

# THE RUTHERFORD INSTITUTE

Post Office Box 7482  
Charlottesville, Virginia 22906-7482

JOHN W. WHITEHEAD  
Founder and President

TELEPHONE | 434 / 978 - 3888  
EMAIL | [staff@rutherford.org](mailto:staff@rutherford.org)  
[www.rutherford.org](http://www.rutherford.org)

October 3, 2022

U.S. Department of Health and Human Services  
Office for Civil Rights  
**Attention: 1557 NPRM (RIN 0945-AA17)**  
Hubert H. Humphrey Bldg, Room 509F  
200 Independence Ave, SW  
Washington, DC 20201

**Re: Opposition to Proposed Rule on “Nondiscrimination in Health Programs and Activities,” Docket # HHS-OS-2022-0012**

*“To go against conscience is neither right nor safe. Here I stand, I can do no other, so help me God.” – Martin Luther*

Secretary Becerra:

As an organization committed to safeguarding the rights of all citizens, including the right of conscience as protected by the Free Exercise Clause of the First Amendment, The Rutherford Institute<sup>1</sup> strongly opposes the U.S. Department of Health and Human Services’ (“HHS”) attempt through this proposed rule to circumvent the Constitution, federal and state laws, and longstanding jurisprudence in order to compel healthcare workers to violate their ethical and religious convictions.<sup>2</sup>

HHS’ proposed rule on “Nondiscrimination in Health Programs and Activities” seeks to force healthcare workers to provide abortion services and gender transition services.<sup>3</sup> For the government to compel healthcare workers to provide certain types of services against their professional judgement, religious convictions, and conscience is both appalling and unconstitutional.

For many healthcare providers, objections to these services come not only from scientific and empirical evidence, as well as concerns that such services may not be in the best interest of

---

<sup>1</sup> The Rutherford Institute is a nonprofit civil liberties organization which seeks to protect individuals’ constitutional rights and educate the public about threats to their freedoms.

<sup>2</sup> 87 Fed. Reg. 47824 (proposed Aug. 4, 2022).

<sup>3</sup> 87 Fed. Reg. 47824, 47828, 47879.

their patient’s health,<sup>4</sup> but also from their religious beliefs which are protected under the First Amendment.

As the U.S. Supreme Court has recognized, “[p]rofessionals might have a host of good-faith disagreements, both with each other and with the government, on many topics in their respective fields . . . and the people lose when the government is the one deciding which ideas should prevail.”<sup>5</sup> As “[g]overnments must not be allowed to force persons to express a message contrary to their deepest convictions,”<sup>6</sup> even more so governments must not be allowed to force persons to perform acts and medical procedures contrary to those convictions.

## **Background**

The Department of Human and Health Services (“HHS”) recently issued a notice for proposed rulemaking (“NPRM”),<sup>7</sup> which would effectively affirm and implement the Biden Administration’s perspectives on nondiscrimination based on sexual orientation and gender identity, as well as reproductive healthcare including abortions.

Specifically, HHS’s proposed rule would reinterpret how Section 1557 of the Affordable Care Act (“ACA”) prohibits discrimination on the basis of “sex” in providing health services.

In 2016, HHS issued a similar rule interpreting Section 1557’s prohibition of “discrimination on the basis of sex” to include discrimination on the basis of “termination of pregnancy” and “gender identity.”<sup>8</sup> However, four years later in 2020, HHS finalized a new rule which “adopted Title IX’s religious exemption and repealed the 2016 Rule’s definition of sex discrimination. But HHS declined to replace it with a new definition, reasoning that the Supreme Court’s impending decision in *Bostock* would ‘likely have ramifications for the definition of “on the basis of sex” under Title IX.’”<sup>9</sup> Shortly thereafter, the Court held in *Bostock v. Clayton County* that it was a violation of Title VII to terminate employees for being homosexual or transgender.<sup>10</sup>

In its NPRM, HHS states that it “proposes to revise the 2020 Rule” and “address nondiscrimination on the basis of sex, including gender identity and sexual orientation, consistent with *Bostock* and related case law, as well as subsequent Federal agency interpretations.”<sup>11</sup> This is in response to President Biden’s Executive Order 13988, which

---

<sup>4</sup> See *Gibson v. Collier*, 920 F.3d 212, 216, 224 (5th Cir. 2019) (finding “it is indisputable that the necessity and efficacy of sex reassignment surgery is a matter of significant disagreement within the medical community” and it “remains one of the most hotly debated topics within the medical community today”).

<sup>5</sup> *Nat’l Inst. of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2374-75 (2018).

