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

**RE: Protecting Statutory Conscience Rights in Health Care; Delegations of Authority**

In health care, the health and well-being of patients must always come first. The new proposed rule issued by the Department of Health and Human Services Office of Civil Rights (HHS OCR), titled “Protecting Statutory Conscience Rights in Health Care; Delegations of Authority,” could allow health care providers to refuse to serve patients on the basis of moral and religious beliefs. This could place vulnerable and marginalized populations, such as lesbian, gay, bisexual, and transgender (LGBT) individuals and people living with HIV, at risk for being denied necessary and life-saving medical care. This proposed rule is contrary to the ethical standards that all health care providers are charged to uphold.

LGBT people already face widespread discrimination in health care, such as being verbally or physically harassed or being denied treatment altogether. This discrimination acts as a barrier to seeking necessary routine and emergency care. For example, a 2009 Lambda Legal survey of 4,916 LGBT people across the U.S. found that 56% of lesbian, gay and bisexual people, and 70% of transgender people, reported experiencing discrimination in health care.<sup>1</sup> The 2015 U.S. Transgender Survey of nearly 28,000 transgender people found that in the last year, 33% of respondents had experienced anti-transgender discrimination in health care, and 23% of respondents chose to forego necessary health care due to fear of discrimination.<sup>2</sup> A 2017 survey of a nationally representative probability sample of 489 LGBT adults found that roughly 1 in 6 (18%) reported avoiding medical care, even when necessary, because of concerns that they would be discriminated against.<sup>3</sup>

Rules and regulations that allow health care providers to discriminate based on religious beliefs will only exacerbate anti-LGBT discrimination in health care. Religion has already been invoked to deny LGBT people access to health care. For example, LGBT individuals have been denied appropriate mental health services and counseling;<sup>4</sup> a newborn was denied care because her parents were lesbians;<sup>5</sup> transgender patients have been denied transition-related medical care;<sup>6</sup> and an individual was denied his HIV medication,<sup>7</sup> all because of someone else’s religious beliefs. All of this contributes to the health disparities that disproportionately burden LGBT people. A health care provider’s religious beliefs should never determine the care a patient receives. In order to make meaningful progress in reducing these health disparities to “enhance and protect

the health and well-being of all Americans,” as is the mission of HHS, it is essential that any rule meant to protect freedom of religion explicitly prohibits discrimination on the basis of sexual orientation and gender identity.

While this proposed rule does not specifically mention LGBT people, sexual orientation, or gender identity, it could easily be interpreted as codifying anti-LGBT discrimination in health care. The proposed rule states that “freedom from discrimination on the basis of religious belief or moral conviction... does not just mean the right not to be treated differently or adversely; it also means being free not to act contrary to one’s beliefs.” This language is exceptionally broad, and could be interpreted to allow providers to deny general health care services to LGBT people, as well as specific services such as STI screening to a gay man, fertility treatment to a lesbian couple, or gender affirmation treatment to a transgender individual.

OCR’s proposed definition of discrimination is exceptionally broad.<sup>8</sup> This section is of particular concern:

OCR will regard as presumptively discriminatory any law, regulation, policy, or other such exercise of authority that has as its purpose, or explicit or otherwise clear application, the targeting of religious or conscience-motivated conduct. In determining the purpose or justification of such an exercise of authority, OCR will consider all relevant factors and proposes to include in that analysis, when supported by the applicable statute, whether or not the exercise of authority has a disparate impact on religious believers or those who share a particular religious belief or conviction.<sup>9</sup>

We are concerned that this language could authorize OCR to challenge federal regulations protective of LGBT people, and state and municipal sexual orientation and gender identity nondiscrimination laws. These laws are needed because LGBT people experience widespread social discrimination in employment, housing and public accommodations, including health care.<sup>10</sup> As U.S. Supreme Court Justice Kennedy stated for the majority in *Romer v. Evans* (94-1039), 517 U.S. 620 (1996), “Enumeration is the essential device used to make the duty not to discriminate concrete and to provide guidance to those who must comply.” Sexual orientation and gender identity nondiscrimination regulations and laws are essential to ensure access of LGBT people to health care. This is something that OCR should be defending, not undermining.

