March 27, 2018

U.S. Department of Health and Human Services
Office for Civil Rights
Hubert H. Humphrey Building
Room 509F
200 Independence Avenue, S.W.
Washington, D.C. 20201

Attn: Conscience NPRM, RIN 0945-ZA03

Submitted via: Federal eRulemaking Portal

Re: Comments regarding Proposed Rule "Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, RIN 0945-ZA03, Docket HHS-OCR-2018-0002

Dear Sir or Madam:

The Center for Law and Religious Freedom of the Christian Legal Society submits the following comments in support of the Proposed Rule, "Protecting Statutory Conscience Rights in Health Care; Delegations of Authority," issued on January 18, 2018, and published at 83 Fed. Reg. 3880-3931 (Jan. 26, 2018). The Center strongly supports the adoption of the Proposed Rule that will protect all Americans' freedom to live according to their deepest convictions regarding the sanctity of human life.

We commend the Department for returning to its historic role of respecting and protecting all Americans' religious freedom to refuse to participate in, facilitate, or refer for medical services, devices, and drugs that violate their sincere religious beliefs against the taking of human life. The comments below reflect comments submitted by the Center for the Christian Legal Society in 2012 and 2013 in response to actions by the Department that did not respect all Americans' religious conscience rights.[1] We are extremely grateful to see the Department return to the essential first principles of protecting religious freedom and respecting human life.

Religious liberty is embedded in our Nation's DNA. Respect for religious conscience rights is not an afterthought or a luxury, but the very essence of our political and social compact. America's tradition of protecting religious conscience predates the United States itself. In Seventeenth Century Colonial America, Quakers were exempted in some colonies from oath taking and removing their hats in court. Jews were sometimes granted exemptions from marriage

[1] On June 19, 2012, the Center filed comments on behalf of the Christian Legal Society on the Advance Notice of Proposed Rulemaking on Preventive Services, CMS-9968-ANPRM, 77 Fed. 16501-16508 (Mar. 21, 2012) http://clsnet.org/document.doc?id=600. On April 8, 2013, the Center filed comments on behalf of the Christian Legal Society on the Notice of Proposed Rulemaking on Preventive Services, CMS-9968-P, 78 Fed. Reg. 8456-8475 (Feb. 6, 2013), http://clsnet.org/document.doc?id=599.

laws inconsistent with Jewish law. Exemptions from paying taxes to maintain established churches became common in the Eighteenth Century.[2]

After Independence, President George Washington urged respect for Quakers' exemptions from military service, even though his army had been perpetually outnumbered in battle during the Revolution.[3] During the struggle against totalitarianism in World War II, the Supreme Court protected schoolchildren of the Jehovah's Witnesses faith from being compelled to pledge allegiance to the American flag.[4]

For forty-five years, federal law has protected religious conscience in the abortion context, in order to ensure that the "right to choose" includes religious citizens' right to choose not to participate in, fund, facilitate, or refer for abortions. The States have similarly followed suit.[5]

Congress has long had a bipartisan tradition of protecting the right not to participate in, facilitate, fund, or refer for abortion on religious or moral grounds. Shining examples of bipartisanship, the federal conscience laws have been supported by Democrats and Republicans, at least until quite recently.[6] The Center shares the hope of many that bipartisan support for conscience rights will again become the norm after the unfortunate deviation from that course that occurred from 2011 through 2016.

In *Doe v. Bolton*,[7] which was the companion case to *Roe v. Wade*,[8] the Supreme Court noted with approval that Georgia state law protected hospitals and physicians from participating in abortion. The Court observed approvingly:

> [T]he hospital is free not to admit a patient for an abortion. . . . Further a physician or any other employee has the right to refrain, for moral or religious reasons, from participating in the abortion procedure. These provisions obviously are in the statute in order to afford appropriate protection to the individual and to the denominational hospital.

