March 26, 2018

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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 been made worse by

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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]

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

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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).

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 assistance to pregnant women

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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.).

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 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

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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.).

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.

<u>The Stormans Family and Ralph's Thriftway</u>

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.

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

[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).

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

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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.
[36] *Id.* at ¶ 47.

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

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[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.

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.

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[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.

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 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,

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

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 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

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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").

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,

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