The proposed rule is especially concerning given existing state and federal legislation that would allow anti-LGBT discrimination under the guise of religious liberty. Altogether, 10 states have some form of religious refusal legislation that could authorize discrimination against LGBT people—such as refusing to allow LGBT people to adopt children, refusing to marry same-sex couples, and refusing to provide medical services to LGBT people—based on religious beliefs.<sup>11</sup> For example, Mississippi law HB 1523 allows discrimination based on the religious belief or moral conviction that “marriage is or should be recognized as the union of one man and one woman; sexual relations are properly reserved to such a marriage; and male (man) or female (woman) refer

to an individual's immutable biological sex as objectively determined by anatomy and genetics at time of birth."<sup>12</sup> This law allows businesses, individuals, and even government employees to refuse to serve LGBT people.<sup>13</sup> In terms of federal legislation, the First Amendment Defense Act (FADA), which prohibits the government from intervening against a person who "speaks, or acts, in accordance with a sincerely held religious belief or moral conviction that marriage is or should be recognized as a union of one man and one woman," was reintroduced in the Senate in March 2018. FADA has the support of President Trump, Vice President Pence, Attorney General Sessions, and the Republican Party.

We are also concerned that the proposed rule<sup>14</sup> expands the definition of several terms in ways that could make it harder for LGBT people to access health care. It greatly expands the definition of "health care program or activity," and expands the definition of "entity" to "include any State, political subdivision of any State, instrumentality of any State or political subdivision thereof, and any public agency, public institution, public organization, or other public entity in any State or political subdivision of any State." The proposed rule extends the entities covered far beyond the scope of traditional health care providers.

We are also concerned that the definition of "assist in the performance" is defined to include "participat[ing] in any program or activity with an *articulable* connection to a procedure, health service, health program, or research activity..." Previously this term was defined to include "participat[ing] in any program or activity with a *reasonable* connection to a procedure, health service, health program, or research activity..." We are concerned that this will allow for a much broader spread of religious refusals to participate in care, thus limiting access to needed health care for patients. We strongly urge OCR to narrow these proposed definitions, and to revert back to previous definitions of "health care program or activity," "entity," and "assist in the performance."

The proposed rule from HHS is also concerning given a number of recent federal policies and actions regarding religious liberty. In September 2017, HHS released its Draft Strategic Plan FY 2018-2022,<sup>15</sup> which stated that HHS will "vigorously enforce" and "affirmatively accommodate" religious beliefs, language which closely mirrors that of state religious refusal legislation being used to discriminate against LGBT people. The Draft Strategic Plan FY 2018-2022 also made no mention of LGBT health at all, while the Draft Strategic Plan FY 2014-2018 had several references to improving LGBT health. On October 6, 2017, Attorney General Sessions issued a memorandum<sup>16</sup> to all federal agencies which authorizes and encourages anti-LGBT discrimination in health care and other services. In the memo, Sessions cited the 2014 U.S. Supreme Court ruling in *Burwell v. Hobby Lobby Stores* in stating that private businesses can deny contraception coverage to employees based on religious beliefs. By this logic, a company could also refuse to provide sexual health care to LGBT people. The Trump Administration has also submitted an *amicus curiae* brief<sup>17</sup> to the U.S. Supreme Court in support of a baker who refused to make a wedding cake for a gay couple based on religious beliefs. In the brief, the Department of Justice argues that there is no compelling federal government interest in preventing anti-gay discrimination. Roger Severino, who President Trump appointed as

head of HHS OCR, has a long history of anti-LGBT activism. Severino has argued that sexual orientation and gender identity can be changed and should not be included in nondiscrimination legislation.<sup>18,19</sup> Given this federal context, this newest proposed rule from HHS appears to be the latest in a string of recent actions which encourage and allow anti-LGBT discrimination under the guise of religious liberty.

Freedom of religion is an important American value, which is why it is already protected by the First Amendment of the Constitution. But as we have learned time and time again in our nation's history, we need both freedom *of* religion (free exercise) and freedom *from* religion (freedom from state-sponsored discrimination in the name of some religious beliefs and practices that are privileged over others—the Establishment Clause).