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[2] *See* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1466-73 (1990); Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 Notre Dame L. Rev. 1793, 1804-1808 (2006).
[3] Letter of President George Washington to the Society of Quakers, Oct. 13, 1789, *Founders Online,* National Archives, last modified Feb. 1, 2018, https://founders.archives.gov/documents/Washington/05-04-02-0188. [Original source: *The Papers of George Washington*, Presidential Series, vol. 4, *8 September 1789–15 January 1790*, ed. Dorothy Twohig. Charlottesville: University Press of Virginia, 1993, pp. 265–269.]
[4] *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943).
[5] Nearly all states have enacted conscience clauses, specifically 47 states as of 2007. James T. Sonne, *Firing Thoreau: Conscience and At-will Employment,* 9 U. Pa. J. Lab. & Emp. L. 235, 269-71 (2007).
[6] *See generally,* Richard M. Doerflinger, *Is Conscience Partisan? A Look at the Clinton, Moynihan, and Kennedy Records,* April 30, 2012, *available at* http://www.thepublicdiscourse.com/2012/04/5306/ (last visited March 27, 2018).
[7] 410 U.S. 179, 197-98 (1973)
[8] 410 U.S. 413 (1973).

In the wake of *Roe v. Wade*, a Democratic Congress passed the Church Amendment,[9] named for its leading sponsor Senator Frank Church, a Democratic senator from Idaho, who was widely known for his opposition to the Vietnam War. The Church Amendment prevents hospitals that receive federal funds from being forced to participate in abortion or sterilization. It also prohibits discrimination against doctors and nurses who refuse to participate in abortion. The Senate vote was 92-1.

In 1976, a Democratic Congress first adopted the Hyde Amendment to prohibit certain streams of federal funding of abortion.[10] In upholding the constitutionality of the Hyde Amendment, the Supreme Court, in *Harris v. McRae*,[11] explained that "[a]bortion is inherently different from other medical procedures, because no other procedure involves the purposeful termination of a potential life." Every Congress since 1976 has passed the Hyde Amendment as part of the appropriations process.

In 1993, Congress passed the Religious Freedom Restoration Act ("RFRA") in order to protect religious conscience generally from government-imposed burdens, which includes securing religious conscience rights in the context of respecting human life. RFRA provides a statutory exemption to all federal laws for religious claims, unless the government has a compelling interest that it is unable to achieve by less restrictive means.[12]

RFRA passed the Senate 97-3, with Senator Edward Kennedy, a Democratic senator from Massachusetts, and Senator Orrin Hatch, a Republican senator from Utah, as its lead co-sponsors. The House passed RFRA by a unanimous voice vote. President Clinton signed RFRA into law on November 16, 1993.

Twenty-five years later, RFRA remains the anchor of religious freedom protections in federal law. Pursuant to Executive Order 13798 § 4,[13] the Attorney General issued a Memorandum for all executive departments and agencies, entitled "Federal Law Protections for Religious Liberty," and an accompanying detailed appendix, on October 6, 2017.[14] In the appendix, the Attorney General noted that "Congress has taken special care with respect to programs touching on abortion, sterilization, and other procedures that may raise religious conscience objections."[15]

In 1994, during the debate over President Clinton's health reform legislation, Senate Majority Leader George Mitchell, a Democratic senator from Maine, and Senator Daniel Patrick Moynihan, a Democratic senator from New York, brought the "Health Security Act" to the Senate

[9] 42 U.S.C. § 300a-7.
[10] Appropriations for the Department of Labor and Department of Health, Education, and Welfare Act, 1976, Pub. L. 94-439, Title II, § 209 (Sept. 30, 1976).
[11] 448 U.S. 297 (1980).
[12] 42 U.S.C. § 42 U.S.C. 2000bb-1(a). *See Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006)("Under RFRA, the Federal Government may not, as a statutory matter, substantially burden a person's exercise of religion, 'even if the burden results from a rule of general applicability.'")
[13] 82 Fed. Reg. 21675 (May 4, 2017).
[14] 82 Fed. Reg. 49668-49680 (Oct. 26, 2017).
[15] *Id.* at 49679.

floor. The health reform bill included robust protection for participants who had religious or moral opposition to abortion or "other services." For example, individual purchasers of health insurance who "object[] to abortion on the basis of a religious belief or moral conviction" could not be denied purchase of insurance that excluded abortion services. Employers could not be prevented from purchasing insurance that excluded "coverage of abortion or other services." Hospitals, doctors and other health care workers who refused to participate in "the performance of any health care service . . . on the basis of a religious belief or moral conviction" were protected. Commercial insurance companies and self-insurers likewise were protected.[16]

In 1996, President Clinton signed into law the Coats-Snowe Amendment, Section 245 of the Public Health Service Act. The Coats-Snowe Amendment prohibits federal, state, and local governments from discriminating against health care workers and hospitals that refuse to participate in abortion.[17]

