthodox Church, the Southern Baptist Convention, the African Methodist Episcopal Church, the Presbyterian Church in America, the Orthodox Presbyterian Church, the Lutheran Church-Missouri Synod, the Reformed Church in America, the Christian Reformed Church in North America, the Mennonite Church USA, the Assemblies of God, the Church of God in Christ, the Church of the Nazarene, the Church of Jesus Christ of Latter Day Saints, the Coptic Church, and the Anglican Church in North America. The same is true for countless nondenominational evangelical Christian churches. Orthodox Judaism, Hinduism, and traditional Buddhism also oppose abortion except when the mother's life is in danger.

45. The Catholic Church prohibits all forms of contraception and birth control because, in order to have a valid marriage (a necessary condition for moral sexual activity), the man and woman must be open to the possibility of children and are prohibited from using artificial methods to prevent conception.

46. The Catholic Church also prohibits the use of hormonal contraceptives because such contraceptives reduce the likelihood that a conceived human life will implant in the uterus, thereby increasing the likelihood that an innocent human life will be aborted.

47. [redacted] has multiple concerns and sincerely held religious beliefs about vaccines, especially the fact that many vaccines are derived from aborted fetal cells. As previously stated, [redacted] strives to obey the Ten Commandments, and the First Commandment is that God must be placed above all else.

48. To remain faithful to her Catholic religious beliefs, [redacted] cannot participate in abortions, dispense birth control or contraceptives, or administer or receive vaccines.

49. [redacted] convictions regarding abortion, birth control, contraceptives, and vaccines constitute sincerely held religious beliefs.

50. [redacted] religious beliefs regarding abortion, birth control, contraceptives, and vaccines are protected by Title VII.

[redacted] Achieves Her Dream of Becoming a Nurse

51. [redacted] faith motivated her to pursue a career as a nurse because, as a nurse, she could help heal the sick.

52. [redacted] received her nursing education at Mount Saint Mary College, graduating in 2008 with a Bachelor of Science in Nursing (BSN).

53. At graduation, [redacted] received the Spirit of Nursing Award in recognition of her love for nursing, her outstanding dedication to her patients, and her deep compassion for those who suffer.

54. After graduating from Mount Saint Mary College [redacted] sat for her nursing boards on Fulton Street in New York City. Following her examination, she went to daily Mass at Our Lady of Victory and prayed to God that she would pass. She promised God that, if she passed her boards, she would serve Him as a nurse and always strive to be faithful to His teachings.

55. [redacted] passed her nursing boards and was licensed as a nurse in the State of New York in 2008.

After Working in New York, [redacted] Moves to North Carolina to Work for Defendant Duke

56. [redacted] worked as a nurse in New York City for eight years.

57. She first worked in the Neuroscience Unit and Neurosurgery ICU at NYU Langone Medical Center ("NYU") for five years.

58. She then worked for three years in the Burn ICU at New York Presbyterian-Weill Cornell Medical Center ("Cornell").

59. Additionally, while in New York, she performed *per diem* home care/private duty nursing and also trained to be a birth doula.

60. [redacted] compiled an impeccable record while working as a nurse in New York.

61. In fact, while working at NYU, [redacted] helped develop a new hospital guideline for patient care in pentobarbital comas, which was featured as a poster presentation at the April 2012 conference of the American Association of Neuroscience Nurses in Seattle, Washington.

62. During her eight years of working in New York, [redacted] never once received any form of discipline from her employers.

63. After much prayer and deliberation, [redacted] decided to move to the Triangle and work as a nurse in the Emergency Department of Duke University Hospital.

64. [redacted] employment with Defendant Duke began in August 2016.

65. In August 2016, [redacted] attended approximately two weeks of classroom orientation with Defendant Duke.

66. On August 15, 2016, while still in classroom orientation, [redacted] received a document regarding Defendant Duke's policies from Clinical

Team Lead [redacted] served as one of Defendant Duke's principal educators during [redacted] orientation.

67. In explaining the aforementioned document to six new Emergency Department nurses (including [redacted], [redacted] discussed how Duke University Hospital operates. She stated that Defendant Duke does not allow employees a religious accommodation with regard to abortion. Wher[redacted] discussed the section titled, "Patient Care and Staff Beliefs," she explained that even if a nurse has a religious objection to abortion, she must still participate in aborting a baby because Defendant Duke categorically refuses to grant this religious accommodation.

68. [redacted] then further stated that a large number of abortions are performed in Defendant Duke's Emergency Department.

69. When making each of the statements described above, [redacted] was speaking on behalf of, and with authority from, Defendant Duke.

70. Additionally, due to her seniority and the nature of her position, [redacted] is privy to information regarding how Defendant Duke reviews and decides requests for religious accommodation and other human resource matters.

71. [redacted] statements about Defendant Duke's policy on religious exemptions had a chilling effect on the exercise of Title VII rights.

72. [redacted] statements about Defendant Duke's policy on religious exemptions constituted religious discrimination and harassment in violation of Title VII in that they required or coerced employees to abandon or alter religious beliefs or practices as a condition of employment with Defendant Duke.

73. Defendant Duke, acting through [redacted] intended the aforementioned statements regarding religious accommodations to intimidate and dissuade employees from exercising their rights under Title VII.

74. Furthermore, the statements of [redacted] evidenced Defendant Duke's hostility and discriminatory attitude towards persons of religious faith.

75. The existence and enforcement of a policy like that described by [redacted] violates (1) Title VII; (2) 42 U.S.C § 300a-7 (also known as the Church Amendments); (3) the Weldon Amendment; and (4) Section 1303(b) of the Affordable Care Act, both as written and as interpreted and implemented by President Obama's Executive Order No. 13535.

76. At all relevant times during the August 2016 training in which [redacted] participated, [redacted] was an employee of Defendant Duke and acting within the course and scope of her employment with Defendant Duke.

77. The acts and omissions of [redacted] in this case are imputable to Defendant Duke under the doctrines of *respondeat superior* and vicarious liability.

[redacted] *Requests Reasonable Religious Accommodations*

78. Though she was fearful of how Defendant Duke would respond (in light of [redacted] comments), [redacted] nevertheless made a request for religious accommodation by letter dated October 5, 2016.

79. Specifically, [redacted] letter of October 5, 2016, requested that she be exempt from receiving vaccines for religious reasons and provided a description of her pro-life religious views.

80. Defendant Duke granted [redacted] request on October 27, 2016.

81. On the same day (October 27, 2016), one of Defendant Duke's Clinical Team Leads in the Emergency Department, [redacted] (now [redacted], asked [redacted] for a copy of her letter of October 5th and also asked that it be forwarded to [redacted] nurse manager.

82. As a result, [redacted] supervisors in the Emergency Department immediately became aware of [redacted] religious beliefs as well as the fact that those beliefs compel her to adhere to pro-life positions.

Defendant Duke Begins to Discriminate Against [redacted] Because of Her Religion and Retaliate Against Her Because She Engaged in Protected Activity

83. Despite granting [redacted] request for a religious accommodation, Defendant Duke thereafter began a pattern of employment actions and decisions adverse to [redacted] hat negatively affected her status as an employee of Defendant Duke and more generally as a nurse.

84. Prior to making a request for religious accommodation and making her religious views known to Defendant Duke, [redacted] had not been disciplined or reprimanded by Defendant Duke.

85. Barely two weeks after two of [redacted] supervisors received the October 5th letter describing her religious beliefs, however, [redacted] (one of the two supervisors who had received a copy of [redacted] request for religious accommodation) and [redacted] (who had stated during [redacted] training that employees can never refuse to participate in an abortion in the Emergency Department) asked to meet with [redacted] on November 15, 2016.

86. During that November 15, 2016 meeting, [redacted] and [redacted] provided vague and unsubstantiated criticisms of [redacted] work performance in the Emergency Department.

87. Both [redacted] and [redacted] however, emphasized that they had no concerns about [redacted] clinical skills.

88. Defendant Duke has never provided any objective evidence that [redacted] work performance was less than satisfactory.

89. The criticism [redacted] received during the November 15, 2016 meeting had no basis in fact, but was rather a pretext designed to mask Defendant Duke's unlawful discrimination and retaliation against [redacted]

90. During the November 15, 2016 meeting, [redacted] stated that she would convene a meeting including herself, [redacted] and [redacted] preceptor in the Emergency Department, [redacted] on November 17, 2016.

91. [redacted] failed to convene the meeting on November 17, 2016, as had been represented merely two days earlier.

92. On November 25, 2016, [redacted] emailed Clinical Team Lead [redacted] to inquire about a clinical ladder promotion, which would have provided her an increase in pay.

93. On November 26, 2016, [redacted] emailed [redacted] in response, saying that she would talk with her about the next steps in applying for a promotion.

94. [redacted] however, never spoke with [redacted] and on December 8, 2016, [redacted] emailed to say that [redacted] (who had stated during [redacted] training that employees can never refuse to participate in

an abortion in the Emergency Department) had informed her that she [redacted] was not able to apply for the promotion.

95. Notably, as described more fully below, the email from [redacted] to [redacted] denying her the ability to seek the clinical ladder promotion came the day after [redacted] made the second of her two requests for religious accommodation based on her pro-life religious views.

96. Due to concern as to why she was still considered to be in her "orientation" period, even though her cohorts were being, or had already been, moved out of "orientation" and into regular status [redacted] emailed [redacted] and [redacted] on November 30, 2016, to inquire about this issue.

97. Neither [redacted] nor [redacted] responded to [redacted] email of November 30, 2016.

98. When she made inquiries of other supervisors in November and December as to the reason for her excessive "orientation" period, [redacted] received differing and contradictory answers.

99. Upon information and belief, other members of [redacted] cohort had not made requests for religious accommodations and did not share [redacted] same religious views.

100. Accordingly, Defendant Duke kept [redacted] on "orientation" longer than necessary so as to discriminate and retaliate against her with the goal of forcing her to quit.

101. Due to the excessive length of her "orientation" period and other harassment initiated by her supervisors [redacted] became the subject of gossip, rumors, and degrading and embarrassing comments by some of her fellow employees in the Emergency Department.

102. For example, on one occasion, [redacted] heard nurses [redacted] talk about her being terminated, which resulted from her supervisors' sharing sensitive personnel issues with her fellow employees.

103. On another occasion, when nurse [redacted] did not immediately see [redacted] told [redacted] that she was happy [redacted] was no longer working there.

104. [redacted] supervisors also encouraged nurse [redacted] to complain about [redacted] work performance and, upon information and belief, even failed to discipline [redacted] in order to persuade her to provide negative feedback regarding Ms. Pedro.

105. Additionally, when the mother of a young patient wrote a note praising the care [redacted] had provided, one or more employees of Defendant Duke ensured the letter was hidden or destroyed.

106. Similarly, [redacted] supervisors failed to tell [redacted] about letters and other forms of praise she would receive from her patients.

107. [redacted] reported these comments and other harassing actions to her supervisors, but her supervisors failed to take any steps to remedy the conduct and even encouraged harassment of [redacted]

108. This harassment and Defendant Duke's failure to take remedial action were both motivated by [redacted] religious beliefs as well as her protected activity.

109. On December 1, 2017, [redacted] asked [redacted] to meet with her and [redacted] Clinical Team Lead in Defendant Duke's Emergency Department. During this meeting, [redacted] was presented with a Performance Improvement Plan that was inexplicably dated November 15, 2016.

110. The meeting of December 1, 2016, was the first time [redacted] had been presented with, or had otherwise seen, this Performance Improvement Plan. [redacted] asked [redacted] to sign this document. When [redacted] expressed concern that the allegations listed were untrue, [redacted] replied that she ([redacted]) would be able to change it later.

111. [redacted] was thereby coerced into signing the Performance Improvement Plan because she was fearful that, if she refused to sign, Defendant Duke would claim she was being insubordinate.

112. Also during the December 1, 2016 meeting, it was stated that [redacted] would be formally disciplined for the sole reason of not meeting with

her preceptor, [redacted] on November 17th, even though the failure to have said meeting was the fault of [redacted] rather than [redacted]

113. On December 7, 2016, [redacted] submitted another request for religious accommodation, as was her right under the law.

114. This request for religious accommodation read, in pertinent part, as follows:

> Dear Sir or Madam:
>
> [. . .]
>
> Since abortion is a grave violation of my religious beliefs, I am unable to assist with or participate in an abortion in any way, including giving drugs intended to induce an abortion.
>
> Methods of birth control and contraception are also grave violations of my religious beliefs, so I am unable to administer drugs intended as birth control or contraception.
>
> As outlined in my previous request for religious accommodation dated on October 5, 2016, vaccines are a violation of my religious beliefs. Therefore, I am unable to administer any vaccines.
>
> [. . .]
>
> Thank you for your time and attention to this matter.
>
> Sincerely,
> Sara Pedro

115. Defendant Duke and, more specifically, [redacted] supervisors in the Emergency Department, were not pleased that [redacted] had now made two requests for religious accommodation.

116. When asking [redacted] about her second religious accommodation request, [redacted] who was at the time Defendant Duke's Emergency Department Clinical Operations Director, said he did not consider it to be a request for a religious accommodation but rather a "dilemma."

117. On December 8, 2016—the day after making her second request for religious accommodation—[redacted] was disciplined by means of a written warning from [redacted] for not satisfying the benchmarks set out in the Performance Improvement Plan.

118. The reasons for the written warning had therefore expanded beyond the sole basis given a few days earlier on December 1, 2016—namely, [redacted] not meeting with her preceptor.

119. Moreover, with only one exception, the benchmarks set out in the Performance Improvement Plan did not even become due until seven days later on December 15, 2016.

120. Accordingly, in violation of Defendant Duke's own policies and procedures, Defendant Duke disciplined [redacted] without affording her an opportunity to make any necessary improvements.

121. The areas of alleged deficiencies described in the written warning of December 8, 2016, had no basis in fact, but were rather a pretext

designed to mask Defendant Duke's unlawful discrimination and retaliation against [redacted]

122. During the meeting with [redacted] on December 8, 2016, at which she was given this written warning, [redacted] asked why she was still in "orientation" while her cohorts were being advanced. [redacted] denied having knowledge of the reasons for this action, but indicated that it was a decision made by [redacted] (Again, it was [redacted] who stated during [redacted] training that employees can never refuse to participate in an abortion in the Emergency Department.)

123. When [redacted] said to [redacted] in the December 8th meeting that she had not once received any form of disciplinary action in the previous eight years that she had worked as a nurse, [redacted] responded by saying that she did not care what happened before [redacted] came to work for Defendant Duke.

Defendant Duke Places [redacted] on Administrative Leave for Pretextual Reasons

124. After the December 8, 2016 meeting, [redacted] attempted to formally dispute the written warning through Defendant Duke's human resources representatives.

125. On December 22, 2016, [redacted] met with [redacted] a human resources representative of Defendant Duke, to complete paperwork

necessary to file a dispute against the written warning that she had been given on December 8.

126. Prior to the meeting with [redacted] emailed [redacted] human resources representative, and [redacted] regarding concerns that she was being discriminated against.

127. During her meeting with [redacted] asked whether her email asserting that she was being discriminated against on the basis of her religion had been received. [redacted] confirmed that she did indeed receive the email and informed [redacted] that [redacted] would address her concerns when she returned from vacation on January 3, 2017.

128. To [redacted] knowledge, Defendant Duke has never completed an investigation into [redacted] allegations or otherwise addressed her concerns about discrimination and harassment.

129. Both [redacted] complaints to her supervisors about harassment from her co-workers, and her complaints to Defendant Duke's human resources personnel about suspected religious discrimination constituted activity protected by Title VII.

130. Both [redacted] complaints to her supervisors and her complaints to Defendant Duke's human resources personnel were reasonable.

131. Nevertheless, Defendant Duke failed to take reasonable steps to prevent and promptly correct the actions complained of by [redacted]

132. Upon information and belief, [redacted] supervisors in the Emergency Department (including [redacted] quickly became aware that [redacted] had complained to Defendant Duke's human resources personnel regarding suspected religious discrimination.

133. On December 30, 2016—a mere eight days after complaining to Duke about alleged religious discrimination and thus engaging in activity protected by Title VII—Ms. Pedro was asked to attend a meeting with [redacted] and her preceptor, nurse [redacted]

134. In the December 30, 2016 meeting, [redacted] informed [redacted] that she was being placed on paid administrative leave effective immediately.

135. Once again, the reasons provided by Defendant Duke for its decision had no basis in fact, but were rather a pretext designed to mask Defendant Duke's unlawful discrimination and retaliation against [redacted]

136. Also during the December 30, 2016 meeting, while disciplining [redacted] inquired into the status of [redacted] request for a religious accommodation.

137. [redacted] further stated that she wanted to know the results of the request for a religious accommodation before making a final decision about [redacted] administrative leave.

138. Such statements by Ms. Denis constitute direct evidence of unlawful discrimination and retaliation.

139. By placing [redacted] on administrative leave, human resources personnel—pursuant to Defendant Duke's policies—were prevented from further investigating [redacted] allegations of religious discrimination, retaliation, and harassment as well as her challenge to her written warning.

140. Therefore, Defendant Duke did not exercise reasonable care to prevent discriminatory, retaliatory, and harassing actions and further failed to have in place measures to prevent and correct illegal discrimination, retaliation, and harassment.

141. Defendant Duke's decision to place [redacted] on administrative leave was based on her religion and the fact that she had engaged in protected activity and was further designed and motivated to cover up the true (and illicit) reasons for Defendant Duke's disciplining of [redacted]

142. In addition to its other adverse effects, subjecting [redacted] to discipline would also threaten her professional standing (both at Defendant Duke and generally) and her licensure as a nurse.

143. At all times relevant to this complaint, [redacted] work for Defendant Duke was more than satisfactory.

144. While working for Defendant Duke, [redacted] had no problems with absenteeism, tardiness, insubordination, or violation of any specific hospital rule or policy.