Unlike other free exercise laws—such as the Religious Freedom Restoration Act of 1993, which protected American Indians' right to ritually use peyote—these recent religious refusal laws and executive branch actions cause real harm to third parties. As Douglas NeJaime and Reva Siegel point out in *The Yale Law Review*, these laws inflict both material harm and dignitary harm—harms that exacerbate stigma and reduce social status—on other citizens.<sup>20</sup>

The U.S. Constitution bars HHS from crafting “affirmative” accommodations within its programs if the accommodations would harm program beneficiaries. The Constitution dictates that “an accommodation must be measured so that it does not override other significant interests,”<sup>21</sup> “impose unjustified burdens on other[s],”<sup>22</sup> or have a “detrimental effect on any third party.”<sup>23</sup>

In addition to causing third party harm, the recent wave of anti-LGBT religious refusal legislation also violates the Establishment Clause of the First Amendment. Our nation's courts have ruled that, under this clause, the government is prohibited from passing laws that favor one religion over another, or laws that favor religion over non-religion.<sup>24</sup> In the *Estate of Thornton v. Caldor* ruling, the U.S. Supreme Court struck down a Connecticut statute which gave workers the absolute right to refuse to work on the Sabbath. The U.S. Supreme Court ruled that this law violated the Establishment Clause because it impermissibly advanced religion by requiring employers to conform business practices without exception to accommodate a particular religious belief that was not even practiced by all employees.<sup>25</sup>

The recent wave of anti-LGBT religious refusal legislation also violates the Establishment Clause by impermissibly advancing religion, and burdening LGBT people by forcing them to accommodate certain religious beliefs or practices to their personal detriment. A group of legal scholars from several Mississippi law schools and from Columbia University School of Law wrote, regarding Mississippi's HB 1523, that “HB 1523 violates the Establishment Clause by impermissibly accommodating religion in a way that harms third parties... the law strips Mississippians of applicable antidiscrimination protections in order to accommodate the preferences of religious individuals and institutions.”<sup>26</sup> The legal scholars go on to say that the law grants “public and private actors broad immunities that allow them to discriminate against

Mississippians based on a specific set of religious beliefs...although [the beliefs] are far from universal, even among religious individuals or denominations.”<sup>27</sup> In addition to violating the Establishment Clause of the First Amendment to the U.S. Constitution, government-sanctioned and -funded discrimination against LGBT people, same-sex couples, and potentially others, such as unmarried single mothers, violates the due process provisions of the Fifth and Fourteenth Amendments, and violates the equal protection provision of the Fourteenth amendment. The Fifth Amendment states, “No person shall be...deprived of life, liberty, or property, without due process of law...”<sup>28</sup> The Fourteenth Amendment states:

...No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.<sup>29</sup>

Several important U.S. Supreme Court cases have found discriminatory laws to violate the equal protection and due process rights of gay, lesbian, and bisexual people. In *Romer v. Evans* (1996) the Court ruled against a Colorado state constitutional amendment that prevented the state from passing legislation or adopting policies that prohibited discrimination based on sexual orientation, and overturned existing municipal nondiscrimination statutes.<sup>30</sup> Writing for the majority, Justice Anthony Kennedy ruled that Colorado’s Amendment 2, passed by a majority of voters in a 1992 ballot campaign, violated the equal protection clause of U.S. Constitution. The Court ruled that Amendment 2 was not motivated by a rational state interest, but rather by “animus” toward gay men, lesbians, and bisexual people. The Court ruled that Amendment 2 singled out homosexual and bisexual persons, imposing harm by denying them the right to seek and receive specific legal protection from discrimination. The Court stated, “If the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare desire to harm a politically unpopular group cannot constitute a legitimate governmental interest.”<sup>31</sup>