<sup>6</sup> *Id.* at 2379 (Kennedy, J. concurring).

<sup>7</sup> Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. 47824 (proposed Aug. 4, 2022).

<sup>8</sup> *Franciscan Alliance, Inc. v. Becerra*, No. 21-11174, slip op. at 3 (5th Cir. Aug. 26, 2022).

<sup>9</sup> *Id.* at 4.

<sup>10</sup> *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020).

<sup>11</sup> 87 Fed. Reg. at 47828; <https://www.federalregister.gov/d/2022-16217/p-136>

“directed agencies to review all agency actions, including regulations, that prohibit discrimination on the basis of sex to determine if they were inconsistent with the Court's reasoning in *Bostock*,”<sup>12</sup> as well as Executive Order 14076,<sup>13</sup> which calls on HHS to “protect and expand access to the full range of reproductive healthcare services” including those relating to the termination of a pregnancy after the Supreme Court held that there is no constitutional right to abortion in *Dobbs v. Jackson Women’s Health Organization*, 142 S. Ct. 2228 (2022).<sup>14</sup> As the NPRM further notes, HHS “believes it could be beneficial to include a provision specifically prohibiting discrimination on the basis of pregnancy-related conditions as a form of sex-based discrimination.”<sup>15</sup>

Thus, the “proposed rule, if adopted, would reinstate much the same approach as the 2016 Rule by likewise interpreting Section 1557 to require that hospitals perform gender-reassignment surgeries and abortions.”<sup>16</sup>

### **Legal Analysis**

Although HHS seeks to rely on *Bostock* for justification of its proposed rule and interpretation, the Court explicitly limited the scope of that decision. In acknowledging the “worry that [the Court’s] decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination,” the Court explained that “none of these other laws are before [the Court] . . . and [the Court] do[es] not prejudge any such question today. Under Title VII, too, [the Court] do[es] not purport to address bathrooms, locker rooms, or anything else of the kind.”<sup>17</sup> Thus, “*Bostock* extends no further than Title VII,”<sup>18</sup> and any application of *Bostock* would have to come through Title VII.

The NPRM states, HHS “is undertaking this rulemaking to better align the Section 1557 regulation with the statutory text of 42 U.S.C. § 18116.”<sup>19</sup> But 42 U.S.C. § 18116 explicitly limits the basis of discrimination to grounds prohibited under Title VI, Title IX, Section 794 of Title 29, and the Age Discrimination Act—not under Title VII. Therefore, it is highly questionable for HHS to rely on *Bostock*’s very limited application to Title VII.

---

<sup>12</sup> 87 Fed. Reg. at 47829; <https://www.federalregister.gov/d/2022-16217/p-160>; Exec. Order No. 13,988, 86 Fed. Reg. 7023 (Jan. 20, 2021).

<sup>13</sup> 87 Fed. Reg. at 47879; <https://www.federalregister.gov/d/2022-16217/p-967>

<sup>14</sup> Exec. Order No. 14,076, 87 Fed. Reg. 42053 (July 8, 2022);

<https://www.federalregister.gov/documents/2022/07/13/2022-15138/protecting-access-to-reproductive-healthcare-services>.

<sup>15</sup> 87 Fed. Reg. at 47879; <https://www.federalregister.gov/d/2022-16217/p-967>

<sup>16</sup> *Franciscan Alliance, Inc.*, No. 21-11174, slip op. at 7 (5th Cir. Aug. 26, 2022).

<sup>17</sup> *Bostock*, 140 S.Ct. at 1753.

<sup>18</sup> *Pelcha v. MW Bancorp., Inc.*, 988 F.3d 318, 324 (6th Cir. 2021); *see also Tennessee v. United States Department of Education*, No. 3:21-cv-00308, slip op. at 31, 41 (E.D. Tenn. July 15, 2022) (finding that the “limited reach of *Bostock*” did not require the Department of Education’s and the Equal Employment Opportunity Commission’s “new interpretations of Titles VII and IX”).