145. In fact, on more than one occasion, [redacted] distinguished herself in the course of her work, often preventing acts of malpractice or other violations of law by Defendant Duke. Examples include, but are not limited to, the following:

a. While [redacted] was assisting an HIV-positive patient, the patient vomited large amounts of blood onto [redacted] leaving her shoes and clothes saturated with blood. Throughout the situation, though, [redacted] remained calm and continued to ensure the patient received proper care. Afterwards [redacted] had to discard her scrubs and shoes and receive an HIV test due to the fact that she had been exposed to this virus.

b. While assigned to work in the psychiatric section of the Emergency Department, [redacted] learned a nurse had provided a patient a television remote control, which the patient then used to engage in a sex act in one of the hospital rooms. [redacted] was the only nurse who thought to ensure that proper cleaning and sanitization were undertaken so as to protect the health and safety of staff and other patients.

c. [redacted] received a patient who had been assaulted by a brick to his head. When she learned the patient was to be discharged, [redacted] approached the attending physician to state that,

based on the patient's clinical findings, she strongly suspected he had a fracture. On reexamining an x-ray of the patient, doctors discovered the x-ray had been misinterpreted previously and that the patient did indeed have a fracture as [redacted] suspected.

d. One of [redacted] preceptors, [redacted] asked [redacted] to prepare a dose of Decadron for a teenage patient. [redacted] voiced concern about the amount of the dose and sought clarification from the pharmacist on the correct dose. The pharmacist then agreed with [redacted] An incident report indicating how [redacted] prevented this dosing error was then filed.

e. On November 27, 2016, [redacted] was assigned as the primary nurse for a three-year-old boy. His mother was greatly displeased at the care he had received as a patient prior to the beginning of [redacted] shift. As a result of the level of care [redacted] then provided, the boy's mother later wrote a letter praising the care she gave him.

f. [redacted] is skilled at placing IV's in patients, particularly in pediatric and infant patients. In one specific instance, she placed an IV on the first attempt in a 5-pound premature baby.

g. A veteran nurse with decades of experience commented to [redacted] that she had exceptional pediatric IV skills and clinical capabilities.

h. Nurse [redacted] a so-called "Epic Superuser" with advanced training in Defendant Duke's new electronic trauma charting system, specifically praised [redacted] for the quality of her charting.

i. On December 21, 2016, [redacted] received a trauma patient transferred to her from another section of the Emergency Department. [redacted] noticed that he had difficulty breathing, which she addressed immediately. Although a trauma reassessment is required for every trauma patient once every hour, [redacted] noticed that no trauma reassessment had been documented on this patient for more than six hours, and even the last assessment recorded was incomplete. [redacted] then documented a thorough physical assessment to ensure proper care. [redacted] the oncoming nurse for the next shift, specifically commended [redacted] for this work

j. On December 29, 2016, [redacted] was supplying a patient with a meal tray for dinner, but [redacted] was concerned about his clinical presentation. Though [redacted] was unalarmed, [redacted]

[redacted] checked his blood glucose and found it to be significantly abnormal. The patient was then treated for hypoglycemia.

k. [redacted] received a trauma patient into the Emergency Department who had been involved in a serious motor vehicle accident. The patient admitted he had been using illicit drugs prior to the accident, and his physical assessment and behavior were consistent with illicit drug use. [redacted] then asked a Patient Care Technician to obtain evidence bags for his clothes. Nurse [redacted] however, would not allow the Patient Care Technician to do this and told [redacted] "We don't do that here." [redacted] then raised concerns that the Emergency Department at Defendant Duke was unlawfully withholding information from law enforcement.

l. Several weeks after this incident, on December 27, 2016, Clinical Nurse Specialist [redacted] emailed the nurses in the Emergency Department a new guideline on obtaining and communicating blood and urine sample results to law enforcement. [redacted] thoroughly reviewed the new guidelines and emailed [redacted] several questions, especially since the new guidelines conflicted with instructions previously provided by her supervisors. [redacted] responded and said, "What you were told is wrong. That is

why we have written this document as we have not been complying with the law by such refusal to give information to law enforcement." The verbatim text of [redacted] question and [redacted] response were then used at the January 2017 Emergency Department staff meeting in explaining the new policy.

146. At no time did [redacted] ever jeopardize or adversely affect the quality of care received by any patient of Defendant Duke.

147. At no time has Defendant Duke ever been able to substantiate any concern about [redacted] clinical skills or knowledge.

148. During the December 30th meeting, [redacted] stated that she would give [redacted] a final decision about her administrative leave by 5:00 pm on January 4, 2017.

149. [redacted] received no such answer from Defendant Duke at any time on January 4, 2017.

150. On January 12, 2017, however, [redacted] received a letter dated January 6, 2017, from [redacted], Defendant Duke's Director of Staff and Labor Relations.

151. The letter from [redacted] stated that Defendant Duke was *still* investigating whether it could accommodate [redacted] request for a religious accommodation.

152. Also on January 12, 2017, [redacted] emailed [redacted] and [redacted] continuing to raise multiple concerns about Defendant Duke's handling of her administrative leave.

153. On January 13, 2017, [redacted] emailed [redacted] asking for an explanation as to what [redacted] meant by the word "vaccines" in her request for religious accommodation.

154. On January 16, 2017, [redacted] responded to [redacted] seeking clarification of her question, but [redacted] did not receive any response until she emailed her again on January 23, 2017.

155. On January 23, 2017, [redacted] emailed [redacted] [redacted] and [redacted] to again raise concerns about repeated discrimination and harassment.

156. On January 25, 2017, [redacted] sent [redacted] a hostile email challenging her request for a religious accommodation.

157. In her email of January 25, 2017, [redacted] advised [redacted] that, if she had such concerns, she could call [redacted] Assistant Vice President for Harassment, Discrimination and Compliance, in Duke University's Office of Institutional Equity.

158. [redacted] email of January 25, 2017, was the first time that [redacted] had been directed to contact [redacted] [redacted] emailed [redacted] the core of her concerns the same day.

159. During this time, it also became necessary for [redacted] to renew her ACLS (nursing) certification. Due to the fact that she was still on administrative leave on the date of the test (January 5, 2017), as well as other failures on the part of Defendant Duke [redacted] was unable to attend the ACLS class and testing provided by Defendant Duke.

160. As a result [redacted] had to pay for a private ACLS class herself and renew her certification on her own. Defendant Duke nonetheless charged [redacted] for the cost of the ACLS class she was unable to attend due to Defendant Duke's own actions.

Defendant Duke Attempts to Interfere with the EEOC Investigative Process

161. On January 26, 2017, [redacted] emailed [redacted] to ask her to meet with her and [redacted] the next day on January 27, 2017.

162. In response, on January 26, 2017 [redacted] emailed [redacted] to inform them that she had complained of religious discrimination to the EEOC.

163. [redacted] also emailed [redacted] to inform them that she had retained an attorney and that she wanted him to attend the meeting with her.

164. The email from [redacted] also politely asked Defendant Duke to have an attorney present at the meeting.

165. The presence of counsel for both parties at the meeting of January 27th would have been beneficial and prudent for each side, given that [redacted] had already made an internal complaint and had also contacted the EEOC to initiate a formal investigation of Defendant Duke's conduct.

166. [redacted] received no response from Defendant Duke on January 26, 2017.

167. Moments before [redacted] was about to leave her home to report for the meeting on January 27th, she finally received a response to her email of the prior day.

168. In the email, Defendant Duke prohibited [redacted] attorney from being present during the meeting, even though the meeting with [redacted] would address her complaint to the EEOC.

169. [redacted] then participated in a conference call that included herself, her attorney, and an in-house attorney for Defendant Duke, [redacted] of Duke University's Office of Counsel.

170. In that call, [redacted] reiterated Defendant Duke's denial of [redacted] request to have an attorney presenting during the meeting with [redacted]

171. [redacted] further stated that [redacted] EEOC charge was a valid topic of discussion during the meeting with [redacted] and [redacted]

172. As such, Defendant Duke attempted to have *ex parte* discussions wit[redacted] even though she was represented by counsel, about a matter before the EEOC without having her attorney present.

173. Upon information and belief, statements made by [redacted] and other information obtained during the meeting that Defendant Duke sought to conduct with [redacted] on January 27, 2017, would have been shared with Defendant Duke's legal counsel and used by Defendant Duke to defend against the EEOC charge filed by [redacted]

174. During the conference call with [redacted] attorney appealed to [redacted]n the grounds of professional courtesy between fellow members of the Bar.

175. In response [redacted] stated that Defendant Duke has such a large number of employee complaints that it would be impossible for its legal department to accommodate requests to discuss an employee's concerns in person with the employee's counsel.

176. At all times relevant to this complaint, Defendant Duke's Office of Counsel has employed a staff of over a dozen attorneys, including [redacted]

177. Additionally, Defendant Duke has ready access to highly skilled and knowledgeable outside counsel.

178. [redacted] began to hyperventilate and suffer a severe panic attack as a direct result of [redacted] response.

179. [redacted] attorney then again called [redacted] and was told she was unavailable. He left her a voicemail asking her to return his call. She never did.

180. [redacted] thereafter sought and received immediate medical attention from a WakeMed urgent care facility.

181. After being discharged from WakeMed, [redacted] sought follow up care from [redacted] M.D., of WakeMed, as well as [redacted] LPC.

182. After assessing [redacted] [redacted] referred [redacted] for trauma counseling several times per week.

183. [redacted] then met with [redacted] Psy.D., L.P., for trauma counseling. Following a psychological examination, [redacted] opined, by letter dated February 6, 2017, that [redacted] was "experiencing significant psychological distress and . . . struggling with maintenance of daily function." [redacted] further opined that [redacted] was unable to return to work, as it would likely exacerbate her symptoms.

184. [redacted] was, therefore, medically unable to return to work and began availing herself of her paid time off through a personal leave of absence for medical reasons until her paid time off was entirely depleted.

185. Even though she has exhausted her paid time off [redacted] is still unable to return to work.

186. Though [redacted] had been hopeful that Defendant Duke would grant her second request for religious accommodation, based on her first-hand experience while working for Defendant Duke [redacted] contends that Defendant Duke never intended to grant her second request for a religious accommodation, but Defendant Duke also lacked any valid grounds to deny her request. [redacted] contends that Defendant Duke therefore intended to force her from her position rather than grant her second request for religious accommodation, which included her request to be excused from assisting in any abortions.

Defendant Duke Continues to Harass [redacted] and Deny Her Pay and Benefits

187. Prior to the meeting set by Defendant Duke for January 27, 2017, Defendant Duke offered [redacted] the option of returning to work *or taking a personal leave of absence*.

188. After [redacted] suffered her medical emergency on January 27th and was therefore unable to return to work, [redacted] emailed her

supervisor to inform her that she was medically unable to attend the meeting.

189. Following receipt of medical attention at WakeMed, [redacted] emailed her supervisor that she had a medical note excusing her from work on January 28, 2017.

190. Despite the fact tha[redacted] had expressly been given the option of taking a personal leave of absence and she informed Defendant Duke of her decision to do so *more than the required amount of time prior to her previously scheduled shift of January 28, 2017*, Defendant Duke nevertheless recorded [redacted] absence as "unscheduled."

191. An "unscheduled" absence is considered a basis for discipline.

192. Subsequent efforts to inquire of Defendant Duke as to whether it indeed considered this "unscheduled" absence to be a basis for discipline of [redacted] went unanswered by Defendant Duke.

193. Wrongfully classifying [redacted] absence as "unscheduled" constituted retaliation for her protected conduct, including filing a charge with the EEOC.

194. Defendant Duke further engaged in unlawful harassment and retaliation of [redacted] in several ways following the incident of January 27, 2017.

195. Defendant Duke failed to correct [redacted] address with her insurers when [redacted] informed Defendant Duke that this information was out of date.

196. Notably, one of her insurers, Cigna, previously had [redacted] current address correct, but Defendant Duke changed it to one of her old addresses at some point during her employment.

197. Again, attempts to inquire of Defendant Duke as to [redacted] concerns with the address being provided by Defendant Duke to her insurers went unanswered.

198. Defendant Duke moreover failed to provide timely and proper payment to [redacted] after January 27, 2017.

199. More specifically, [redacted] was not timely compensated for the pay period of 1/23/17 to 2/5/17.

200. [redacted] had specifically made written requests for paid time off to cover part of this pay period (1/27/17-2/5/17).

201. Defendant Duke nevertheless inexplicably failed to honor [redacted] requests for paid time off, even though [redacted] emailed [redacted] that it would apply her PTO to January 27 and January 28, and only then compensated her well after it was due to be paid to her.

202. Additionally, at the same time, Defendant Duke issued [redacted] a check that included thirty-six hours of paid administrative leave, even

though it had previously informed her in writing that her paid administrative leave ended on January 27th. Because of this erroneous allocation of income by Defendant Duke, [redacted] was afraid to deposit the check for fear of later being accused of acting improperly.

203. As with almost all of her other inquiries, Defendant Duke did not respond to [redacted] when she attempted to obtain clarification and thereby allay her concerns about depositing the check.

204. Furthermore, Defendant Duke also failed to directly deposit [redacted] check into her checking account and instead held the check, telling her to retrieve it from its offices in Durham.

205. [redacted] was not able to pick up this check, however, because she lived in Raleigh and did not have a car.

206. Only after causing [redacted] much unnecessary trouble, did Defendant Duke eventually send [redacted] her check.

207. Because she was forced to take a personal leave of absence for medical reasons, [redacted] no longer received income or benefits from Defendant Duke once her PTO had been depleted.

208. Moreover, because Defendant Duke had disciplined [redacted] prior to her entering unpaid administrative leave, she was ineligible to participate in its PTO donation program, which would have provided her an opportunity for income.

209. As a result of Defendant Duke's canceling of her health insurance and denying her income, [redacted] was unable to obtain the trauma counseling and treatment she required.

210. Additionally, by letter dated October 19, 2016, Defendant Duke had accepted [redacted] into its competitive Nurse Loan Forgiveness Program, by which it would satisfy the balance of [redacted] remaining student loans. To date, Defendant Duke has made no such payments.

211. Furthermore, Defendant Duke failed to provide [redacted] testing to follow up on the HIV exposure she received during her treatment of an HIV-positive patient at Defendant Duke, and [redacted] was unable to afford such testing due to her loss of income from Defendant Duke.

212. Thus, following [redacted] initial request for a religious accommodation, her subsequent request for a second religious accommodation, and her decision to engage in other forms of protected conduct, Defendant Duke treated [redacted] differently than other, similarly situated employees. Such treatment was motivated by [redacted] religion and was in retaliation for engaging in activity protected by Title VII. [redacted] was also subjected to a hostile work environment that was permeated with harassment by Defendant Duke. Additionally, she suffered severe harassment from fellow employees that was the result of Defendant Duke failing to correct, and even initiating, said harassment.

213. At all times relevant to the series of event described above, Defendant Duke's employees and agents—including [redacted]—were acting within the course and scope of their employment or agency relationship with Defendant Duke.

214. The acts and omissions of Defendant Duke's employees and agents in this case—including [redacted]—are imputable to both Defendant Duke University and Defendant Duke University Health System, Inc., under the doctrines of *respondeat superior* and vicarious liability.

215. Defendant Duke engaged in discriminatory practices with malice or with reckless indifference to [redacted]federally protected rights.

216. Furthermore, Defendant Duke discriminated in the face of a perceived risk that its actions would violate federal law.

Effects of Defendant Duke's
Violation of [redacted]Civil Rights

217. [redacted]is currently suffering from Post-Traumatic Stress Disorder ("PTSD").

218. The actions of Defendant Duke have also exacerbated [redacted] preexisting medical conditions, including asthma, an injury to her back, and an autoimmune disorder.

219. The actions of Defendant Duke described above (and to be more fully established by the proof at trial), constitute the direct and proximate cause of [redacted] current manifestation of PTSD and current problems associated with her other medical issues.

220. Though she desires to work [redacted] PTSD and other injuries preclude her from regularly engaging in gainful employment, resulting in a nearly total loss of income.

221. [redacted] PTSD is expected to preclude her from regularly engaging in gainful employment for the foreseeable future.

222. [redacted] suffers significant psychological and emotional distress on a daily basis as a direct and proximate result of the actions of Defendant Duke.

223. Due to her lack of income, [redacted] was evicted from her apartment in Raleigh by a Wake County Sheriff's deputy. [redacted] then returned to the New York City area, which she could only accomplish by taking a bus. Consequently, she had to abandon countless personal possessions by leaving them in her Raleigh apartment.

224. She has suffered other consequential injuries from her loss of income.

225. [redacted] loss of income, loss of personal property, and other related injuries are the direct and proximate result of Defendant Duke's actions.

COUNT I:
Religious Discrimination in
Violation of Title VII
(Disparate Treatment)

226. The preceding paragraphs are hereby realleged and incorporated herein by reference.

227. Religion constitutes a protected class under Title VII.

228. [redacted] supervisors at Defendant Duke do not hold [redacted] same religious beliefs.

229. [redacted] was subjected to adverse employment actions by Defendant Duke.

230. [redacted] protected status (religion) was a motivating factor in the decisions of Defendant Duke that constituted adverse employment actions.

231. The above allegations of this complaint describe conduct that constitutes direct evidence of invidious discrimination on the basis of religion in violation of Title VII.

232. At the time Defendant Duke took adverse employment actions against [redacted] ob performance was satisfactory.

233. At the time Defendant Duke took adverse employment actions against [redacted] was qualified for her position and for the position(s) for which she applied.

234. Employees outside of the protected class were treated more favorably than [redacted] including by receiving promotions from "orientation" status and by receiving clinical ladder promotions like that for which [redacted] applied.

235. Upon information and belief, Defendant Duke has actively discriminated against others who hold pro-life religious views on prior occasions.

236. Defendant Duke's discrimination against [redacted] was intentional.

237. Defendant Duke's discrimination against [redacted] on the basis of her religion took several forms.

238. Defendant Duke discriminated against [redacted] on the basis of her religion in numerous specific ways, including but not limited to the following: (1) its failure to promote [redacted] from "orientation" to regular status and denying [redacted] a clinical ladder promotion; (2) its repeated disciplining of [redacted] wrongfully and without basis, in ways that would

negatively affect her professional standing (both with Defendant Duke and generally) and her licensure; (3) its denial and interference in myriad ways with [redacted] receipt of income and fringe benefits, including insurance, from Defendant Duke; (4) its placing [redacted] on administrative leave and later compelling her to take an unpaid personal leave of absence for medical reasons; (5) failing to make any payments under the Nurse Loan Forgiveness Program; and (6) other ways described in this complaint or otherwise to be established by the proof at trial.

239. Defendant Duke lacked any justification for the adverse employment actions taken agains[redacted]

240. Any justification offered by Defendant Duke for its adverse employment actions is either false or insufficient to support the nature of the adverse employment actions taken.

241. Defendant Duke therefore violated Title VII, and [redacted] is entitled to the relief set out more fully below, including compensatory damages, back pay, front pay, compensation for benefits under the Nurse Loan Forgiveness Program, past and future medical and counseling expenses, interest, and reasonable attorneys' fees and costs of the action.

242. The events described here further justify an award of punitive damages under Title VII.

COUNT II:
Religious Discrimination in
Violation of Title VII
(Harassment/Hostile Work Environment)

243. The preceding paragraphs are hereby realleged and incorporated herein by reference.

244. Defendant Duke also subjected [redacted] to harassment and a hostile work environment because of her religion.

245. The statements of [redacted] during training regarding Defendant Duke's policy on religious accommodations and abortion constituted *quid pro quo* harassment on the basis of religion in violation of Title VII.

246. The statements of [redacted] during training regarding Defendant Duke's policies constituted part of a hostile work environment.