In 2004, a Republican Congress passed the Weldon Amendment. It prohibits HHS and the Department of Labor from funding governmental programs, including State or local governmental programs, that discriminate against religious hospitals, doctors, nurses, and health insurance plans on the basis of their refusal to "provide, pay for, provide coverage of, or refer for abortions."[18]

In 2010, a Democratic Congress passed the Patient Protection and Affordable Care Act ("ACA"), which contained a conscience provision that states:

> Nothing in this Act shall be construed to have any effect on Federal laws regarding conscience protection; willingness or refusal to provide abortion; and discrimination on the basis of the willingness or refusal to provide, pay for, cover, or refer for abortion or to provide or participate in training to provide abortion.[19]

The ACA also provided that it shall not "be construed to require a qualified health plan to provide coverage of [abortion] services . . . as part of its essential health benefits."[20] Also, the ACA further provided that "the issuer of a qualified health plan . . . determine[s] whether or not the plan provides coverage of [abortion]."[21]

In 2010, President Obama issued Executive Order 13535, affirming that:

> [L]ongstanding Federal Laws to protect conscience (such as the Church Amendment, 42 U.S.C. 300a-7, and the Weldon Amendment, section 508(d)(1) of Public Law 111-8) remain intact and new protections prohibit discrimination against health care facilities and health care providers

16 *Doerflinger, supra*, note 4.
17 42 U.S.C. § 238n.
18 Consolidated Appropriations Act of 2009, Pub. L. No. 111-117, Sec. 508(d)(1)-(2), 123 Stat. 3034, 1111 (2009).
19 42 U.S.C. § 18023 (a)(2)(A).
20 *Id.* § 18023(b)(1)(A)(i).
21 *Id.* § 18023(b)(1)(A)(ii).

> because of an unwillingness to provide, pay for, provide coverage of, or refer for abortions.[22]

The Church, Hyde, Coates-Snow, and Weldon Amendments are the preeminent conscience protections in the defense-of-life context. But numerous other federal statutes protect religious conscience as well.[23]

Of course, these bipartisan presidential and congressional protections are rooted in the First Amendment freedoms of speech and free exercise. As James Madison wrote in the Memorial and Remonstrance, freedom of religion "is in its nature an unalienable right" because a citizen owes to God a duty that "is precedent, both in order of time and in degree of obligation, to the claims of Civil Society."[24] This is doubly true when the unalienable right of religious conscience is being exercised to defend and preserve the unalienable right to life.

In conclusion, the Center for Law and Religious Freedom commends the Department for its commitment to the protection of religious conscience and the right of all Americans to refuse to take human life. We support the Proposed Rule and its thoughtful, judicious application of the many protections that Congress has enacted for religious conscience. The Proposed Rule reflects the historic, bipartisan tradition of respecting religious conscience, particularly in the context of life-taking procedures. In so doing, the Department follows in the footsteps of both Democratic and Republican presidents, senators, and members of Congress to protect religious conscience and respect human life.

Respectfully submitted,

/s/ Kimberlee Wood Colby

Kimberlee Wood Colby
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[22] 75 Fed. Reg. 15599 (Mar. 24, 2010).

[23] *E.g.,* 20 U.S.C. § 1688 (federal sex discrimination law cannot be interpreted to force anyone to participate in an abortion); 18 U.S.C. § 3597 (protecting persons who object for moral or religious reasons to participating in federal executions or prosecutions); 8 U.S.C. § 1182 (g) (protecting aliens who object to vaccinations on religious or moral grounds); 42 U.S.C. § 1396u-2(b)(3) (protecting Medicaid managed care plans from forced provision of counseling or referral if they have religious or moral objections); *id.* § 1395w-22(j)(3)(B) (same for Medicare managed care plans); Financial Services and General Government Appropriations Act of the Consolidated Appropriations Act, Div. C, Title VII, § 727 (since 1999, protects religious health plans in federal employees' health benefits program from forced provision of contraceptives coverage, and protects individual religious objectors from discrimination); Department of State, Foreign Operations, and Related Programs Appropriations Act of the Consolidated Appropriations Act, Pub. L. No. 112-74, Div. I, Title III (since 1986, prohibits discrimination in the provision of family planning funds against applicants who offer only natural family planning for religious or conscience reasons).

[24] James Madison, *Memorial and Remonstrance Against Religious Assessments*, June 20, 1785, *in* 5 *The Founders' Constitution* 82 (Philip B. Kurland & Ralph Lerner eds., 1987).