<sup>19</sup> 87 Fed. Reg. at 47829; <https://www.federalregister.gov/d/2022-16217/p-143>

Even if HHS could rely on the reasoning from *Bostock*, the Court noted numerous protections for those with religious beliefs, which are contrary to the proposed rule by HHS. The Court stated that within Title VII, “Congress included an express statutory exception for religious organizations[:] § 2000e–1(a),” and

[t]his Court has also recognized that the First Amendment can bar the application of employment discrimination laws “to claims concerning the employment relationship between a religious institution and its ministers.” *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171, 188, 132 S.Ct. 694, 181 L.Ed.2d 650 (2012). And Congress has gone a step further yet in the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, codified at 42 U.S.C. § 2000bb et seq. That statute prohibits the federal government from substantially burdening a person’s exercise of religion unless it demonstrates that doing so both furthers a compelling governmental interest and represents the least restrictive means of furthering that interest. § 2000bb–1. Because RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII’s commands in appropriate cases. See § 2000bb–3.<sup>20</sup>

Thus, if HHS truly seeks to address nondiscrimination on the basis of sex consistent with *Bostock*, then it should recognize that the holding in *Bostock* clearly does not stand for the government being able to compel workers to violate their religious convictions in order to maintain their employment. *Bostock* rightly protects workers from being treated unfairly and penalized in their employment because of their sex.

It would be inconsistent with *Bostock* to then penalize healthcare workers because of their religious convictions, which is what the HHS proposed rule seeks to do.

Indeed, HHS acknowledges that there are many protections for workers with religious beliefs, stating in its NPRM that

there are several other statutory and regulatory provisions related to the provision of abortions that may apply to an entity covered by Section 1557, and OCR will apply such provisions consistent with the law. For example, the Weldon Amendment forbids funds appropriated to HHS, among other Departments, from being “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.” The Coats-Snowe Amendment forbids discriminating against an entity that refuses to undergo training in performance or referrals for abortions. The Church

---

<sup>20</sup> *Bostock*, 140 S.Ct. at 1754.

Amendment forbids requiring any individual “to perform or assist in the performance of any part of a health service program . . . if his performance or assistance in the performance of such part of such program . . . would be contrary to his religious beliefs or moral convictions.” It also provides that an entity’s receipt of any grant, contract, loan, or loan guarantee under the Public Health Service Act, the Community Mental Health Centers Act, or the Developmental Disabilities Services and Facilities Construction Act “does not authorize any court or any public official or other public authority to require . . . such entity to . . . make its facilities available for the performance of any sterilization procedure or abortion if the performance of such procedure or abortion in such facilities is prohibited by the entity on the basis of religious beliefs or moral convictions.” The Church Amendment also prohibits discrimination against health care personnel related to their employment or staff privileges because they “performed or assisted in the performance of a lawful sterilization procedure or abortion.” The same nondiscrimination protections also apply to health care personnel who refuse to perform or assist in the performance of sterilization procedures or abortion. In addition, some of HHS’ programs and services are specifically governed by abortion restrictions in the underlying statutory authority or program authorization.<sup>21</sup>

HHS further acknowledges adverse court rulings against it enforcing such a proposed rule, noting that “[i]n 2021, the court in *Franciscan Alliance* issued an order enjoining [HHS] from interpreting or enforcing Section 1557 against the plaintiffs in that case in a manner that would require them to perform or provide insurance coverage for gender transition services or abortion”<sup>22</sup> as that would violate the protection of their religious exercise under RFRA.<sup>23</sup>

Despite this ruling, HHS states, “We acknowledge that the *Franciscan Alliance* court vacated the challenged provisions of the 2016 rule and reasoned that the Department was required to incorporate the language of Title IX’s abortion neutrality provision; however, we disagree with that decision, which does not bind this new rulemaking.”<sup>24</sup> However, three weeks after HHS issued this NPRM, the Fifth Circuit rejected HHS’s arguments disagreeing with the district court’s decision on appeal and affirmed the injunction against HHS in part due to this new NPRM, noting that “the loss of freedoms guaranteed by the First Amendment . . . and RFRA all constitute per se irreparable harm.”<sup>25</sup>

HHS also asserts a theory in its NPRM “that the Emergency Medical Treatment and Active Labor (EMTALA) provides rights to individuals when they seek examination or

---

<sup>21</sup> 87 Fed. Reg. at 47879; <https://www.federalregister.gov/d/2022-16217/p-957>

<sup>22</sup> 87 Fed. Reg. at 47826; <https://www.federalregister.gov/d/2022-16217/p-96>

<sup>23</sup> *Franciscan Alliance, Inc.*, No. 21-11174, slip op. at 10-11, 13 (5th Cir. Aug. 26, 2022); *Franciscan Alliance, Inc. v. Becerra*, 553 F.Supp.3d 361, 376 (N.D. Tex. 2021).