247. Additionally, the harassment and hostile work environment suffered by [redacted] on account of her religion further arose from a series of actions by Defendant Duke that include, but are not limited to, the following:

a. Imposing discipline on [redacted] for baseless, unsubstantiated, and ultimately pretextual reasons;

b. Imposing discipline that negatively affects [redacted] professional standing and/or licensure;

c. Violating its own internal policies and procedures regarding the imposition of discipline on employees;

d. Failing to articulate objective benchmarks by which to measure Ms. Pedro's progress as an employee;

e. Failing to properly communicate with [redacted]

f. Keeping [redacted] on "orientation" status longer than necessary and without cause, thereby subjecting her to embarrassment and ridicule;

g. Denying [redacted] the clinical ladder promotion she sought;

h. Failing to take steps to address harassing and hostile comments made to [redacted] by co-workers and otherwise failing to address hostile actions directed toward [redacted]

i. Sharing sensitive information about [redacted] employment status with her co-workers and even initiating harassment of [redacted]

j. Interfering with an internal investigation by its own human resources personnel into [redacted] allegations of unlawful discrimination and harassment;

k. Unreasonably delaying a decision on [redacted]'s second request for a religious accommodation;

l. Misleading [redacted] about when she might receive a decision on her second request for a religious accommodation as well as about other aspects of her request;

m. Not allowing [redacted] to work while her second request for a religious accommodation was pending;

n. Attempting to force [redacted] to engage in *ex parte* discussions with employees or agents of Defendant Duke related to her EEOC charge, and expressly denying [redacted] the right to have the assistance of counsel during such discussions;

o. Forcing [redacted] into taking a personal leave of absence due to medical reasons, thereby denying her pay and fringe benefits, including health insurance;

p. Wrongfully classifying [redacted] absence on January 28, 2017, as "unscheduled" and therefore subject to discipline;

q. Forcing [redacted] to pay for her own recertification exam and charging her a fee for not attending her previously scheduled ACLS class at Defendant Duke;

r. Preventing [redacted] from participating in Defendant Duke's PTO leave sharing program;

s. Failing to timely pay [redacted] and imposing unjustified obstacles to, and delays in, [redacted] receipt of her pay;

t. Violating federal and state wage and hour laws;

u. Exposing [redacted] to HIV in the course of her work and then failing to provide follow up HIV testing after denying her the economic means to obtain testing herself;

v. Failing to make any payments under the Nurse Loan Forgiveness Program;

w. Failing to update and maintain correct contact information with her insurers, thereby affecting her receipt of benefits;

x. Failing to respond to numerous inquiries regarding important employment issues; and/or

y. Other ways to be established by the proof at trial.

248. This course of conduct by Defendant Duke was motivated by [redacted] religion, including her religious beliefs and practices.

249. As such, Defendant Duke engaged in a series of separate acts which constitute one unlawful employment practice for purposes of anti-discrimination law.

250. The harassing conduct was so severe and pervasive that a reasonable person in [redacted] position would find her work environment to be hostile or abusive.

251. Defendant Duke has no training program to specifically educate its managers and other employees on the need to respect pro-life religious views or religious views that oppose vaccinations.

252. [redacted] complained of harassment to Defendant Duke. Nevertheless, Defendant Duke did nothing to remedy it.

253. Defendant Duke therefore violated Title VII, and [redacted] is entitled to the relief set out more fully below, including compensatory damages, back pay, front pay, compensation for benefits under the Nurse Loan Forgiveness Program, past and future medical and counseling expenses, interest, and reasonable attorneys' fees and costs of the action.

254. The events described here further justify an award of punitive damages under Title VII.

COUNT III:
Religious Discrimination in
Violation of Title VII
(Denial of Religious Accommodation)

255. The preceding paragraphs are hereby realleged and incorporated herein by reference.

256. Defendant Duke further discriminated against [redacted] by failing to grant (and/or constructively denying) her second request for religious accommodation of her sincerely held religious beliefs and religious practices.

257. [redacted] *bona fide* religious beliefs and practices conflict with certain of Defendant Duke's employment requirements.

258. [redacted] brought this conflict to the attention of Defendant Duke.

259. [redacted] religious beliefs and practices were the basis for Defendant Duke's adverse employment actions.

260. Accommodating [redacted] second request for religious accommodation would not have imposed an undue hardship on Defendant Duke.

261. Defendant Duke therefore violated Title VII, and [redacted] is entitled to the relief set out more fully below, including compensatory damages, back pay, front pay, compensation for benefits under the Nurse Loan Forgiveness Program, past and future medical and counseling expenses, interest, and reasonable attorneys' fees and costs of the action.

262. The events described here further justify an award of punitive damages under Title VII.

COUNT IV:
Retaliation in
Violation of Title VII

263. The preceding paragraphs are hereby realleged and incorporated herein by reference.

264. [redacted] engaged in activity protected by Title VII on several occasions while employed by Defendant Duke, including (but not limited to) making requests for religious accommodation, complaining about perceived discrimination and harassment, and filing a charge with the EEOC.

265. As set forth in the preceding paragraphs of this complaint, Defendant Duke subjected [redacted] to adverse employment actions at the time, and after, her protected conduct took place.

266. These adverse employment actions were serious enough that they well might have discouraged a reasonable worker from engaging in protected activity.

267. [redacted] was subjected to these adverse employment actions because of her protected conduct.

268. Defendant Duke therefore violated Title VII, and [redacted] is entitled to the relief set out more fully below, including compensatory damages, back pay, front pay, compensation for benefits under the Nurse Loan Forgiveness Program, past and future medical and counseling expenses, interest, and reasonable attorneys' fees and costs of the action.

269. The events described here further justify an award of punitive damages under Title VII.

COUNT V:
Constructive Discharge in
Violation of Title VII

270. The preceding paragraphs are hereby realleged and incorporated herein by reference.

271. To the extent it is found that [redacted] left her employment with Defendant Duke without being formally terminated, such action was the

result of conditions so intolerable that a reasonable person in [redacted] position would feel compelled to resign. Therefore, such action constitutes a constructive discharge in violation of Title VII.

272. Defendant Duke therefore violated Title VII, and [redacted] is entitled to the relief set out more fully below, including compensatory damages, back pay, front pay, compensation for benefits under the Nurse Loan Forgiveness Program, past and future medical and counseling expenses, interest, and reasonable attorneys' fees and costs of the action.

273. The events described here further justify an award of punitive damages under Title VII.

COUNT VI:
Termination in Violation of
North Carolina Public Policy

274. The preceding paragraphs are hereby realleged and incorporated herein by reference.

275. To the extent that Defendant Duke has terminated, or will in the future terminate, [redacted] employment, such termination (whether actual or constructive) was unlawful and in violation of North Carolina public policy.

276. Defendant Duke's action therefore gives rise to a claim pursuant to the North Carolina Equal Employment Practices Act, N.C. Gen. Stat. § 143-422.2, and North Carolina common law.

277. As a natural, foreseeable, and proximate result of the wrongful acts alleged herein, [redacted] has suffered loss of income and severe emotional distress and mental anguish as well as injury to her reputation.

278. Accordingly, [redacted] is entitled to the relief set out more fully below, including compensatory damages, back pay and front pay, compensation for benefits under the Nurse Loan Forgiveness Program, as well as past and future medical and counseling expenses and interest.

COUNT VII:
Violation of the
Fair Labor Standards Act

279. The preceding paragraphs are hereby realleged and incorporated herein by reference.

280. Defendant Duke failed to timely pay [redacted] certain wages and benefits (including benefits under the Nurse Loan Forgiveness Program) she was owed.

281. Defendant Duke's failure to make timely payment of [redacted] wages and benefits violated the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 *et seq.*

282. Defendant Duke's failure to pay [redacted] did not result from good faith and reasonable grounds for believing that its act or omission was not a violation of the Fair Labor Standards Act.

283. Defendant Duke is liable to [redacted] for compensatory and liquidated damages as well as attorneys' fees, expenses, and costs of the action under 29 U.S.C. § 216(b).

COUNT VIII:
Violation of the
North Carolina Wage & Hour Act

284. The preceding paragraphs are hereby realleged and incorporated herein by reference.

285. From August 2016 to the present, Defendant Duke has been [redacted] "employer" within the meaning of N.C. Gen. Stat. § 95-25.2(5) in that it acted directly or indirectly in the interest of an employer in relation to [redacted]

286. From August 2016 to the present, [redacted] has been an "employee" of Defendant Duke within the meaning of N.C. Gen. Stat. § 95-25.2(4).

287. As described above, Defendant Duke failed to pay [redacted] certain wages and benefits (including benefits under the Nurse Loan Forgiveness Program) within the time periods mandated pursuant to North Carolina law, including N.C. Gen. Stat. § 95-25.6 and/or N.C. Gen. Stat. § 95-25.7.

288. Defendant Duke knew that it owed [redacted] these wages and benefits.

289. Defendant Duke nonetheless failed to tender them in a timely manner.

290. Defendant Duke failed to tender these wages and benefits in the usual and customary manner.

291. As a direct and proximate result of Defendant Duke's failures, [redacted] suffered unreasonable delay and difficulty in receiving wages and benefits that Defendant Duke was legally obligated to pay her.

292. Defendant Duke's violations of the North Carolina Wage and Hour Act were knowing and willful.

293. Accordingly, [redacted] is entitled to compensatory damages as well as liquidated damages pursuant N.C. Gen. Stat. § 95-25.22(a1) in addition to interest under N.C. Gen. Stat. § 24-1, and attorneys' fees, costs, and fees related to bringing this action pursuant to N.C. Gen. Stat. § 95-25.22(d).

COUNT IX:
Breach of Contract

294. The preceding paragraphs are hereby realleged and incorporated herein by reference.

295. A legally valid and enforceable contract exists between Defendant Duke and [redacted] with respect to the Nurse Loan Forgiveness Program.

296. All conditions precedent to performance of the contract have occurred.

297. No conditions subsequent have excused Defendant Duke's performance.

298. Defendant Duke has breached this contract.

299. Defendant Duke's breach of contract was unjustified and without cause.

300. [redacted] has been damaged by Defendant Duke's breach of contract.

301. Accordingly, [redacted] is entitled to damages for Defendant Duke's breach of contract.

COUNT X:
Breach of the Covenant of
Good Faith and Fair Dealing

302. The preceding paragraphs are hereby realleged and incorporated herein by reference.

303. Defendant Duke was under an obligation to act in good faith and with fair dealing as to the terms of the contract it had with [redacted] for repayment of her student loans under the Nurse Loan Forgiveness Program.

304. Defendant Duke has breached its obligation to act in good faith and with fair dealing with respect to repayment of [redacted] student loans under the Nurse Loan Forgiveness Program.

305. Defendant Duke's breach of the covenant of good faith and fair dealing was unjustified and without cause.

306. [redacted] has been harmed as a result of Defendant Duke's breach of the covenant of good faith and fair dealing.

307. Accordingly, [redacted] is entitled to damages for Defendant Duke's breach of the covenant of good faith and fair dealing.

COUNT XI:
Intentional Infliction of
Emotional Distress

308. The preceding paragraphs are hereby realleged and incorporated herein by reference.

309. As described above, Defendant Duke has engaged in extreme and outrageous conduct, which was intended to cause severe emotional distress.

310. Defendant Duke's conduct has been without legal justification.

311. [redacted] has in fact sustained severe emotional distress as a direct and proximate result of Defendant Duke's conduct, entitling her to an award of compensatory damages, including past and future loss of income, compensation for benefits under the Nurse Loan Forgiveness Program, and past and future medical and counseling expenses.

COUNT XII:
Negligent Infliction of
Emotional Distress

312. The preceding paragraphs are hereby realleged and incorporated herein by reference.

313. Alternatively, the actions of Defendant Duke negligently inflicted emotional distress upon [redacted]

314. Defendant Duke owed a duty of care to [redacted]

315. Defendant Duke negligently breached that duty.

316. Defendant Duke was negligent in the following respects:

a. Violating its own internal policies regarding employee discipline;

b. Failing to reasonably manage its response to allegations of discrimination, harassment, and retaliation;

c. Failing to take reasonable steps to protect [redacted] following her complaints of discrimination, harassment, and retaliation;

d. Failing to properly manage [redacted] leave days, income, and fringe benefits so as to ensure she received what she was entitled to receive;

e. Providing incorrect wage payments and failing to promptly correct or clarify its errors;

f. Exposing [redacted] to HIV in the course of her work and then failing to provide follow up HIV testing after denying her the economic means to obtain testing herself; and/or

g. Other ways to be established by the proof at trial.

317. It was reasonably foreseeable that this negligent conduct would cause [redacted] severe emotional distress and mental anguish.

318. As a direct and proximate result of Defendant Duke's negligence, [redacted] has in fact sustained severe emotional distress and mental anguish, entitling her to an award of compensatory damages, including past and future loss of income, compensation for benefits under the Nurse Loan Forgiveness Program, and past and future medical and counseling expenses.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff [redacted] respectfully prays that the Court grant her the following relief:

1. Grant her a trial by jury on all claims so triable;

2. Grant her compensatory damages for back pay, lost fringe benefits, benefits under the Nurse Loan Forgiveness Program, past and future medical and counseling expenses, past and future emotional distress, past and future pain and suffering, past and future loss of enjoyment of life, loss of personal property, expenses necessary to secure new employment, and past and future injury to her reputation;

3. Grant her an award of front pay, including future fringe benefits;

4. Grant her an award of punitive damages pursuant to 42 U.S. Code § 1981a(b)(1);

5. Grant her liquidated damages pursuant to 29 U.S.C. § 216(b) and N.C. Gen. Stat. § 95-25.22(a1);

6. Grant her prejudgment and post-judgment interest;

7. Grant her attorneys' fees and costs pursuant 42 U.S.C. § 2000e-5(k), 29 U.S.C. § 216(b), N.C. Gen. Stat. § 95-25.22(d), and as may be otherwise allowed by applicable law;

8. Tax costs of this action against Defendant Duke University and/or Defendant Duke University Health System, Inc.; and

9. Grant her such other and further relief as the Court may deem just and proper.

Respectfully submitted, this the 27th day of October, 2017.

THOMAS MORE LAW CENTER

BY: s/ [redacted]

[redacted]

*Admitted to practice law in North Carolina, South Carolina, and Tennessee. Not admitted to practice law in Michigan.

† *Pro hac vice* pursuant to L.R. 83.1(d).

JS 44 (Rev. 06/17)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

I. (a) PLAINTIFFS

Sara Theresa Pedro

(b) County of Residence of First Listed Plaintiff: Bronx (New York)
(EXCEPT IN U.S. PLAINTIFF CASES)

[redacted]

DEFENDANTS

Duke University and Duke University Health System, Inc.

County of Residence of First Listed Defendant: Durham (North Carolina)
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question *(U.S. Government Not a Party)*
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*
(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated or Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated and Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

Click here for: Nature of Suit Code Descriptions.

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
☐ 110 Insurance ☐ 120 Marine ☐ 130 Miller Act ☐ 140 Negotiable Instrument ☐ 150 Recovery of Overpayment & Enforcement of Judgment ☐ 151 Medicare Act ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans) ☐ 153 Recovery of Overpayment of Veteran's Benefits ☐ 160 Stockholders' Suits ☐ 190 Other Contract ☐ 195 Contract Product Liability ☐ 196 Franchise	PERSONAL INJURY ☐ 310 Airplane ☐ 315 Airplane Product Liability ☐ 320 Assault, Libel & Slander ☐ 330 Federal Employers' Liability ☐ 340 Marine ☐ 345 Marine Product Liability ☐ 350 Motor Vehicle ☐ 355 Motor Vehicle Product Liability ☐ 360 Other Personal Injury ☐ 362 Personal Injury - Medical Malpractice	PERSONAL INJURY ☐ 365 Personal Injury - Product Liability ☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability ☐ 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY ☐ 370 Other Fraud ☐ 371 Truth in Lending ☐ 380 Other Personal Property Damage ☐ 385 Property Damage Product Liability	☐ 625 Drug Related Seizure of Property 21 USC 881 ☐ 690 Other	☐ 422 Appeal 28 USC 158 ☐ 423 Withdrawal 28 USC 157 PROPERTY RIGHTS ☐ 820 Copyrights ☐ 830 Patent ☐ 835 Patent - Abbreviated New Drug Application ☐ 840 Trademark SOCIAL SECURITY ☐ 861 HIA (1395ff) ☐ 862 Black Lung (923) ☐ 863 DIWC/DIWW (405(g)) ☐ 864 SSID Title XVI ☐ 865 RSI (405(g))	☐ 375 False Claims Act ☐ 376 Qui Tam (31 USC 3729(a)) ☐ 400 State Reapportionment ☐ 410 Antitrust ☐ 430 Banks and Banking ☐ 450 Commerce ☐ 460 Deportation ☐ 470 Racketeer Influenced and Corrupt Organizations ☐ 480 Consumer Credit ☐ 490 Cable/Sat TV ☐ 850 Securities/Commodities/ Exchange ☐ 890 Other Statutory Actions ☐ 891 Agricultural Acts ☐ 893 Environmental Matters ☐ 895 Freedom of Information Act ☐ 896 Arbitration ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision ☐ 950 Constitutionality of State Statutes
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS	LABOR	FEDERAL TAX SUITS	
☐ 210 Land Condemnation ☐ 220 Foreclosure ☐ 230 Rent Lease & Ejectment ☐ 240 Torts to Land ☐ 245 Tort Product Liability ☐ 290 All Other Real Property	☐ 440 Other Civil Rights ☐ 441 Voting ☒ 442 Employment ☐ 443 Housing/ Accommodations ☐ 445 Amer. w/Disabilities - Employment ☐ 446 Amer. w/Disabilities - Other ☐ 448 Education	Habeas Corpus: ☐ 463 Alien Detainee ☐ 510 Motions to Vacate Sentence ☐ 530 General ☐ 535 Death Penalty Other: ☐ 540 Mandamus & Other ☐ 550 Civil Rights ☐ 555 Prison Condition ☐ 560 Civil Detainee - Conditions of Confinement	☐ 710 Fair Labor Standards Act ☐ 720 Labor/Management Relations ☐ 740 Railway Labor Act ☐ 751 Family and Medical Leave Act ☐ 790 Other Labor Litigation ☐ 791 Employee Retirement Income Security Act IMMIGRATION ☐ 462 Naturalization Application ☐ 465 Other Immigration Actions	☐ 870 Taxes (U.S. Plaintiff or Defendant) ☐ 871 IRS—Third Party 26 USC 7609	

V. ORIGIN *(Place an "X" in One Box Only)*

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing *(Do not cite jurisdictional statutes unless diversity)*:
42 U.S.C. § 2000e et seq.; 29 U.S.C. § 201 et seq.; 28 U.S.C. § 1367(a).

Brief description of cause:
Religious discrimination, harassment, and retaliation under Title VII; FLSA; NC statutory and common law claims.

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND $ CHECK YES only if demanded in complaint.
JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY *(See instructions)*: JUDGE DOCKET NUMBER

DATE: 10/27/2017

SIGNATURE OF ATTORNEY OF RECORD: [redacted]

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE

JS 44 Reverse (Rev. 06/17)

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I.(a) **Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) **County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) **Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. **Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)

III. **Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. **Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: Nature of Suit Code Descriptions.

V. **Origin.** Place an "X" in one of the seven boxes.
Original Proceedings. (1) Cases which originate in the United States district courts.
Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket.
PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statue.

VI. **Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service

VII. **Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. **Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

Exhibit 8

ACLJ
American Center for Law & Justice

January 10, 2018

Centralized Case Management Operations
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Room 509F HHH Bldg.
Washington, D.C. 20201

Re: Complaint for Discrimination by State of Hawaii in Violation of Federal Conscience-Protecting Statutes

Contact attorney for complainants:

[redacted]
American Center for Law and Justice
6375 New Hope Rd.
P.O. Box 60
New Hope, KY 40052
(502) 549-7020
[redacted]@aclj.org

Complaints filed on behalf of:

Aloha Pregnancy Care and Counseling Center, Inc.
45-1151 G Kamehameha Hwy.
Kaneohe, HI 96744
(808) 234-7233

Person/Agency/Organization committing discrimination:

State of Hawaii
c/o Attorney General Douglas Chin
Department of the Attorney General
425 Queen Street
Honolulu, HI 96813
(808) 586-1500

Date and nature of discriminatory acts:

On July 12, 2017, the Hawaii legislature enacted Hawaii Senate Bill 501 (hereafter, "the Act"), a bill which compels limited service pregnancy centers, such as the Complainant, to disseminate a message crafted by the State which is, in effect, an advertisement for free or low-cost contraceptive services and abortions. A copy of the law is attached.

Among other things, the Act requires that certain facilities, such as those operated by Complainant, post in their waiting rooms, or distribute to their clients in written or digital form, a

message from the State of Hawaii that the State "has public programs that provide immediate free or low-cost access to comprehensive family planning services, including, but not limited to, all FDA-approved methods of contraception and pregnancy-related services for eligible women." One of the "comprehensive family planning services" that Hawaii pays for is elective abortions.

Those who fail or refuse to comply with the Act are subject to a civil penalty of $500 for a first offense and $1000 for each subsequent offense.

Complainant is a non-profit, faith-based pregnancy resource center that offers pregnancy related care and counseling to its clients free of charge and consistent with Complainant's religious beliefs. Those beliefs compel Aloha not to perform, counsel for, or provide referrals for, or education about contraceptives or abortion. Because of these beliefs, Complainant objects to posting or distributing the State's dictated message, because they view it as requiring them to approve of and refer for contraceptives and abortions. At a minimum, the Act unlawfully requires Complainant's counselors to tailor their discussion of contraception and abortion in a manner and at a time dictated by the State instead of by the Complainant itself.

Inasmuch as the Act compels the Complainant to participate in, and refer for contraception and abortions, it violates Complainant's rights under at least two federal conscience-protecting statutes:

- The Public Health Service Act, 42 USC § 238n, prohibiting the federal government and any state or local government receiving federal financial assistance from discriminating against any health care entity on the basis that the entity: 1) *refuses* to undergo training in the performance of induced abortions, to require or provide such training, *to perform such abortions, or to provide referrals for such training or such abortions*; 2) refuses to make arrangements for such activities; or 3) attends (or attended) a post-graduate physician training program, or any other program of training in the health professions, that does not (or did not) perform induced abortions or require, provide, or refer for training in the performance of induced abortions, or make arrangements for the provision of such training (emphasis added);

- The Weldon Amendment, originally passed as part of the HHS appropriation and readopted (or incorporated by reference) in each subsequent HHS appropriations act since 2005. It provides that "[n]one of the funds made available in this Act [making appropriations for the Departments of Labor, Health and Human Services, and Education] may be made available to a Federal agency or program, *or to a state or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions*" (emphasis added). It also defines "health care entity" to include "an individual physician or other health care professional, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, or any other kind of health care facility, organization, or plan."

The Complainant herein faces ongoing discrimination by the State of Hawaii which is currently defending the discriminatory aspects of the law in U.S. District Court.[1] The Complainant hereby requests OCR to investigate this matter and take appropriate action to remedy this ongoing discrimination in violation of federal law.

Date: January 10, 2018

AMERICAN CENTER FOR LAW AND JUSTICE

By: [redacted]

[1] The Complainant and the State are currently litigating the constitutionality of the Act in the matter of *Aloha Pregnancy Care and Counseling v. Chin*, Case No. 1:17-cv-00343 (D. Haw.).

THE SENATE
TWENTY-NINTH LEGISLATURE, 2017
STATE OF HAWAII

S.B. NO. 501 S.D. 1 H.D. 2 C.D. 1

A BILL FOR AN ACT

RELATING TO HEALTH.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. The legislature finds that all women in Hawaii, regardless of income, should have meaningful access to effective reproductive health services. Public programs providing insurance coverage and direct services for reproductive health care and counseling to eligible, low-income women are currently available through the department of health and department of human services.

Thousands of women in Hawaii are in need of publicly-funded family planning services, contraception services and education, pregnancy-related services, prenatal care, and birth-related services. In 2010, sixteen thousand women in Hawaii experienced an unintended pregnancy, which can carry enormous social and economic costs to both individual families and to the State. Many women in Hawaii, however, remain unaware of the public programs available to provide them with contraception, health education and counseling, family planning, prenatal care, pregnancy-related, and birth-related services.

Because family planning decisions are time sensitive and care early in pregnancy is important, Hawaii must make every possible effort to advise women of all available reproductive health programs. In Hawaii, low-income women can receive immediate access to free or low-cost comprehensive family planning services and pregnancy-related care through Med-QUEST and the department of health's family planning program. Providers who contract with these programs are able to immediately enroll patients in these programs at the time of a health center visit.

Requiring facilities that provide pregnancy- or family planning-related services to provide accurate health information and to inform clients of the availability of and enrollment procedures for reproductive health programs will help ensure that all women in the State can quickly obtain the information and services that they need to make and implement informed, timely, and personally appropriate reproductive health decisions.

The purpose of this Act is to ensure that women in Hawaii are able to make personal reproductive health decisions with

full and accurate information regarding their rights to access the full range of health care services that are available.

SECTION 2. Chapter 321, Hawaii Revised Statutes, is amended by adding two new sections to be appropriately designated and to read as follows:

"**§321-A Limited service pregnancy centers; notice of reproductive health services.** (a) For purposes of this section, "limited service pregnancy center" or "center":

(1) Means a facility that:

(A) Advertises or solicits clients or patients with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling;

(B) Collects health information from clients or patients; and

(C) Provides family planning or pregnancy-related services, including but not limited to obstetric ultrasound, obstetric sonogram, pregnancy testing, pregnancy diagnosis, reproductive health counseling, or prenatal care; and

(2) Shall not include a health care facility. For the purposes of this paragraph, a "health care facility"

means any facility designed to provide comprehensive health care, including but not limited to hospitals licensed pursuant to chapter 321, intermediate care facilities, organized ambulatory health care facilities, emergency care facilities and centers, health maintenance organizations, federally qualified health centers, and other facilities providing similarly organized comprehensive health care services.

(b) Every limited service pregnancy center in the State shall disseminate on-site to clients or patients the following written notice in English or another language requested by a client or patient:

"Hawaii has public programs that provide immediate free or low-cost access to comprehensive family planning services, including, but not limited to, all FDA-approved methods of contraception and pregnancy-related services for eligible women.

To apply online for medical insurance coverage, that will cover the full range of family planning and prenatal care services, go to mybenefits.hawaii.gov.

Only ultrasounds performed by qualified healthcare professionals and read by licensed clinicians should be considered medically accurate."

The notice shall contain the internet address for online medical assistance applications and the statewide phone number for medical assistance applications.

(c) The information required by subsection (b) shall be disclosed in at least one of the following ways:

(1) A public notice on a sign sized at least eight and one-half inches by eleven inches, written in no less than twenty-two point type, and posted in a clear and conspicuous place within the center's waiting area so that it may be easily read by individuals seeking services from the center; or

(2) A printed or digital notice written or rendered in no less than fourteen point type that is distributed individually to each patient or client at the time of check-in for services; provided that a printed notice shall be available to all individuals who cannot or do not wish to receive the notice in a digital format.

(d) No limited service pregnancy center that collects health information from any individual seeking or receiving its services shall disclose any individually identifiable health information to any other person, entity, or organization without express written authorization from the subject individual. Any disclosure made under this section shall be limited by the express terms of the written authorization and all applicable state and federal laws and regulations, including the federal Health Insurance Portability and Accountability Act of 1996 and title 45 Code of Federal Regulations part 164.

(e) A limited service pregnancy center that provides or assists in the provision of pregnancy testing shall provide the individual tested with a free written statement of the results of the pregnancy test in English or another language requested by a client or patient immediately after the test is completed.

(f) Upon receipt of a written request from an individual to examine or copy all or part of the individual's recorded health information or other information retained by a limited service pregnancy center, the center shall, promptly as required under the circumstances but in no case later than fifteen working days after receiving the request:

(1) Make the information available for examination by the individual during regular business hours;

(2) Provide a free copy to the individual, if requested;

(3) Inform the individual if the information does not exist or cannot be found; and

(4) If the center does not maintain the record or information, inform the individual of that fact and provide the name and address of the entity that maintains the record or information.

§321-B Limited service pregnancy centers; enforcement; private right of action. (a) A limited service pregnancy center that violates section 321-A shall be liable for a civil penalty of $500 for a first offense and $1,000 for each subsequent offense. If the center is provided with reasonable notice of noncompliance, which informs the center that it is subject to a civil penalty if it does not correct the violation within thirty days from the date the notice is sent to the center, and the violation is not corrected as of the expiration of the thirty-day notice period, the attorney general may bring an action in the district court of the district in which the center is located to enforce this section.

A civil penalty imposed pursuant to this subsection shall be deposited to the credit of the general fund.

(b) Any person who is aggrieved by a limited service pregnancy center's violation of section 321-A may bring a civil action against the limited service pregnancy center in the district court of the district in which the center is located to enjoin further violations and to recover actual damages sustained together with the costs of the suit including reasonable attorneys' fees. The court may, in its discretion, increase the award of damages to an amount not to exceed three times the actual damages sustained. If damages are awarded pursuant to this subsection, the court may, in its discretion, impose on a liable center a civil fine of not more than $1,000 to be paid to the plaintiff.

A party seeking civil damages under this subsection may recover upon proof of a violation by a preponderance of the evidence.

For the purposes of this subsection, "person" includes a natural or legal person.

(c) The enforcement procedure and remedies provided by this section shall be in addition to any other procedure or

remedy that may be available to the State or a person aggrieved by a violation of this chapter.

(d) This section and section 321-A are not intended to require regulation or oversight of limited service pregnancy centers by the department of health."

SECTION 3. In codifying the new sections added by section 2 of this Act, the revisor of statutes shall substitute appropriate section numbers for the letters used in designating the new sections in this Act.

SECTION 4. If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the invalidity does not affect other provisions or applications of the Act that can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable.

SECTION 5. New statutory material is underscored.

SECTION 6. This Act shall take effect upon its approval.

S.B. NO. 501 S.D. 1 H.D. 2 C.D. 1

Report Title:
Limited Service Pregnancy Centers; Disclosures; Privacy; Remedy

Description:
Requires all limited service pregnancy centers to disclose the availability of and enrollment information for reproductive health services. Defines limited service pregnancy center. Establishes privacy and disclosure requirements for individual records and information. Authorizes civil penalties and civil actions for enforcement and remedy. (CD1)

The summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent.

2017-2606 SB501 CD1 SMA-3.doc

Exhibit 9

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

DEPARTMENT OF HEALTH AND HUMAN SERVICES

OFFICE FOR CIVIL RIGHTS (OCR)

CIVIL RIGHTS DISCRIMINATION COMPLAINT

YOUR FIRST NAME	YOUR LAST NAME
[redacted]	[redacted]
H CELL PHONE (Please include area code)	W PHONE (Please include area code)
[redacted]	[redacted]
STREET ADDRESS	CITY
[redacted]	[redacted]
ST [redacted]	E-MAIL ADDRESS (If availa [redacted]
[redacted]	[redacted]

Are you filing this complaint for someone else? ☒ Yes ☐ No

If Yes, whose civil rights do you believe were violated?

FIRST NAME	LAST NAME
The Little Sisters of the Poor	

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

☐ Race / Color / National Origin ☐ Age ☒ Religion ☐ Sex

☐ Disability ☐ Other (specify): _____

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

PERSON/AGENCY/ORGANIZATION

Commonwealth of Pennsylvania, Attorney General Josh Shapiro

STREET ADDRESS	CITY
Office of Attorney General , Strawberry Square, 16th Floor	Harrisburg

STATE	ZIP	PHONE (Please include area code)
Pennsylvania	17120	(717) 787-3391

When do you believe that the civil right discrimination occurred?

LIST DATE(S)

10/11/2017, 01/11/2018

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

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

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

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

SIGNATURE	DATE *(mm/dd/yyyy)*
[redacted]	01/11/2018

Filing a complaint with OCR is voluntary. However, without the information requested above, OCR may be unable to proceed with your complaint. We collect this information under authority of Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of1973 and other civil rights statutes. We will use the information you provide to determine if we have jurisdiction and, if so, how we will process your complaint. Information submitted on this form is treated confidentially and is protected under the provisions of the Privacy Act of 1974. Names or other identifying information about individuals are disclosed when it is necessary for investigation of possible discrimination, for internal systems operations, or for routine uses, which include disclosure of information outside the Department of Health and Human Services (HHS) for purposes associated with civil rights compliance and as permitted by law. It is illegal for a recipient of Federal financial assistance from HHS to intimidate, threaten, coerce, or discriminate or retaliate against you for filing this complaint or for taking any other action to enforce your rights under Federal civil rights laws. You are not required to use this form. You also may write a letter or submit a complaint electronically with the same information. To submit an electronic complaint, go to OCR's web site at: **www.hhs.gov/ocr/civilrights/complaints/index.html**. To mail a complaint see reverse page for OCR Regional addresses.

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

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

☐ Braille ☐ Large Print ☐ Cassette tape ☐ Computer diskette ☐ Electronic mail ☐ TDD

☐ Sign language interpreter (specify language): _____

☐ Foreign language interpreter (specify language): _____ ☐ Other: _____

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

FIRST NAME	LAST NAME
HOME / CELL PHONE (Please include area code)	WORK PHONE (Please include area code)

STREET ADDRESS	CITY

STATE	ZIP	E-MAIL ADDRESS (If available)

Have you filed your complaint anywhere else? If so, please provide the following. (Attach additional pages as needed)

PERSON/AGENCY/ORGANIZATION/ COURT NAME(S)

DATE(S) FILED	CASE NUMBER(S) (If known)

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

ETHNICITY (select one)

☐ Hispanic or Latino

☐ Not Hispanic or Latino

RACE (select one or more)

☐ American Indian or Alaska Native ☐ Asian ☐ Native Hawaiian or Other Pacific Islander

☐ Black or African American ☐ White ☐ Other (specify): _____

PRIMARY LANGUAGE SPOKEN (if other then English) _____

How did you learn about the Office for Civil Rights?

☒ HHS Website/Internet Search ☐ Family/Friend/Associate ☐ Religious/Community Org ☐ Lawyer/Legal Org ☐ Phone Directory ☐ Employer

☐ Fed/State/Local Gov ☐ Healthcare Provider/Health Plan ☐ Conference/OCR Brochure ☐ Other (specify): _____

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

Region I - CT, ME, MA, NH, RI, VT
Office for Civil Rights, DHHS
JFK Federal Building - Room 1875
Boston, MA 02203
(617) 565-1340; (617) 565-1343 (TDD)
(617) 565-3809 FAX

Region II - NJ, NY, PR, VI
Office for Civil Rights, DHHS
26 Federal Plaza - Suite 3312
New York, NY 10278
(212) 264-3313; (212) 264-2355 (TDD)
(212) 264-3039 FAX

Region III - DE, DC, MD, PA, VA, WV
Office for Civil Rights, DHHS
150 S. Independence Mall West - Suite 372
Philadelphia, PA 19106-3499
(215) 861-4441; (215) 861-4440 (TDD)
(215) 861-4431 FAX

Region IV - AL, FL, GA, KY, MS, NC, SC, TN
Office for Civil Rights, DHHS
61 Forsyth Street, SW. - Suite 16T70
Atlanta, GA 30303-8909
(404) 562-7886; (404) 562-7884 (TDD)
(404) 562-7881 FAX

Region V - IL, IN, MI, MN, OH, WI
Office for Civil Rights, DHHS
233 N. Michigan Ave. - Suite 240
Chicago, IL 60601
(312) 886-2359; (312) 353-5693 (TDD)
(312) 886-1807 FAX

Region VI - AR, LA, NM, OK, TX
Office for Civil Rights, DHHS
1301 Young Street - Suite 1169
Dallas, TX 75202
(214) 767-4056; (214) 767-8940 (TDD)
(214) 767-0432 FAX

Region VII - IA, KS, MO, NE
Office for Civil Rights, DHHS
601 East 12th Street - Room 248
Kansas City, MO 64106
(816) 426-7277; (816) 426-7065 (TDD)
(816) 426-3686 FAX

Region VIII - CO, MT, ND, SD, UT, WY
Office for Civil Rights, DHHS
999 18th Street, Suite 417
Denver, CO 80202
(303) 844-2024; (303) 844-3439 (TDD)
(303) 844-2025 FAX

Region IX - AZ, CA, HI, NV, AS, GU, The U.S. Affiliated Pacific Island Jurisdictions
Office for Civil Rights, DHHS
90 7th Street, Suite 4-100
San Francisco, CA 94103
(415) 437-8310; (415) 437-8311 (TDD)
(415) 437-8329 FAX

Region X - AK, ID, OR, WA
Office for Civil Rights, DHHS
701 Fifth Avenue, Suite 1600, MS - 11
Seattle, WA 98104
(206) 615-2290; (206) 615-2296 (TDD)
(206) 615-2297 FAX

Burden Statement

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

HHS-699 (7/09) (BACK)

COMPLAINANT CONSENT FORM

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

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

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

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

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

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

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

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

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

- I am also aware of the obligations of OCR to honor requests under the Freedom of Information Act (FOIA). I understand that it may be necessary for OCR to disclose information, including personally identifying information, which it has gathered as part of its investigation of my complaint.

- In addition, I understand that as a complainant I am covered by the Department of Health and Human Services' (HHS) regulations which protect any individual from being intimidated, threatened, coerced, retaliated against, or discriminated against because he/she has made a complaint, testified, assisted, or participated in any manner in any mediation, investigation, hearing, proceeding, or other part of HHS' investigation, conciliation, or enforcement process.

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

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

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

Signature: [redacted] Date: 01/11/2018

**Please sign and date need to sign if submitting this form by email because submission by email represents your signature.*

Name (Please print): [redacted]

Address: [redacted]

Telephone Number: [redacted]

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

Privacy Act

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

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

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

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

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

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

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

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

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

PROTECTING PERSONAL INFORMATION IN COMPLAINT INVESTIGATIONS

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

HOW DOES OCR PROTECT MY PERSONAL INFORMATION?

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

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

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

CAN I SEE MY OCR FILE?

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

CAN OCR GIVE MY FILE TO ANY ONE ELSE?

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

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

CAN ANYONE ELSE SEE THE INFORMATION IN MY FILE?