<sup>24</sup> 87 Fed. Reg. at 47879; <https://www.federalregister.gov/d/2022-16217/p-952>

<sup>25</sup> *Franciscan Alliance, Inc.*, No. 21-11174, slip op. at 2, 18 (5th Cir. Aug. 26, 2022).

treatment and appear at an emergency department of a hospital that participates in Medicare. If that person has an ‘emergency medical condition,’ the hospital must provide available stabilizing treatment, including abortion . . . notwithstanding any directly conflicting state laws or mandate that might otherwise prohibit or prevent such treatment.”<sup>26</sup> But not long after HHS posted its NPRM, the Northern District of Texas enjoined enforcement of HHS guidance on EMTALA where HHS claimed that healthcare providers had an obligation to perform abortions regardless of state law.<sup>27</sup> The court explained that EMTALA “protects *both* mothers and unborn children, is silent as to abortion, and preempts state law only when the two directly conflict.”<sup>28</sup>

Likewise, many conflicts and preemption issues will probably arise from this proposed rule as some states provide conscience protections for their citizens from having to perform abortions.

For example, Illinois provides the “Health Care Right of Conscience Act,” which serves “to prohibit all forms of discrimination, disqualification, coercion, disability or impositions of liability upon such persons or entities by reason of their refusing to act contrary to their conscience or conscientious convictions in providing . . . health care services and medical care.”<sup>29</sup> This specifically includes abortion and makes it “unlawful for any public official, guardian, agency, institution or entity to deny any form of aid, assistance or benefits, or to condition the reception in any way of any form of aid, assistance or benefits, or in any other manner to coerce, disqualify or discriminate against any person, otherwise entitled to such aid, assistance or benefits, because that person refuses to . . . perform, assist, counsel, suggest, recommend, refer or participate in any way in any form of health care services contrary to his or her conscience.”<sup>30</sup>

Similarly, Virginia has a “Conscience Clause” which provides that “any person who shall state in writing an objection to any abortion or all abortions on personal, ethical, moral or religious grounds shall not be required to participate in procedures which will result in such abortion, and the refusal of such person, hospital or other medical facility to participate therein shall not form the basis of any claim for . . . any disciplinary or recriminatory action against such person, nor shall any such person be denied employment because of such objection or refusal.”<sup>31</sup>

---

<sup>26</sup> 87 Fed. Reg. at 47879; <https://www.federalregister.gov/d/2022-16217/p-952>

<sup>27</sup> *Texas v. Becerra*, No. 5:22-cv-00185-H (N.D. Tex. Aug. 23, 2022).

<sup>28</sup> *Id.*, slip op. at 1.

<sup>29</sup> 745 ILCS 70/2.

<sup>30</sup> 745 ILCS 70/3(a), 70/8.

<sup>31</sup> Va. Code Ann. § 18.2-75.

## Conclusion

By seeking to punish those who hold religious and ethical beliefs with which HHS disagrees, the proposed rule appears to “suggest some sort of religious animus,”<sup>32</sup> which is in direct opposition to the First Amendment’s Free Exercise Clause.

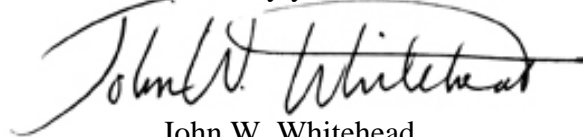
Healthcare workers should not face penalties for refusing to perform controversial medical procedures like abortions and gender transition services which go against their deeply held religious or ethical beliefs. Even if HHS thinks that abortions and gender transition services should be lawful, there is no reason or justification to force healthcare workers to provide those services against their conscience, especially when there are many other healthcare providers willing to do so. Moreover, the proposed rule would likely discourage individuals from entering or remaining in the healthcare profession, further exacerbating the existing shortage of healthcare workers.

Federal and state laws exist to protect workers from being forced to make an impossible choice—whether they should commit an act which goes against their deeply held beliefs, or whether they should lose their ability to earn a living and provide for themselves and their families.<sup>33</sup> These protections for healthcare workers have not and would not deprive patients of losing access to the care they seek; rather, they simply prevent the government from forcing some healthcare workers to perform services which they find unconscionable and not in their patient’s best interest.

For the reasons laid out herein, it is likely the proposed rule will conflict with established laws and result in widespread litigation throughout the country where courts will side in favor of those challenging the rule.

The Rutherford Institute opposes HHS’s proposed rule and calls on the government to abide by its obligation to respect and uphold the constitutional rights of all its citizenry, including the rights of conscience and religious beliefs.

Sincerely yours,

A handwritten signature in black ink that reads "John W. Whitehead". The signature is written in a cursive style with a large, sweeping flourish over the name.

John W. Whitehead  
President

---

<sup>32</sup> *Franciscan Alliance, Inc.*, 553 F.Supp.3d 361, 376 n.13 (N.D. Tex. 2021).

<sup>33</sup> *See Id.* at 374, 378.