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

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

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

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

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

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

OR

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

Exhibit 10

RICHARD C. BAKER
WHITMAN H. BRISKY
JOHN W. MAUCK
NOEL W. STERETT

SORIN A. LEAHU

MAUCK & BAKER, LLC

[redacted]
OF COUNSEL

ONE NORTH LASALLE STREET, SUITE 600
CHICAGO, ILLINOIS 60602

WWW.MAUCKBAKER.COM
TEL: 312.726.1243 FAX: 866.619.8661

January 16, 2018

Via E-Mail and U.S. Mail: OCRComplaint@hhs.gov

Centralized Case Management Operations
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Room 509F HHH Bldg.
Washington, DC 20201

Re: Complaint of Discrimination in Violation of Federal Statutes

Dear Sir or Madam:

Mauck & Baker, LLC, represents [redacted] (also known as [redacted]), a licensed practical nurse ("LPN") who was subjected to unlawful discrimination by the Winnebago County Health Department, a state agency subject to the Church Amendments (42 U.S.C. § 300a-7), the Public Health Service (PHS) Act (§ 245 (42 U.S.C. § 238n)), and/or the Weldon Amendment (Continuing Appropriations Resolution, Pub. L. No. 113-164, Sec. 101(a) (Sept. 19, 2015)) by virtue of its status as a recipient of federal funding.

[redacted]s a pediatric nurse with forty years of experience. She serves as a nurse in furtherance of and in conformance with her religious convictions to care for children. Her religious convictions also prohibit her from performing, assisting in, referring for, or participating in any way with abortion or abortion-causing drugs. Her right to serve as a pediatric nurse without violating her conscience or compromising her religious convictions relating to abortion or abortion-causing drugs are protected by the First Amendment to the United States Constitution, the Constitution of the State of Illinois, the Illinois Religious Freedom Restoration Act, 775 ILCS 35/15, and the Illinois Healthcare Right of Conscience Act, 745 ILCS 70/1 *et seq*, in addition to the federal conscience clauses named above.

For nearly eighteen years [redacted] served as a pediatric nurse at the Winnebago County Health Department and until 2015 was never forced to participate in abortion related services. However, in the summer of 2015, the county's new Public Health Administrator, [redacted] informed [redacted] that she could no longer work in the health department clinics if she was unwilling to participate in the provision of abortion related

services. Her termination had nothing to do with her performance as [redacted] had recently received the "Employee of the Week" and "Employee of the Quarter" awards.

The attached First Amended Complaint, [redacted] *et al.*, Case No. 2016 L 160, (attached as Exhibit 1), contains the factual and legal descriptions of specific violations of our clients' rights. The letter from [redacted] to [redacted] dated June 30, 2015 (Ex. B to the First Amend. Compl.) shows that [redacted] informed [redacted] that she was basing her decision to terminate [redacted] from the clinic environment on account of [redacted] religious convictions and conscientious objections and also on account of the terms of the federal grants the health department receives. The Defendants' "Third Affirmative Defense" (attached as Exhibit 2) shows how the Health Department has tried to justify its unlawful discrimination against Sandra by referring to the terms of Title X and the federal funds it receives. But as the aforementioned federal conscience clauses make plain, Title X and the terms of the federal grants actually *prohibited* [redacted] termination on account of her religious and conscientious objections.

[redacted] state court case is pending before the Circuit Court of Winnebago County in Rockford, Illinois. On February 15, 2018, the court will hold a status hearing at which the judge may rule on the parties' cross-motions for summary judgment.

Please promptly inform us of the actions your office plans to take regarding this violation. Thank you for your attention to this matter.

Sincerely yours,

[redacted]

cc: Client
[redacted] Assistant Deputy States Attorney for Winnebago County

Exhibit 11

ACLJ
American Center for Law & Justice

May 9, 2018

RECEIVED
MAY 11 2018
HHS/OCR HQ

Centralized Case Management Operations
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Room 509F HHH Bldg.
Washington, D.C. 20201

Attn: Conscience and Religious Freedom Division

Re: Complaint for Discrimination in Violation of 42 U.S.C. § 300a-7(c)(1) ("Church Amendment")

Contact attorney for complainant:

Francis J. Manion, Esq.
Geoffrey R. Surtees, Esq.
American Center for Law and Justice
6375 New Hope Rd.
P.O. Box 60
New Hope, KY 40052
502-549-7020
fmanion@aclj.org

Complaint filed on behalf of:

[redacted]

Person/Agency/Organization committing discrimination:

The University of Vermont Medical Center
111 Colchester Avenue
Burlington, Vermont 05401
802-847-0000

Date and nature of discriminatory acts:

In 2017, the complainant, [redacted] RN, was coerced by her employer, University of Vermont Medical Center, Inc. ("UVMMC") into participating in an abortion. Ms [redacted] a Catholic, had previously informed her employer that she

6375 New Hope Road
New Hope, Kentucky 40052
(502) 549-7020
(502) 549-5252 (Facsimile)

could not participate in such procedures as a matter of religious belief. Her employer deliberately misled [redacted] about the nature of the procedure, and then, after [redacted] confirmed that she was, in fact, being assigned to an abortion, refused her request that other equally qualified and available personnel take her place. Fearing a charge of patient abandonment which could bring with it loss of employment and revocation of her nursing license, [redacted] participated in the procedure under duress. She suffered immediate emotional distress, attempted to suppress the event psychologically, and has been haunted by nightmares ever since. In addition, her employer has created a hostile environment targeting [redacted] and other employees who conscientiously object to participating in abortion procedures.

The coerced-participation event described above appears to have been related to a change in UVMMC policy regarding the hospital's performance of abortions. Under the leadership, since 2013, of a hospital board President with decades-long experience in senior leadership of Planned Parenthood facilities in Vermont, Portland, Oregon, and New York City, UVMMC reversed a longstanding policy which limited abortions in its facilities to those considered "medically necessary." While the policy appears to have been changed *sub silentio* at some point even before 2017, hospital staff, including [redacted] and other nurses, were only formally informed of the change in October of 2017. Thus, it is highly possible that other staff and, perhaps, [redacted] herself, have been deceived into participating in other abortion procedures which were misleadingly labeled as "miscarriages" or "medically necessary" but which were, in fact, purely elective abortions.

In addition, following public controversy which arose after the formal disclosure to staff of the hospital's new policy in the Fall of 2017, UVMMC, in February 2018, adopted a revised "Conflict of Care" policy. (Copy attached hereto). This policy is sharply inconsistent with existing federal conscience laws and inappropriately continues to leave the conscience rights of hospital employees to the virtually unbridled discretion of supervisors who, as [redacted] and others will attest, have a history of demeaning, belittling, and failing to respect the views of conscientious objectors.

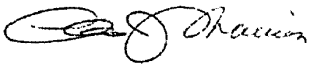
The Church Amendment protects the conscience rights of individuals and entities that object to performing or assisting in the performance of abortion or sterilization procedures if doing so would be contrary to the provider's religious beliefs or moral convictions, and prohibits discrimination in employment of "any physician or other health care personnel . . . because of his religious beliefs or moral convictions respecting sterilization procedures or abortions." 42 U.S.C. §300a-7 *et seq.*

It is clear that [redacted] (and perhaps others employed at UVMMC) has suffered and continues to suffer discrimination and violations of her conscience rights under federal law. We urge your office to immediately initiate an

investigation of these charges and order appropriate remedial and corrective actions as soon as possible.

Our investigation has disclosed identities and contact information of individuals in addition to our client who have information pertinent to this matter. That information, to the extent said individuals have already spoken publicly about it or authorize us to disclose it, will be provided upon request.

Respectfully submitted,



Francis J. Manion
Senior Counsel
American Center for Law & Justice

Date: May 9, 2018

Documents Status: **Approved**

IDENT	HR-F-09
Type of Document	Policy
Applicability Type	Corporate
Title of Owner	Dir Human Resources
Title of Approving Official	VP Human Resources
Date Effective	2/5/2018
Date of Next Review	2/5/2021

THE University of Vermont MEDICAL CENTER

TITLE: Conflict of Care: Staff Conscientious Objection

PURPOSE: UVM Medical Center respects workforce diversity and the cultural values, ethics and religious beliefs of our staff. In situations where a conflict may exist between the employee's cultural values, ethics, and religious beliefs and their participation in any aspect of patient care, UVMMC supports a process by which an employee may request to be excused from performing specific duties.

Patients and their families' perspectives and choices are valued and honored in all phases of care. Accordingly, all patients are entitled to comprehensive, quality care, without regard to their diagnosis, race, color, sex, sexual orientation, gender identity or expression, ancestry, place of birth, HIV status, national origin, religion, marital status, age, language, socioeconomic status, physical or mental disability, protected veteran status.

UVMMC encourages open dialogue between the employee and their leader.

POLICY STATEMENT: Employees may request to be excused from participating in a type of care/treatment in situations where that care/treatment conflicts with the employee's cultural values, ethics, or religious beliefs. Procedures/treatments which may present conflict may include but are ***not limited*** to the following:

- Blood and blood component administration
- Elective termination of pregnancy
- Initiation and cessation of life support
- DNR/Life support issues for critically ill/terminally ill populations
- Assisting with the harvesting of human organs
- Sterilization procedures
- Reproductive technologies

Alternative staffing arrangements will be considered, and if appropriate, arranged. At no time will staff be allowed to act in a manner that negatively impacts the patient's care or treatment.

PROCEDURE:

I. When the need to provide care or treatment of a patient is in conflict with an employee's cultural values, ethics or religious beliefs, the employee may request to be reassigned to other duties and not participate in the specific type of care or treatment. In the event a conflict of care arises, care of the patient will be maintained until alternate staffing arrangements can be provided.

II. UVMMC supports open dialogue between the employee and their leader when a conflict exists for the employee. We recognize that not all conflicts can be predicted. When possible we encourage employees to proactively raise concerns about potential conflicts in order to minimize impact to patient care.

III. During the hiring process, the hiring manager shall discuss the typical scope of practice and service within the department in which the candidate has applied to work. Employees are expected to perform all the duties of their positions as set forth in their job descriptions, given to them at the time of hire or whenever revised.

IV. All new employees are informed about this Conflict of Care policy during new employee orientation.

Printed on: 4/12/2018 11:00 AM By: [redacted]
DISCLAIMER: Only the online policy is considered official. Please compare with on-line document for accuracy.

Documents Status: **Approved**

V. The direct Supervisor/designee shall be responsible for administering and monitoring a process to accommodate an employee's cultural values, ethics, and religious beliefs regarding treatment of patients.

a) An employee who desires to be reassigned from a specific type of care or treatment shall submit the request in writing to the Supervisor/designee. Written request may be received on the form provided in this policy OR via an email addressed to the Supervisor/designee containing the details as requested/outlined on the form.

b) The written request will be acknowledged by the Supervisor/designee and maintained in the appropriate unit resource binder for scheduling purposes within the unit. The Supervisor/designee will assign staff as necessary for appropriate patient coverage. The written request will be placed in the employee's electronic personnel file by the Supervisor/designee.

c) Any conflict which may occur in an emergent situation for which staff may not have previously submitted a written request, may be brought to the Supervisor/designee. Alternative coverage may be sought at the discretion of the Supervisor/designee. The written request shall be submitted by the employee directly following the event and the request will be placed in the employee's electronic personnel file by the Supervisor/designee.

d) Any employee who is excused from an aspect of care will be re-assigned to other responsibilities.

e) In any scenario where circumstances prevent arrangements for alternate coverage, the staff member will be expected to provide the assigned care to ensure patient care is not negatively impacted.

f) Refusal to perform assigned job functions will be addressed in accordance with established corrective action procedures by the supervisor, in consultation with leadership and/or Human Resources.

VI. All employees have access to the Ethics Consultation through UVMMC's Director of Clinical Ethics and can request input on ethical issues by contacting Provider Access Services (847-2700), ask who the ethics consultant on call is and should then contact that consultant by phone or in person.

VII. An employee experiencing ongoing conflict of care issues should seek a transfer to a department or position where conflict of care issues are less likely to occur.

MONITORING PLAN: N/A

DEFINITIONS: N/A

RELATED POLICIES: Code of Conduct B1N; Clinical Ethics Consultations ETH15; Compliance & Privacy Plan B31

REFERENCES: 2017, Hospital Accreditation Standards, The Joint Commission LD.04.02

REVIEWERS: [redacted]

OWNER: [redacted], Dir Human Resources

APPROVING OFFICIAL: [redacted] Human Resources

Printed on: 4/12/2018 11:00 AM By: [redacted]
DISCLAIMER: Only the online policy is considered official. Please compare with on-line document for accuracy.

Documents Status: **Approved**

Conflict of Care Disclosure Form

To be completed by the employee making the request: *Make a copy of this form for your records and then give this form to your leader.*

Your Name: _____ (Please Print)

Your Signature: _____ Date: _____

Please identify the clinical circumstances where you experience personal conflict. Please provide specific details regarding which procedure/treatment you are requesting to be excused from.

Please briefly provide your reasons for requesting removal from the patient's care team.

Received by:_____ (Please Print)

Leader Signature _____ Date Received _____

Printed on: 4/12/2018 11:00 AM By: [redacted]
DISCLAIMER: Only the online policy is considered official. Please compare with on-line document for accuracy.

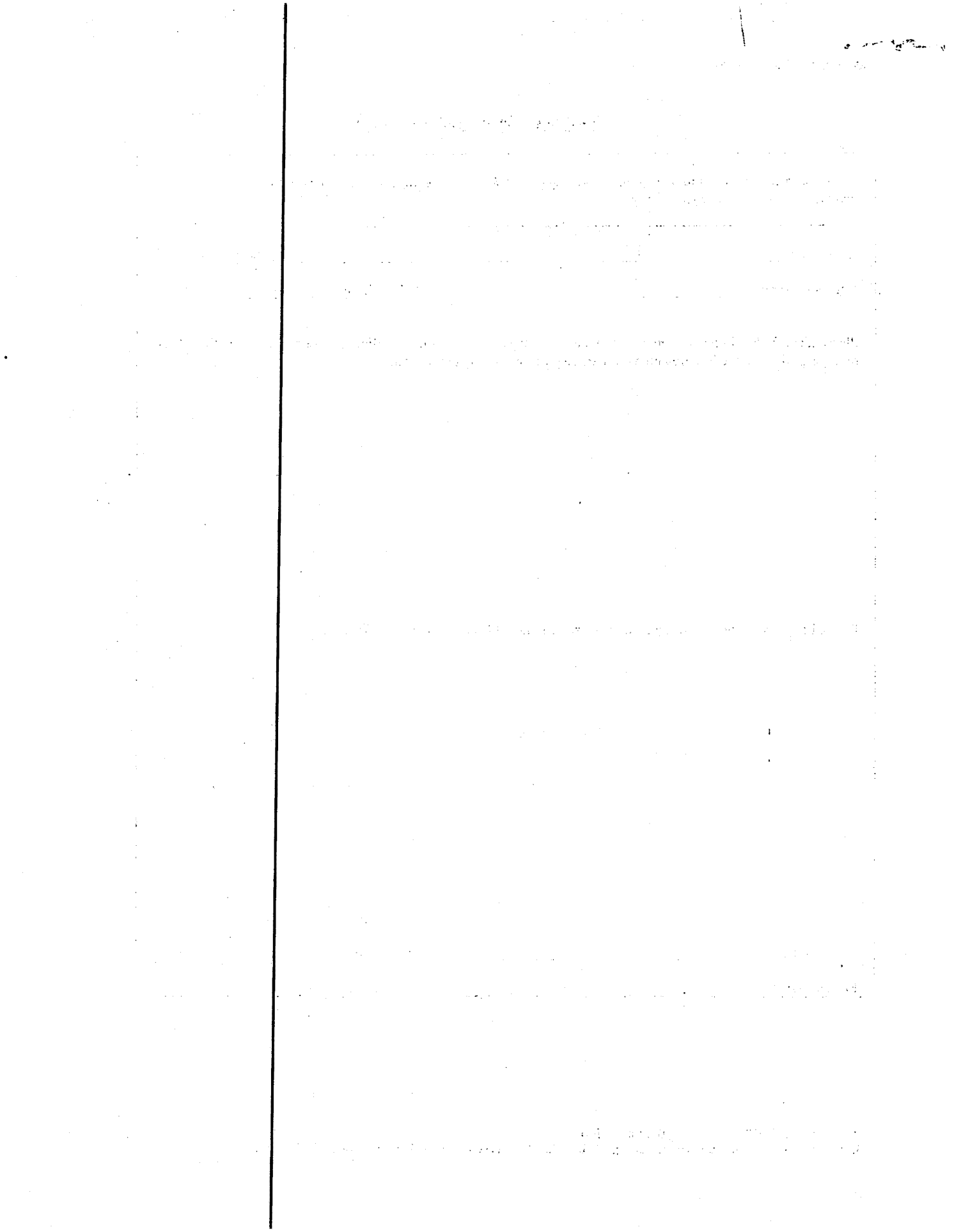


Exhibit 12

ACLJ
American Center for Law & Justice

August 4, 2017

Centralized Case Management Operations
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Room 509F HHH Bldg.
Washington, D.C. 20201

Re: Complaint for Discrimination in Violation of 42 U.S.C. 300a-7(c)(1) ("Church Amendment")

Contact attorney for complainant:

[redacted]
American Center for Law and Justice
6375 New Hope Rd.
P.O. Box 60
New Hope, KY 40052
[redacted]

Complaint filed on behalf of:

[redacted]

Person/Agency/Organization committing discrimination:

Indiana University South Bend
School of Nursing
1700 Mishawaka Ave.
South Bend, IN 46615
(574) 520-4872

Date and nature of discriminatory acts:

In January 2017, complainant [redacted] applied for a full-time faculty position with Indiana University South Bend ("IUSB") to teach a course on Maternal Child Nursing which she had already been teaching at IUSB as an adjunct. Shortly after she began working at IUSB on August 1, 2016, complainant published an internet article entitled "How a Formerly Pro-Choice Nursing Instructor Discusses Abortion with her Students." *Available at:* http://thetorchblog.net/ ?p=996 (August 12, 2016).

Complainant interviewed for the full-time position on January 31, 2017 before a committee of four faculty members of the IUSB Nursing School. During the interview, [redacted] Assistant Dean of Nursing, asked questions of [redacted] which indicated that [redacted] was familiar with [redacted] article.

One of the other members of the search/interview committee believed that [redacted] was asking [redacted] about her views on abortion and interrupted her by saying something to the effect of that, on a mother-baby unit, abortion is not an issue. [redacted] did not correct or clarify that she was *not* asking about abortion.

On or about February 20, 2017, [redacted] learned that she was not hired for the position, purportedly due to a "lack of teaching experience." [redacted] has 19 years of relevant teaching experience (along with her Doctorate of Nursing Practice). The individual who was hired in her stead has less than 3 years teaching experience.

Further, [redacted] has learned that the decision not to hire her was made by IUSB on the recommendation of [redacted] *alone*, *i.e.*, without a vote of the search committee, contrary to normal procedure. In addition to her duties at IUSB, [redacted] is employed as an advance practice nurse by Planned Parenthood. See Attached.

The evidence indicates that complainant was denied the position for which she applied due to [redacted] and/or IUSB's perceptions regarding her moral convictions and/or religious beliefs concerning abortion as set forth in her widely circulated internet article.

The Church Amendment prohibits discrimination in employment of "any physician or other health care personnel . . . because of his religious beliefs or moral convictions respecting sterilization procedures or abortions." 42 U.S.C. § 300a-7(c)(1). On information and belief, IUSB is an entity covered by the Church Amendment, and the circumstances surrounding IUSB's decision not to hire Isabell point to a violation of that statute.

Date: August 4, 2017

AMERICAN CENTER FOR LAW AND JUSTICE

[redacted]

Indiana
Online Licensing

New Search
Licensee Documents
Digital Certification
Nursing Board

Practitioner Information

[redacted]

CSR Practice Address Information

Planned Parenthood of Indiana
3005 Grape Road, Suite B
Mishawaka IN 46545

License Information

License No: [redacted]
Profession: Nursing Board
License Type: CSR-Prescriptive Authority
Obtained By Method: Application
Issue Date: [redacted]
Expiration Date:
License Status:

Practice Acknowledgement CSR Drug Schedules

No Data Available

Drug Schedule 1:		Drug Schedule 2:	Y	Drug Schedule 2N:	Y	Drug Schedule 3:	Y
Drug Schedule 3N:	Y	Drug Schedule 4:	Y	Drug Schedule 5:	Y		

Disciplines

No Data Available

Related Licenses

License #: [redacted] Name: [redacted]
License Type: APN Prescriptive Authority
Status: Active
Relationship: Same Licensee

Exhibit 13

Form Approved: OMB No. 0945-0002
Expiration Date: 04/30/2019.

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

CIVIL RIGHTS DISCRIMINATION COMPLAINT

YOUR FIRST NAME	YOUR LAST NAME
Thomas More Society	N/A
HOME PHONE (Please include area code)	WORK PHONE (Please include area code)
( )	[redacted]

STREET ADDRESS	CITY
19 South LaSalle Street, Suite 603	Chicago

STATE	ZIP	E-MAIL ADDRESS (If available)
IL	60603	[redacted]

Are you filing this complaint for someone else? ☒ Yes ☐ No

If Yes, whose civil rights do you believe were violated?

FIRST NAME	LAST NAME
[redacted]; Hope Life Center; and others similarly situated	

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

☐ Race / Color / National Origin ☐ Age ☒ Religion ☐ Sex
☐ Disability ☒ Other (specify): Abortion and First Amendment

Who or what agency or organization do you believe discriminated against you (or someone else)?
PERSON/AGENCY/ORGANIZATION

State of Illinois

STREET ADDRESS	CITY
Gov. Bruce Rauner, Office of the Governor, 207 State House	Springfield

STATE	ZIP	PHONE (Please include area code)
IL	62,076	(1)(217) 782-0244

When do you believe that the civil rights discrimination occurred?
LIST DATE(S)

Starting January 1, 2017

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

Please see explanatory letter accompanying this complaint form.

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

SIGNATURE	DATE *(mm/dd/yyyy)*
	1-04-2018

Filing a complaint with OCR is voluntary. However, without the information requested above, OCR may be unable to proceed with your complaint. We collect this information under authority of Section 1557 of the Affordable Care Act, Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973 and other civil rights statutes. We will use the information you provide to determine if we have jurisdiction and, if so, how we will process your complaint. Information submitted on this form is treated confidentially and is protected under the provisions of the Privacy Act of 1974. Names or other identifying information about individuals are disclosed when it is necessary for investigation of possible discrimination, for internal systems operations, or for routine uses, which include disclosure of information outside the Department of Health and Human Services (HHS) for purposes associated with civil rights compliance and as permitted by law. It is illegal for a recipient of Federal financial assistance from HHS to intimidate, threaten, coerce, or discriminate or retaliate against you for filing this complaint or for taking any other action to enforce your rights under Federal civil rights laws. You are not required to use this form. You also may write a letter or submit a complaint electronically with the same information. To submit an electronic complaint, go to OCR's web site at:
www.hhs.gov/ocr/civilrights/complaints/index.html. To mail a complaint, please see page 2 of this form for the mailing address.

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

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

☐ Braille ☐ Large Print ☐ Cassette tape ☐ Computer diskette ☐ Electronic mail ☐ TDD

☐ Sign language interpreter (specify language): _____

☐ Foreign language interpreter (specify language): _____ ☐ Other: _____

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

FIRST NAME	LAST NAME
[redacted] Attorney at Thomas More Society	
HOME PHONE (Please include area code)	WORK PHONE (Please include area code)
( )	[redacted]

STREET ADDRESS	CITY
19 South LaSalle Street	Chicago

STATE	ZIP	E-MAIL ADDRESS (If available)
IL	60,603	tolp@thomasmoresociety.org

Have you filed your complaint anywhere else? If so, please provide the following. (Attach additional pages as needed)

PERSON/AGENCY/ORGANIZATION/ COURT NAME(S)

Hope Life Center is a plaintiff in Abigail Women's Center, et. al, v. Rauner, et al., in the Circuit Court of the 7th Judicial District, Sangamon County, Chancery Division

DATE(S) FILED	CASE NUMBER(S) (If known)
February 9, 2017	CASE NO. 2017CH000066 (consolidated withCASE NO. 2017CH000052)

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

ETHNICITY (select one)

☐ Hispanic or Latino ☐ Not Hispanic or Latino

RACE (select one or more)

☐ American Indian or Alaska Native ☐ Asian ☐ Native Hawaiian or Other Pacific Islander ☐ Black or African American ☐ White ☐ Other (specify): _____

PRIMARY LANGUAGE SPOKEN (if other then English) _____

How did you learn about the Office for Civil Rights?

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

To submit a complaint, please type or print, sign, and return completed complaint form package (including consent form) to the OCR Headquarters address below.

U.S. Department of Health and Human Services

Office for Civil Rights
Centralized Case Management Operations
200 Independence Ave., S.W.
Suite 515F, HHH Building
Washington, D.C. 20201
Customer Response Center: (800) 368-1019
Fax: (202) 619-3818
TDD: (800) 537-7697
Email: ocrmail@hhs.gov

Burden Statement

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

HHS-700 11/15) (BACK)

COMPLAINANT CONSENT FORM

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

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

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

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

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

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

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

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

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

- I am also aware of the obligations of OCR to honor requests under the Freedom of Information Act (FOIA). I understand that it may be necessary for OCR to disclose information, including personally identifying information, which it has gathered as part of its investigation of my complaint.

- In addition, I understand that as a complainant I am covered by the Department of Health and Human Services' (HHS) regulations which protect any individual from being intimidated, threatened, coerced, retaliated against, or discriminated against because he/she has made a complaint, testified, assisted, or participated in any manner in any mediation, investigation, hearing, proceeding, or other part of HHS' investigation, conciliation, or enforcement process.

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

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

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

Signature: _____ Date: 1-4-2018

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

Name (Please print): [redacted] Attorney, Thomas More Society

Address: 19 South LaSalle Street, Suite 603, Chicago, IL 60603

Telephone Number: [redacted]

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

Privacy Act

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

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

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

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

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

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

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

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

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

PROTECTING PERSONAL INFORMATION IN COMPLAINT INVESTIGATIONS

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

HOW DOES OCR PROTECT MY PERSONAL INFORMATION?

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

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

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

CAN I SEE MY OCR FILE?

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

CAN OCR GIVE MY FILE TO ANY ONE ELSE?

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

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

CAN ANYONE ELSE SEE THE INFORMATION IN MY FILE?

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

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

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

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

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

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

OR

Contact the Customer Response Center at (800) 368-1019
(see contact information on page 2 of the Complaint Form)

THOMAS MORE SOCIETY
A National Public Interest Law Firm

January 4, 2018

Via US Mail & email: ocrmail@hhs.gov

U.S. Department of Health and Human Services
Office of Civil Rights
Centralized Case Management Operations
200 Independence Ave., S.W.
Suite 515F, HHH Building
Washington, D.C. 20201

Re: Violations of Federal Law arising from Illinois Public Act 99-690.

Dear members of the Office of Civil Rights for the Department:

We write on behalf of our clients, [redacted] and Hope Life Center, to request that the Office of Civil Rights investigate what we believe to be ongoing, serious violations of federal law by the State of Illinois. The basis for our request is Illinois' enactment and enforcement of Illinois Public Act 99-690, which became effective January 1, 2017, and which amends the 1977 Illinois Health Care Right of Conscience Act, 745 ILCS 70/1, *et seq.*, in ways that gut its protection of state and federal conscience rights. (P.A. 99-690 is attached as **Exhibit 1**.) As explained below, we believe that P.A. 99-690 violates existing federal laws that have been enacted to protect the conscience rights of healthcare providers. We respectfully request your office to investigate this claim and to take appropriate action to prevent the State's application of P.A. 99-690 to our clients, and similarly situated health care providers in Illinois, who cannot comply with the amendment because of their sincerely held religious beliefs.

The complainant, [redacted], is a physician licensed to practice in Illinois. He serves, pro bono, as a medical director of Hope Life Center, a pregnancy resource center providing limited medical services (pregnancy testing, ultrasounds, and STD tests) to women facing unplanned pregnancies. Although abortion, sterilization, and abortifacient contraception are "legal treatment options" for these women under P.A. 99-690, [redacted] cannot, in conscience, perform or promote these procedures, or refer women to, or provide identifying information about, providers of these procedures. Yet, P.A. 99-690 now requires him, and the officers, employees, and volunteers who work at Hope Life Center, to perform these very actions.

[redacted] and Hope Life Center thus face an unacceptable dilemma under the new Illinois law. P.A. 99-690 requires them to discuss so-called "benefits" of the very abortion and sterilization procedures they, as a matter of conscience, vigorously oppose. See P.A. 99-690 at Sec. 6 and Sec. 6.1(1). And it requires them, if asked, to refer for, or provide information about, providers of the very abortion services they abhor. See P.A. 99-690 at Sec.

19 S. LaSalle | Suite 603 | Chicago, IL 60603 | | P: 312.782.1680 | F: 312.782.1887
501 Scoular | 2027 Dodge | Omaha, NE 68102 | | P: 402-346-5010 | F: 402 345 8853
www.thomasmoresociety.org

"Injustice anywhere is a threat to justice everywhere." – Rev. Dr. Martin Luther King

6.1(3)(ii)&(iii). Failure to comply with the amendment subjects them to loss of conscience protection under the Health Care Right of Conscience Act, the possibility of professional discipline, liability for penalties and damages (including attorneys fees), and discrimination in funding and licensing under Illinois law. See 745 ILCS §70/6.1 (stripping protection of IHRCA from those who do not comply with its conditions); see also, 745 ILCS §70/4 & §§70/9—70/11.4 (forms of protection stripped away by Section 6.1); see also, 745 ILCS §70/10 (private cause of action for violations of statute, including statutory minimum damage award and liability for attorney's fees and costs).

We believe that Illinois is using this amendment (P.A. 99-690) to target and discriminate against healthcare providers in violation of federal law. First, the Hyde-Weldon Amendment, 114 P.L. 116, Title V, §507(d), as incorporated in 114 P.L. 223, Title III, Division C, Section 101(a)(8), prohibits any state or local government receiving federal HHS funds from discriminating against any health care entity based on its refusal to "provide, pay for, provide coverage of, or refer for" abortions. Second, Coates-Snow, 42 U.S.C. §238n, prohibits a state or local government that receives federal financial assistance from discriminating against a healthcare entity because it refuses to "perform" induced abortions, "provide referrals for" abortions, or "make arrangements for" abortions. Third, the Church Amendment, 42 U.S.C. §300a-7 prohibits an entity receiving federal funds under a wide range of federal legislation from discriminating against physicians or healthcare personnel because they refuse "to perform or assist in the performance of any sterilization procedure or abortion. . . contrary to [the person's] religious beliefs or moral convictions." The State of Illinois and its political subdivisions are subject to these federal laws by virtue of federal funding of many social welfare programs including Medicare, Medicaid, Child's Health Insurance Program, Head Start, Supplemental Nutrition Assistance Program, and Temporary Assistance for Needy Families. Yet P.A. 99-690 purports to nullify the protection Illinois physicians and health care providers enjoy under these federal laws.

P.A. 99-690 violates federal law in its purpose, practical operation, and effects. Section 6.1(1) compels physicians and other healthcare providers to inform patients about supposed "benefits" of abortions, abortifacient drugs, or sterilization, as legal treatment options. Provision of medical advice within the professional competence of a medical provider is an integral part of medical practice. Yet P.A. 99-690's discussion requirement coerces physicians and other healthcare providers, against their consciences, to assist in the promotion and provision of abortion or sterilization. This result, we believe, is directly contrary to the federal laws cited. In addition, Section 6.1(3)(ii)&(iii) of P.A. 99-690 requires medical professionals, upon request, to refer for abortion or sterilization, or in the alternative, to supply patients with a list of abortion and/or sterilization providers. In this way, P.A. 99-690 coerces physicians and other healthcare providers to promote and participate in abortion and sterilization, contrary to the cited federal laws.

A review of the publicly available committee proceedings and floor debates of the Illinois General Assembly shows that the clear intent of this law was to force medical professionals and their medical facilities to cooperate with abortion in ways that violate the deeply held religious

and moral beliefs of those professionals and facilities. The Illinois General Assembly knew well the risks of enacting P.A. 99-690, as even the fiscal note entered on the bill by the Illinois Department of Healthcare & Family Services recognized that:

> It is unclear if the passage of SB 1564 would jeopardize federal funding for the Illinois Medical Assistance Program. The Church Amendment codified at 42 U.S.C. § 300a-7, stipulates that for healthcare services funded in whole or in part by a program administered by the U.S. Department of Health and Human Services (HHS), no person may be required to 'perform or assist in the performance of any sterilization procedure or abortion if his performance or assistance in the performance of such procedure or abortion would be contrary to his religious beliefs or moral convictions.' *The requirement in SB 1564 that the provider refer individuals to other providers who perform the procedure, especially if abortion or sterilization, violates the Church amendment*; such referral could be interpreted as assistance with a morally objectionable procedure.

(emphasis added). See Bill Status of P.A. 99-690, at http://www.ilga.gov/legislation/billstatus.asp?DocNum=1564&GAID=13&GA=99&DocTypeID=SB&LegID=88256&SessionID=88&SpecSess= (accessed on December 19, 2017).

P.A. 99-690 also violates our clients' First Amendment rights to free speech and the free exercise of religion. The law is content-based, compelling speech, and viewpoint discriminatory, targeting only conscientious objectors. It is not religiously neutral because on its face it blatantly discriminates against the religious beliefs and practices of pro life physicians and health providers. The unconstitutionality of P.A. 99-690 was recognized earlier this year when its application against conscientious objectors was preliminarily enjoined on First Amendment grounds. See *NIFLA, et al., v. Rauner, et al.*, 16 C 51030, (N.D. Ill., July 19, 2017, Hon. Frederick J. Kapala, attached as **Exhibit 2**. The decision did not, however, find that the Plaintiffs had a private right of action under the Coates-Snowe Amendment, observing that "enforcement of § 238n is left up to the Department of Health and Human Services which may terminate funding in the event of non-compliance. See 45 C.F.R. § 88.2." *Id.* at p.4.

We are therefore requesting the Office of Civil Rights of the Department of Health and Human Services to investigate this complaint that alleges that P.A. 99-690 violates the federal laws cited, and to act to prohibit enforcement of P.A. 99-690 by the State of Illinois against our clients and all similarly situated health care providers in the State through all means at its disposal. We urge the Office to take prompt and effective action to prevent the State of Illinois from ever using P.A. 99-690 to punish physicians and healthcare providers who refrain, because of conscience, to counsel patients about so-called benefits of abortion or who refrain from assisting women desiring an abortion by referring them to (or providing information about) abortion providers.

We also respectfully request, for the benefit of physicians and healthcare providers throughout the nation, that your office issue interpretive guidelines making it clear that the cited federal

laws reach, and prohibit, any state law which, like P.A. 99-690, targets and punishes religious and conscience-based opposition to the practice of abortion. The cited federal laws were enacted precisely to protect conscience-based refusals to participate in abortion, and should be interpreted so as to be effective in prohibiting state laws like P.A. 99-690, which seek to force conscience objectors to participate in and promote abortion against their will. Without this office's interpretive guidance some states will continue to interpret these laws in ways contrary to their manifest purpose, and will continue to enact laws punishing conscience-based refusals to participate in abortion, as did Illinois through enactment of P.A. 99-690. Such state actions flouting the federal laws cited should not be countenanced. This office's regulatory guidance would facilitate that desired outcome.

Thank you for considering this complaint. Contact the undersigned in the event additional information is needed to bring your investigation to conclusion.

Respectfully,

Counsel, Thomas More Society
19 South LaSalle Street, Suite 603
Chicago, IL 60603
tolp@thomasmoresociety.org

Enclosures:
Exhibit 1 - Text of P.A.99-690
Exhibit 2 - Hon. Frederick J. Kapala's decision in *NIFLA, et al., v. Rauner*

EXHIBIT ONE

AN ACT concerning civil law.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 5. The Health Care Right of Conscience Act is amended by changing Sections 2, 3, 6, and 9 and by adding Sections 6.1 and 6.2 as follows:

(745 ILCS 70/2) (from Ch. 111 1/2, par. 5302)

Sec. 2. Findings and policy. The General Assembly finds and declares that people and organizations hold different beliefs about whether certain health care services are morally acceptable. It is the public policy of the State of Illinois to respect and protect the right of conscience of all persons who refuse to obtain, receive or accept, or who are engaged in, the delivery of, arrangement for, or payment of health care services and medical care whether acting individually, corporately, or in association with other persons; and to prohibit all forms of discrimination, disqualification, coercion, disability or imposition of liability upon such persons or entities by reason of their refusing to act contrary to their conscience or conscientious convictions in <u>providing, paying for, or</u> refusing to obtain, receive, accept, deliver, pay for, or arrange for the payment of health care services and medical care. <u>It is also the public policy of the State of</u>

Illinois to ensure that patients receive timely access to information and medically appropriate care.

(Source: P.A. 90-246, eff. 1-1-98.)

(745 ILCS 70/3) (from Ch. 111 1/2, par. 5303)

Sec. 3. Definitions. As used in this Act, unless the context clearly otherwise requires:

(a) "Health care" means any phase of patient care, including but not limited to, testing; diagnosis; prognosis; ancillary research; instructions; family planning, counselling, referrals, or any other advice in connection with the use or procurement of contraceptives and sterilization or abortion procedures; medication; or surgery or other care or treatment rendered by a physician or physicians, nurses, paraprofessionals or health care facility, intended for the physical, emotional, and mental well-being of persons;

(b) "Physician" means any person who is licensed by the State of Illinois under the Medical Practice Act of 1987;

(c) "Health care personnel" means any nurse, nurses' aide, medical school student, professional, paraprofessional or any other person who furnishes, or assists in the furnishing of, health care services;

(d) "Health care facility" means any public or private hospital, clinic, center, medical school, medical training institution, laboratory or diagnostic facility, physician's office, infirmary, dispensary, ambulatory surgical treatment

center or other institution or location wherein health care services are provided to any person, including physician organizations and associations, networks, joint ventures, and all other combinations of those organizations;

(e) "Conscience" means a sincerely held set of moral convictions arising from belief in and relation to God, or which, though not so derived, arises from a place in the life of its possessor parallel to that filled by God among adherents to religious faiths; ~~and~~

(f) "Health care payer" means a health maintenance organization, insurance company, management services organization, or any other entity that pays for or arranges for the payment of any health care or medical care service, procedure, or product; and ~~.~~

(g) "Undue delay" means unreasonable delay that causes impairment of the patient's health.

The above definitions include not only the traditional combinations and forms of these persons and organizations but also all new and emerging forms and combinations of these persons and organizations.

(Source: P.A. 90-246, eff. 1-1-98.)

(745 ILCS 70/6) (from Ch. 111 1/2, par. 5306)

Sec. 6. Duty of physicians and other health care personnel. Nothing in this Act shall relieve a physician from any duty, which may exist under any laws concerning current standards~~,~~ of

~~normal~~ medical practice or care ~~practices and procedures~~, to inform his or her patient of the patient's condition, prognosis, legal treatment options, and risks and benefits of treatment options, provided, however, that such physician shall be under no duty to perform, assist, counsel, suggest, recommend, refer or participate in any way in any form of medical practice or health care service that is contrary to his or her conscience.

Nothing in this Act shall be construed so as to relieve a physician or other health care personnel from obligations under the law of providing emergency medical care.

(Source: P.A. 90-246, eff. 1-1-98.)

(745 ILCS 70/6.1 new)

Sec. 6.1. Access to care and information protocols. All health care facilities shall adopt written access to care and information protocols that are designed to ensure that conscience-based objections do not cause impairment of patients' health and that explain how conscience-based objections will be addressed in a timely manner to facilitate patient health care services. The protections of Sections 4, 5, 7, 8, 9, 10, and 11 of this Act only apply if conscience-based refusals occur in accordance with these protocols. These protocols must, at a minimum, address the following:

(1) The health care facility, physician, or health care personnel shall inform a patient of the patient's

condition, prognosis, legal treatment options, and risks and benefits of the treatment options in a timely manner, consistent with current standards of medical practice or care.

(2) When a health care facility, physician, or health care personnel is unable to permit, perform, or participate in a health care service that is a diagnostic or treatment option requested by a patient because the health care service is contrary to the conscience of the health care facility, physician, or health care personnel, then the patient shall either be provided the requested health care service by others in the facility or be notified that the health care will not be provided and be referred, transferred, or given information in accordance with paragraph (3).

(3) If requested by the patient or the legal representative of the patient, the health care facility, physician, or health care personnel shall: (i) refer the patient to, or (ii) transfer the patient to, or (iii) provide in writing information to the patient about other health care providers who they reasonably believe may offer the health care service the health care facility, physician, or health personnel refuses to permit, perform, or participate in because of a conscience-based objection.

(4) If requested by the patient or the legal representative of the patient, the health care facility,

physician, or health care personnel shall provide copies of medical records to the patient or to another health care professional or health care facility designated by the patient in accordance with Illinois law, without undue delay.

(745 ILCS 70/6.2 new)

Sec. 6.2. Permissible acts related to access to care and information protocols. Nothing in this Act shall be construed to prevent a health care facility from requiring that physicians or health care personnel working in the facility comply with access to care and information protocols that comply with the provisions of this Act.

(745 ILCS 70/9) (from Ch. 111 1/2, par. 5309)

Sec. 9. Liability. No person, association, or corporation, which owns, operates, supervises, or manages a health care facility shall be civilly or criminally liable to any person, estate, or public or private entity by reason of refusal of the health care facility to permit or provide any particular form of health care service which violates the facility's conscience as documented in its ethical guidelines, mission statement, constitution, bylaws, articles of incorporation, regulations, or other governing documents.

Nothing in this Act ~~act~~ shall be construed so as to relieve a physician, ~~or other~~ health care personnel, or a health care

facility from obligations under the law of providing emergency medical care.

(Source: P.A. 90-246, eff. 1-1-98.)

EXHIBIT TWO

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

National Institute of Family and Life Advocates, et al.,	)	
Plaintiffs,	)	
v.	)	Case No: 16 C 50310
Governor Bruce Rauner, et al.,	)	
Defendants.	)	Judge Frederick J. Kapala

ORDER

Defendants' motion to dismiss plaintiffs' complaint [15] is granted in part and denied in part. Counts II, IV, and V are dismissed in their entirety and those portions of Counts I, III, and V that are based upon the Illinois Constitution are dismissed. All claims against Governor Rauner are dismissed and he is terminated as a defendant in this case. The motion to dismiss is denied in all other respects. Plaintiffs' motion for preliminary injunction [35] is granted.

STATEMENT

Plaintiffs, the National Institute of Family and Life Advocates, four non-profit pro-life pregnancy centers, and Dr. Tina Gingrich, M.D., have filed a Verified Complaint for Injunctive and Declaratory Relief against Illinois Governor Bruce Rauner and Secretary of the Illinois Department of Financial & Professional Regulation Bryan A. Schneider challenging the constitutionality of an amendment to the Illinois Healthcare Right of Conscience Act ("HCRCA"), 745 ILCS 70/1 et seq. This court has jurisdiction under 28 U.S.C. § 1331. Before the court are defendants' motion to dismiss plaintiffs' complaint and plaintiffs' motion for a preliminary injunction. For the reasons that follow, the motion to dismiss is granted in part and denied in part and the motion for a preliminary injunction is granted.

I. BACKGROUND

In the wake of Roe v. Wade, 410 U.S. 113 (1973), Illinois and other states enacted laws protecting physicians, hospitals, and others from civil liability arising from the refusal to recommend, perform, or assist in the performance of an abortion. See 745 ILCS 30/1. The HCRCA was enacted in 1977 "to respect and protect the right of conscience of all persons who refuse to . . . act contrary to their conscience or conscientious convictions in providing . . . health care services and medical care." 745 ILCS 70/2. Consistent with this goal, the HCRCA provides that "[n]o physician or health care personnel shall be civilly or criminally liable . . . by reason of his or her refusal to perform, assist, counsel, suggest, recommend, refer or participate in any way in any particular form of health care service which is contrary to the conscience of such physician or health

care personnel." Id. § 70/4. The HCRCA also makes it unlawful for public officials to discriminate against any person, in any manner, in licensing "because of such person's conscientious refusal to receive, obtain, accept, perform, assist, counsel, suggest, recommend, refer or participate in any way in any particular form of health care services contrary to his or her conscience." Id. § 70/5. "Conscience" is defined as "a sincerely held set of moral convictions arising from belief in and relation to God, or which, though not so derived, arises from a place in the life of its possessor parallel to that filled by God among adherents to religious faiths." Id. § 70/3(e).

Forty years later, the Illinois General Assembly passed Public Act 99-690, signed into law on July 29, 2016 and effective January 1, 2017, also known as SB 1564 ("the amended act"), which now requires physicians and other health care personnel seeking protection under the HCRCA to adopt and follow certain protocols:

> § 6.1. Access to care and information protocols. All health care facilities shall adopt written access to care and information protocols that are designed to ensure that conscience-based objections do not cause impairment of patients' health and that explain how conscience-based objections will be addressed in a timely manner to facilitate patient health care services. The protections of Sections 4, 5, 7, 8, 9, 10, and 11 of this Act only apply if conscience-based refusals occur in accordance with these protocols. These protocols must, at a minimum, address the following:
>
> (1) The health care facility, physician, or health care personnel shall inform a patient of the patient's condition, prognosis, legal treatment options, and risks and benefits of the treatment options in a timely manner, consistent with current standards of medical practice or care.
>
> (2) When a health care facility, physician, or health care personnel is unable to permit, perform, or participate in a health care service that is a diagnostic or treatment option requested by a patient because the health care service is contrary to the conscience of the health care facility, physician, or health care personnel, then the patient shall either be provided the requested health care service by others in the facility or be notified that the health care will not be provided and be referred, transferred, or given information in accordance with paragraph (3).
>
> (3) If requested by the patient or the legal representative of the patient, the health care facility, physician, or health care personnel shall: (i) refer the patient to, or (ii) transfer the patient to, or (iii) provide in writing information to the patient about other health care providers who they reasonably believe may offer the health care service the health care facility, physician, or health personnel refuses to permit, perform, or participate in because of a conscience-based objection.
>
> (4) If requested by the patient or the legal representative of the patient, the health care facility, physician, or health care personnel shall provide copies of medical records to the patient or to another health care professional or health care facility designated by the patient in accordance with Illinois law, without undue delay.

Id. § 70/6.1. The amended act also includes an affirmative duty that physicians and other health care personnel inform his or her patient of the patient's "legal treatment options, and risks and benefits of treatment options." Id. § 70/6.

Plaintiffs are health care facilities and health professionals who offer medical services to support women in giving birth and discourage them from seeking abortion. Plaintiffs explain that they treat every unborn child as a human being with inalienable dignity and as a patient along with the child's mother. Consequently, their religious and pro-life beliefs prohibit them from providing women with the names of other health care providers who may perform abortions because that would implicate them in destroying a human life and violate one of the leading principles of the Hippocratic Oath, that doctors do no harm to those under their care. Based on these ethical and religious beliefs, plaintiffs do not consider abortion to have medical "benefits," and do not consider abortion a "treatment option." Plaintiffs maintain that the amended act compels them to tell pregnant women the names of other doctors they believe offer abortions, and compels them to tell pregnant women that abortion has "benefits" and is a "treatment option" for pregnancy. Plaintiffs have religious and moral objections to speaking about abortion in these ways.

In their verified complaint for declaratory and injunctive relief, plaintiffs challenge the amended act in five counts. In particular, plaintiffs allege that it violates the Free Speech Clause of the First Amendment to the U.S. Constitution and Article I, § 4 of the Illinois Constitution (Count I); the Illinois Religious Freedom Restoration Act, 775 ILCS 35/1 et seq. (Count II); the free exercise of religion clause of the First Amendment to the U.S. Constitution and Article I, § 3 of the Illinois Constitution (Count III); the Coats-Snowe Amendment, 42 U.S.C. § 238n (Count IV); and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and Article I, § 2 of the Illinois Constitution (Count V).

II. MOTION TO DISMISS

Initially, defendants contend that plaintiffs' state-law claims are barred under the sovereign immunity afforded by the Eleventh Amendment. In response, plaintiffs have agreed to withdraw their state-law claims. Accordingly, Count II, advancing a claim under the Illinois Religious Freedom Restoration Act, as well as those portions of Counts I, III, and V based upon the Illinois Constitution are dismissed.

Next, defendants argue that plaintiffs' First Amendment free speech and free exercise claims in Counts I and III fail to state a claim upon which relief can be granted. Although defendants have cited the applicable Twombly/Iqbal plausibility standard in their memorandum of law filed in support of their motion to dismiss plaintiffs' complaint, they have not incorporated that standard into their arguments seeking dismissal of the First Amendment claims in Counts I and III. Instead, defendants contend, for example, that intermediate scrutiny should be applied, not strict scrutiny, but that the amended act survives either; and that the amended act imposes no substantial burden on plaintiffs' exercise of religion. These are substantive arguments more appropriately made in opposing plaintiffs' request for a preliminary injunction or for a permanent injunction, not arguments that plaintiffs' complaint is somehow insufficiently pleaded. Thus, defendants have advanced an insufficient basis to dismiss Counts I and III. In any event, in light of this court's finding below that plaintiffs have made a substantial showing of a likelihood of success on the merits of their claim

under the Free Speech Clause of the First Amendment, defendants' motion to dismiss Counts I and III is denied.

Next, defendants argue that plaintiffs' Coates-Snowe Amendment claim in Count IV fails because: (1) § 238n prohibits discrimination against any "health care entity" which "includes an individual physician, a postgraduate physician training program, and a participant in a program of training in the health professions," 42 U.S.C. § 238n(c)(2), and therefore the only plaintiff afforded protection is Dr. Gingrich; (2) there is no private right of action under § 238n; and (3) even if there were such an action, plaintiffs have failed to state a claim under § 238n. The relevant part of the Coates-Snowe Amendment prohibits health care entities that receive federal financial assistance from discriminating on the basis that the entity refuses to perform or provide training in the performance of abortion or to refer for abortion or such training. Id. § 238n(a). However, because the court agrees that the Coates-Snowe Amendment does not confer a private right of action for such discrimination, it need not reach defendants' other arguments. Section 238n does not contain an express private right of action and a strong presumption exists against creation of an implied right of action. See Endsley v. City of Chi., 230 F.3d 276, 281 (7th Cir. 2000). Instead, enforcement of § 238n is left up to the Department of Health and Human Services which may terminate funding in the event of non-compliance. See 45 C.F.R. § 88.2. Plaintiffs do not cite any legislative history to suggest a private right of action was intended nor do they cite any decision where such an action has been recognized. Therefore, this court, "will not imply a private right of action where none appears in the statute," Endsley, 230 F.3d at 281, and Count IV is dismissed.

Next, defendants argue that plaintiffs' equal protection claim under the Fourteenth Amendment fails because they have not pleaded dissimilar treatment of similarly situated classes. Defendants also argue that Count V should be dismissed because plaintiffs' equal protection claim adds nothing to their First Amendment free exercise claim. Irrespective of whether plaintiff's have identified similarly situated groups that are treated dissimilarly under the amended act, they have pleaded that such differential treatment impairs their fundamental right of freedom of religion. Plaintiffs do maintain that they have stated an Equal Protection claim by pleading dissimilar treatment of similarly situated classes, but they do not dispute the contention that their equal protection claim adds nothing to their First Amendment claims. Consequently, the court agrees that plaintiffs' Fourteenth Amendment Equal Protection claim in Count V is unnecessary and redundant in light of the more specific First Amendment free exercise claim in Count III. See Goodman v. Carter, No. 2000 C 948, 2001 WL 755137, at *7 (N.D. Ill. July 2, 2001) (finding a separate equal protection analysis unnecessary because "the protection afforded religious practice by the Equal Protection Clause is no greater than that granted by the First Amendment"). Accordingly, Count V is dismissed.

Finally, defendants argue that plaintiffs' claims against Governor Rauner should be dismissed because he is not a proper defendant in a case challenging the constitutionality of a state statute. In support of this argument, defendants cite Johnson v. Rauner, No. 15 C 131, 2016 WL 3917372, at *3 (N.D. Ill. July 20, 2016) (dismissing Governor Rauner as defendant in an action challenging the Sex Offender Registration Act on constitutional grounds); Illinois League of Advocates for the Developmentally Disabled v. Quinn, No. 13 C 1300, 2013 WL 5548929, at *4 (N.D. Ill. Oct. 8, 2013) (citing Ex Parte Young, 209 U.S. 123, 157 (1908), in concluding that Governor Quinn was

not a proper defendant because the proper defendant has some connection with the enforcement of the challenged law and the governor's general obligations to enforce the law are insufficient); Weinstein v. Edgar, 826 F. Supp. 1165, 1166 (N.D. Ill. 1993) ("Implicit in the right to sue state officials for prospective injunctive relief, however, is the requirement that the state official bear some connection with the enforcement of the challenged statute."). In response, plaintiffs do not take issue with these authorities or maintain that they are somehow inapplicable or distinguishable. Instead, plaintiffs simply argue that the injunction issued in Morr-Fitz, Inc. v. Quinn, 2012 IL App (4th) 110398, ¶ 84, enjoined "all defendants" which included Governor Pat Quinn. The problem with plaintiffs' argument is that there is no indication that Governor Quinn ever moved to dismiss the claims brought against him in Morr-Fritz. Accordingly, the claims against Governor Rauner are dismissed and he is terminated as a defendant in this case.

III. MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs move, based on their claim under the Free Speech Clause of the First Amendment, for a preliminary injunction enjoining defendants from enforcing the amended act to the extent that enforcement would penalize health facilities or professionals who object to furnishing information about other health care providers who offer abortion or who object to describing abortion as a beneficial treatment option.[1] Defendants' oppose the motion. When bringing a motion for a preliminary injunction, plaintiffs must demonstrate: (1) that they are likely to succeed on the merits of their claim; (2) that they are likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in their favor; and (4) that an injunction is in the public interest. Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7, 20 (2008). "The purpose of [a preliminary injunction] is not to conclusively determine the rights of the parties, but to balance the equities as the litigation moves forward." Trump v. Int'l Refugee Assistance Project, 582 U.S. ____, No. 16-1436, 2017 WL 2722580, at *5 (U.S. June 26, 2017). The Seventh Circuit has recently explained that in First Amendment cases such as this the likelihood of success on the merits is the lynchpin factor:

> [I]n First Amendment cases, the likelihood of success on the merits will often be the determinative factor. That is because even short deprivations of First Amendment rights constitute irreparable harm, and the balance of harms normally favors granting preliminary injunctive relief because the public interest is not harmed by preliminarily enjoining the enforcement of a statute that is probably unconstitutional. So the analysis begins and ends with the likelihood of success on the merits of the [First Amendment] claim.

Higher Soc'y of Ind. v. Tippecanoe Cty., Ind., 858 F.3d 1113, 1116 (7th Cir. 2017) (citations omitted). "[T]he threshold for demonstrating a likelihood of success on the merits is low." D.U. v. Rhoades, 825 F.3d 331, 338 (7th Cir. 2016). "[P]laintiff's chances of prevailing need only be better

[1]Plaintiffs also move for a preliminary injunction based on their claim under the First Amendment Free Exercise Clause. However, because the court grants plaintiffs a preliminary injunction based on their First Amendment Free Speech claim and has enjoined enforcement of the amended act against them, the court need not address plaintiffs' free exercise claim. The parties will have a full and fair opportunity to litigate that claim as this case moves forward.

than negligible." Id. The court will therefore address the likelihood of plaintiffs' success on the merits of their First Amendment Free Speech claim.

The First Amendment to the United States Constitution, as incorporated by the Fourteenth Amendment, prohibits states from enacting laws "abridging the freedom of speech." U.S. Const. amend. I. The Free Speech Clause of the First Amendment provides protection from both government suppressed speech and government compelled speech. Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., ___ U.S. ___, 133 S. Ct. 2321, 2327 (2013) ("It is . . . a basic First Amendment principle that freedom of speech prohibits the government from telling people what they must say."); Knox v. Serv. Employees Int'l Union, Local 1000, 567 U.S. 298, 309 (2012) ("The government may not prohibit the dissemination of ideas that it disfavors, nor compel the endorsement of ideas that it approves."). Thus, the First Amendment prohibits not only direct burdens on speech, but also indirect burdens that are created when the government conditions receipt of a benefit on compelling or foregoing constitutionally-protected speech. See Perry v. Sindermann, 408 U.S. 593, 597 (1972). This principle, known as the unconstitutional conditions doctrine, acknowledges that the government, having no obligation to furnish a benefit, nevertheless cannot force a citizen to choose between a benefit and free speech. Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 59-60 (2006); Perry, 408 U.S. at 597.

The parties dispute the proper level of scrutiny that should be applied to the amended act. Defendants contend that intermediate scrutiny applies to legislation like the amended act which regulates professional speech. Plaintiffs, on the other hand, contend that the amended act is subject to strict scrutiny because it is a content- and viewpoint-based regulation.

In support of their position, defendants argue that federal courts have generally applied intermediate scrutiny to regulations aimed at medical professionals. For example, defendants cite National Institute of Family and Life Advocates v. Harris, wherein the Ninth Circuit applied intermediate scrutiny to a California law requiring all pregnancy-related clinics to disseminate a notice stating the existence of publicly-funded family-planning services, including contraception and abortion. 839 F.3d 823, 828 (9th Cir. 2016). The Ninth Circuit only did so, however, after concluding that the law, while content-based because it required speech on a particular matter, did not discriminate based on viewpoint because it "applies to all licensed and unlicensed facilities, regardless of what, if any, objections they may have to certain family-planning services." Id. at 835. Thus, neither Harris nor the other cases cited by defendants stand for the proposition that content-based laws that discriminate based on viewpoint are subject to intermediate scrutiny.

In any event, in this court's view, any dispute about the applicable level of scrutiny to be applied to the amended act is resolved by the Supreme Court's recent decision in Matal v. Tam, 582 U.S. ____, No. 15-1293, 2017 WL 2621315 (U.S. June 19, 2017). In Tam, the question of whether trademarks are commercial speech to which the relaxed scrutiny, i.e. intermediate scrutiny, applied was left unanswered in the opinion of the Court because the Court concluded that the regulation under review did not withstand even relaxed scrutiny. Id. at *18-19. Nevertheless, in concurring opinions, five justices agreed that even commercial speech that is viewpoint discriminatory is subject to heightened or strict scrutiny. Id. at *23 ("Commercial speech is no exception, the Court has explained, to the principle that the First Amendment requires heightened scrutiny whenever the government creates a regulation of speech because of disagreement with the message it conveys.

Unlike content based discrimination, discrimination based on viewpoint, including a regulation that targets speech for its offensiveness, remains of serious concern in the commercial context." (citations omitted) (Kennedy, J. with Ginsburg, Sotomayor, and Kagan J.J.); id. at *25 ("I also write separately because I continue to believe that when the government seeks to restrict truthful speech in order to suppress the ideas it conveys, strict scrutiny is appropriate, whether or not the speech in question may be characterized as commercial.") (Thomas, J., concurring in part and concurring in judgment)). Thus, it is clear that the prevailing view of a majority of the Supreme Court is that content-based laws that discriminate based on point of view, even if for the purpose of regulating commercial or professional speech, are still subject to strict scrutiny.

In this case, there is a substantial likelihood that plaintiffs will be successful in demonstrating that the amended act is content-based because it "[m]andat[es] speech that a speaker would not otherwise make" which "necessarily alters the content of the speech." Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 795 (1988). Defendants do not advance a discernible argument that the amended act is not content-based. The parties do dispute, however, whether the amended act is viewpoint discriminatory. A law discriminates based on viewpoint when it regulates speech "based on the specific motivating ideology or the opinion or perspective of the speaker [and] is a more blatant and egregious form of content discrimination." Reed v. Town of Gilbert, Ariz., 576 U.S. ___, 135 S. Ct. 2218, 2230 (2015).

Defendants maintain that the pre-existing ethical standards of informed consent governing the medical profession, which are incorporated into Illinois law, unambiguously require health care providers to disclose all relevant treatment options to their patients. Defendants argue that the HCRCA was amended to ensure that health care providers with conscience-based objections to certain treatments nevertheless provide their patients with certain information to make an informed decision regarding their health, and thus the amended act is not a viewpoint-based law.

However, the HCRCA was enacted to excuse health care providers from performing legal treatment options like abortion because they had conscience-based objections and the HCRCA provided them with protection from any resulting civil liability or professional discipline. 745 ILCS 70/4. The HCRCA also excused such health care providers from referring their patients to other providers who would perform the abortion and excused them from in any way assisting, counseling, suggesting, recommending, or participating in abortion as a legal treatment option. Id. The amended act fundamentally changes the HCRCA by conditioning its protection on a protocol requiring health care providers with conscience-based objections to abortion to now do some of the things the HCRCA formerly excused them from doing. In particular, the amended act now requires plaintiffs to inform their patients about abortion and counsel them on the risks and benefits of abortion. Id. § 70/6.1(1). In addition, if requested by the patient or her legal representative, those with conscience-based objections must now either refer their patient to a provider who will perform the abortion, transfer her to a provider who will perform the abortion, or provide her with the information about other providers who will perform the abortion. Id. § 70/6.1(3). It is clear that the amended act targets the free speech rights of people who have a specific viewpoint. Thus, plaintiffs have demonstrated a better than negligible chance of succeeding in showing that the amended act discriminates based on their viewpoint by compelling them to tell their patients that abortion is a legal treatment option, which has benefits, and, at a minimum and upon request, to give their patients

the identifying information of providers who will perform an abortion. Moreover, in conditioning the protections of the HCRCA on compelled speech, the amended act has potentially violated the unconstitutional conditions doctrine. See Rumsfeld, 547 U.S. at 59-60 (explaining that while the government has no obligation to furnish a benefit it cannot force a citizen to choose between a benefit and free speech); see also United States v. American Library Ass'n, Inc., 539 U.S. 194, 210 (2003).("[T]he government may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.").

A comparison to the regulation under review in Harris demonstrates the viewpoint discrimination present in the amended act. The law being challenged in Harris required that all licensed and unlicensed pregnancy-related clinics disseminate a notice stating the existence of publically-funded family-planning services, including contraception and abortion. Harris, 839 F.3d at 828-29. In concluding that the law did not discriminate based on the point of view or ideology of the compelled speaker, the court in Harris relied on the circumstance that the law applied to all pregnancy-related clinics "regardless of what, if any, objections they may have to certain family-planning services." Id. at 835. In contrast, the amended act under review in this case applies only to health care providers with conscience-based objections to certain legal treatment options such as abortion. Therefore, the court finds that plaintiffs have demonstrated a likelihood of showing that the amended act discriminates against health care providers that are of the point of view that abortion is wrong by compelling only them to speak a message that, from their viewpoint, is abhorrent.

Having found that plaintiffs have demonstrated a likelihood of success in showing that the amended act is content-based and viewpoint discriminatory, the amended act will be subject to strict scrutiny, that is, it must be the least restrictive means of achieving a compelling state interest. See McCullen v. Coakley, 573 U.S. ___, 134 S. Ct. 2518, 2530 (2014). Defendants contend that even if strict scrutiny applies, the amended act survives because it is the least restrictive means of protecting Illinois' compelling interest in protecting the health and autonomy of its citizens by ensuring that they receive information that they need to make informed medical decisions. Plaintiffs argue that defendants have not demonstrated a need for the compelled speech, let alone a compelling state interest in having those with conscience-based objections to make these statements to their patients. Defendants also argue that the requirements of the amended act, particularly the compelled discussion of abortion as a legal treatment option and providing the patient with information about other health care providers who they reasonably believe may offer abortion, are clearly not the least restrictive means to achieve this interest when this information is or could be provided through other means such as telephone directories and internet websites. At this stage of the litigation and on this record, suffice it to say that defendants have yet to satisfy their burden of proving that the compelled speech requirements of the amended act are the least restrictive means of achieving its interest. See St. John's United Church of Christ v. City of Chi., 502 F.3d 616, 646 (7th Cir. 2007) (noting that under strict scrutiny review, the government bears the burden of proving both elements). In contrast, plaintiffs have demonstrated a better than negligible chance of showing that Illinois has multiple options less restrictive than compelling those with conscience-based objections to abortion to communicate to a patient that abortion is a legal treatment option as well as the information she will need to obtain an abortion. Moreover, the special concern of overburdening speech is implicated when, as here, the compelled speech is on a matter of public debate:

> Regardless of whether less restrictive means exist, the Services Disclosure overly burdens Plaintiffs' speech. When evaluating compelled speech, we consider the context in which the speech is made. Here, the context is a public debate over the morality and efficacy of contraception and abortion, for which many of the facilities regulated by Local Law 17 provide alternatives. [E]xpression on public issues has always rested on the highest rung on the hierarchy of First Amendment values. Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. A requirement that pregnancy services centers address abortion, emergency contraception, or prenatal care at the beginning of their contact with potential clients alters the centers' political speech by mandating the manner in which the discussion of these issues begins.

Evergreen Ass'n, Inc. v. City of N.Y., 740 F.3d 233, 249 (2d Cir. 2014) (citations omitted).

The court finds further that even if the intermediate scrutiny applicable to laws regulating professional or commercial speech were applied in this case, see Central Hudson Gas & Elec. Corp. v. Public Serv. Comm. of New York, 447 U.S. 557, 561-62 (1980), plaintiffs have demonstrated a better than negligible chance of showing that the amended act would still likely fail. Once again, at this stage of the litigation and on this record, defendants have not proven that the amended act is narrowly tailored to achieve a substantial government interest. See Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 71 n.20 (1983) ("The party seeking to uphold a restriction on commercial speech carries the burden of justifying it."). Plaintiffs have, on the other hand, demonstrated a better than negligible chance of showing that a law compelling the health care provider with conscience-based objections to abortion to serve as the source of information about the legal treatment option of abortion and to serve as a directory of health care providers performing abortions is not narrowly tailored to achieve a substantial government interest. For these reasons, plaintiffs have demonstrated a likelihood of success on their First Amendment Free Speech claim and a preliminary injunction will issue.[2]

IV. CONCLUSION

For these reasons, defendants' motion to dismiss is granted in part and denied in part. Plaintiff's motion for a preliminary injunction is granted. The Secretary of the Illinois Department of Financial & Professional Regulation is hereby enjoined pursuant to Federal Rule of Civil Procedure 65(a) from enforcing the amended act to the extent that enforcement would penalize health care facilities, health care personnel, or physicians who object to providing information about health care providers who may offer abortion or who object to describing abortion as a beneficial

[2]Even if the court were to consider the remaining factors, the court would find that they weigh in favor of granting the preliminary injunction. The second factor is satisfied because irreparable harm is presumed. See Christian Legal Soc'y v. Walker, 453 F.3d 853, 867 (7th Cir. 2006) ("Violations of First Amendment rights are presumed to constitute irreparable injuries."). With respect to factors three and four, the court concludes that in balancing the equities in consideration of the public interest, Illinois is not harmed by preliminarily enjoining the enforcement of a law that probably violates the First Amendment. See Higher Soc'y of Ind. 858 F.3d at 1116. Moreover, the legal right to an abortion is widely known and a person desiring such a procedure, except in the most extraordinary circumstances, would have little difficulty in finding a provider.

treatment option. This preliminary injunction is effective until the conclusion of this action or further order of the court.

Date: 7/19/2017

ENTER:

FREDERICK J. KAPALA

District Judge

Exhibit 14

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

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

CIVIL RIGHTS DISCRIMINATION COMPLAINT

YOUR FIRST NAME [redacted] | YOUR LAST NAME [redacted]

H[redacted] / CELL PHONE (Please include area code) | W[redacted] ONE (Please include area code)

S[redacted] x_____

CITY [redacted]

ST[redacted] | ZIP [redacted] | E-MAIL ADDRESS (If availa[redacted]

Are you filing this complaint for someone else? ☐ Yes ☒ No

If Yes, whose civil rights do you believe were violated?

FIRST NAME | LAST NAME

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

☐ Race / Color / National Origin ☐ Age ☒ Religion / Conscience ☐ Sex

☐ Disability ☐ Other (specify): _____

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

PERSON/AGENCY/ORGANIZATION

State of Wisconsin Department of Safety and Professional Services

STREET ADDRESS

4822 Madison Yards Way

CITY

Madison

STATE

Wisconsin

ZIP

53705

PHONE (Please include area code) [redacted]

When do you believe that the discrimination occurred?

LIST DATE(S)

04/13/2005

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

In Wisconsin in 2002 as a pharmacist I did not feel comfortable with a prescription refill. I determined that the refill was being used for contraception. Therefore, I made a conscientious objection out of a sincerely held religious belief not to dispense or to participate in the transfer of the refill order.

The State Board of Pharmacy determined that my objection was "unprofessional." I was formally

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

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

SIGNATURE [redacted] | DATE *(mm/dd/yyyy)* 09/17/2018

Filing a complaint with OCR is voluntary. However, without the information requested above, OCR may be unable to proceed with your complaint. We collect this information under authority of Sections 1553 and 1557 of the Affordable Care Act, Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, the Church Amendments, the Coats-Snowe Amendment, the Weldon Amendment, and other civil rights statutes. We will use the information you provide to determine if we have jurisdiction and, if so, how we will process your complaint. Information submitted on this form is treated confidentially and is protected under the provisions of the Privacy Act of 1974. Names or other identifying information about individuals are disclosed when it is necessary for investigation of possible discrimination, for internal systems operations, or for routine uses, which include disclosure of information outside the Department of Health and Human Services (HHS) for purposes associated with civil rights compliance and as permitted by law. It is illegal for a recipient of Federal financial assistance from HHS to intimidate, threaten, coerce, or discriminate or retaliate against you for filing this complaint or for taking any other action to enforce your rights under Federal civil rights laws. You are not required to use this form. You also may write a letter or submit a complaint electronically with the same information. To submit an electronic complaint, go to OCR's web site at: **www.hhs.gov/ocr/civilrights/complaints/index.html**. To submit a complaint using alternative methods, see reverse page (page 2 of the complaint form).

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

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

☐ Braille ☐ Large Print ☐ Cassette tape ☐ Computer diskette ☐ Electronic mail ☐ TDD

☐ Sign language interpreter (specify language): _____

☐ Foreign language interpreter (specify language): _____ ☐ Other: _____

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

FIRST NAME	LAST NAME
HOME PHONE (Please include area code)	WORK PHONE (Please include area code)

STREET ADDRESS	CITY

STATE	ZIP	E-MAIL ADDRESS (If available)

Have you filed your complaint anywhere else? If so, please provide the following. (Attach additional pages as needed)

PERSON/AGENCY/ORGANIZATION/ COURT NAME(S)

DATE(S) FILED	CASE NUMBER(S) (If known)

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

ETHNICITY (select one)

☐ Hispanic or Latino

☐ Not Hispanic or Latino

RACE (select one or more)

☐ American Indian or Alaska Native ☐ Asian ☐ Native Hawaiian or Other Pacific Islander

☐ Black or African American ☐ White ☐ Other (specify): _____

PRIMARY LANGUAGE SPOKEN (if other then English) _____

How did you learn about the Office for Civil Rights?

☐ HHS Website/Internet Search ☐ Family/Friend/Associate ☐ Religious/Community Org ☐ Lawyer/Legal Org ☐ Phone Directory ☐ Employer

☐ Fed/State/Local Gov ☐ Healthcare Provider/Health Plan ☐ Conference/OCR Brochure ☐ Other (specify): _____

To submit a complaint, please type or print, sign, and return completed complaint form package (including consent form) to the OCR Headquarters address below.

U.S. Department of Health and Human Services
Office for Civil Rights
Centralized Case Management Operations
200 Independence Ave., S.W.
Suite 515F, HHH Building
Washington, D.C. 20201
Customer Response Center: (800) 368-1019
Fax: (202) 619-3818
TDD: (800) 537-7697
Email: ocrmail@hhs.gov

Burden Statement

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

HHS-699 (7/09) (BACK)

COMPLAINANT CONSENT FORM

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

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

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

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

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

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

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

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

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

- I am also aware of the obligations of OCR to honor requests under the Freedom of Information Act (FOIA). I understand that it may be necessary for OCR to disclose information, including personally identifying information, which it has gathered as part of its investigation of my complaint.

- In addition, I understand that as a complainant I am covered by the Department of Health and Human Services' (HHS) regulations which protect any individual from being intimidated, threatened, coerced, retaliated against, or discriminated against because he/she has made a complaint, testified, assisted, or participated in any manner in any mediation, investigation, hearing, proceeding, or other part of HHS' investigation, conciliation, or enforcement process.

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

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

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

Signature: [redacted] Date: 09/17/2018

**Please sign and date* [redacted] *ed to sign if submitting this form by email because submission by email represents your signature.*

Name (Please print): [redacted]

Address: [redacted]

Telephone Number: [redacted] x (H)

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

Privacy Act

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

— OCR is authorized to solicit information under:
(i) Federal laws barring discrimination by recipients of Federal financial assistance on grounds of race, color, national origin, disability, age, sex, religion, and conscience under programs and activities receiving Federal financial assistance from the U.S. Department of Health and Human Services (HHS), including, but not limited to, Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d *et seq.*), Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794), the Age Discrimination Act of 1975 (42 U.S.C. § 6101 *et seq.*), Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 et seq.), Sections 794 and 855 of the Public Health Service Act (42 U.S.C. §§ 295m and 296g), Section 1553 of the Affordable Care Act (42 U.S.C. § 18113), the Church Amendments (42 U.S.C. § 300a-7), the Coats-Snowe Amendment (42 U.S.C. § 238n) and the Weldon Amendment (*e.g.*, Consolidated Appropriations Act of 2017, Pub. L. 115-31, Div. H, Tit. V, § 507);
(ii) Titles VI and XVI of the Public Health Service Act (42 U.S.C. §§ 291 *et seq.* and 300s *et seq.*) and 42 C.F.R. Part 124, Subpart G (Community Service obligations of Hill- Burton facilities);
(iii) 45 C.F.R. Part 85, as it implements Section 504 of the Rehabilitation Act in programs conducted by HHS; and
(iv) Title II of the Americans with Disabilities Act (42 U.S.C. § 12131 et seq.) and Department of Justice regulations at 28 C.F.R. Part 35, which give HHS "designated agency" authority to investigate and resolve disability discrimination complaints against certain public entities, defined as health and service agencies of state and local governments, regardless of whether they receive federal financial assistance.
(v) The Standards for the Privacy of Individually Identifiable Health Information (The Privacy Rule) at 45 C.F.R. Part 160 and Subparts A and E of Part 164, which enforce the Health Insurance Portability and Accountability Act of 1996 (HIPAA) (42 U.S.C. § 1320d-2).

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

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

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

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

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

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

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

PROTECTING PERSONAL INFORMATION IN COMPLAINT INVESTIGATIONS

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

HOW DOES OCR PROTECT MY PERSONAL INFORMATION?

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

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

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

CAN I SEE MY OCR FILE?

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

CAN OCR GIVE MY FILE TO ANY ONE ELSE?

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

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

CAN ANYONE ELSE SEE THE INFORMATION IN MY FILE?

Access to OCR's files and records is controlled by the Freedom of Information Act (FOIA). Under FOIA, OCR may be required to release information about this case upon public request. In the event that OCR receives such a request, we will make every effort, as permitted by law, to protect information that identifies individuals, or that, if released, could constitute a clearly unwarranted invasion of personal privacy.

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

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

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

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

OR

Contact the Customer Response Center at (800) 368-1019

(see contact information on page 2 of the Complaint Form)