The two landmark marriage equality decisions, *United States v. Windsor* (2013) and *Obergefell v. Hodges* (2015), both appealed to the due process and equal protection clauses in striking down federal non-recognition of same-sex marriages, and state non-recognition, respectively. In *Windsor*, Justice Kennedy, writing for the majority, found that the federal non-recognition provision of the 1996 Defense of Marriage Act violated the equal liberty of persons protected by the Fifth Amendment’s due process and equal protection principles.<sup>32</sup> In *Obergefell*, Justice Kennedy, writing for the majority, ruled that the right of same-sex couples to marry is guaranteed by the equal protection and due process clauses of the Fourteenth Amendment.<sup>33</sup>

Faith-based organizations can play an important role in health care. For example, Black churches have played a major role in promoting HIV screening and raising awareness of HIV. However, the proposed rule goes too far in authorizing discriminatory action under the guise of free exercise of religion. The focus of HHS should be to assist individuals in need of critical services and support by increasing access to health care, supporting individual decision

making and informed consent, and prohibiting discrimination in the provision of human services. We respectfully urge HHS to rethink this proposed rule and any other attempts to allow health care providers to be able to use religion to engage in taxpayer-funded discrimination. Instead, we recommend that HHS instead focus on addressing health disparities and ensuring equal access to services regardless of race, color, national origin, religion, sex, gender identity, sexual orientation, age, or disability. Religious freedom does not include the freedom to discriminate and cause harm to others by denying basic services we all need to live—including health care.

Thank you for the opportunity to provide comment. Should you have any questions or require further information, please contact Sean Cahill at [scahill@fenwayhealth.org](mailto:scahill@fenwayhealth.org) or 617-927-6016.

Sincerely,

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<sup>1</sup> Lambda Legal. (2010.) *When Health Care Isn't Caring: Lambda Legal's Survey of Discrimination against LGBT People and People with HIV*. New York: Lambda Legal.

<sup>2</sup> James SE, Herman JL, Rankin S, Keisling M, Mottet L, Anafi M. (2016). *The Report of the 2015 U.S. Transgender Survey*. Washington, DC: National Center for Transgender Equality.

<sup>3</sup> National Public Radio, Harvard T.H. Chan School of Public Health. (2017, November). "Discrimination in America: Experiences and Views of LGBTQ Americans." Funded by the Robert Wood Johnson Foundation. Available online at: <https://www.npr.org/documents/2017/nov/npr-discrimination-lgbtq-final.pdf>

<sup>4</sup> Ward v. Wilbanks, 09-CV-11237, 2010 WL 3026428 (E.D. Mich. 2010, July 26), rev'd and remanded sub nom. Ward v. Polite, 667 F.3d 727 (6th Cir. 2012), dismissed with prej. by Ward v. Wilbanks, 09-CV-11237 (E.D. Mich. Dec. 12, 2012) (case settled).

<sup>5</sup> Phillip A. (2015, February 19). "Pediatrician Refuses to Treat Baby with Lesbian Parents and There's Nothing Illegal About It." *Washington Post*. <https://www.washingtonpost.com/news/morning-mix/wp/2015/02/19/pediatrician-refuses-totreat-baby-with-lesbian-parents-and-theres-nothing-illegal-about-it/>

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- <sup>6</sup> National Women’s Law Center. (2014, May.) *Health Care Refusals Harm Patients: The Threat to LGBT People and Individuals Living with HIV/AIDS*. Available online at: [http://www.nwlc.org/sites/default/files/pdfs/lgbt\\_refusals\\_factsheet\\_05-09-14.pdf](http://www.nwlc.org/sites/default/files/pdfs/lgbt_refusals_factsheet_05-09-14.pdf)
- <sup>7</sup> Complaint, *Simoes v. Trinitas Reg’l Med. Ctr.*, No. UNNL-1868-12 (N.J. Super. Ct. Law Div. 2012, May 23).
- <sup>8</sup> Department of Health and Human Services. 45 CFR Part 88 [Docket No.: HHS–OCR–2018–0002] RIN 0945–ZA03. Protecting Statutory Conscience Rights in Health Care; Delegations of Authority. At 3892-3893. <https://www.gpo.gov/fdsys/pkg/FR-2018-01-26/pdf/2018-01226.pdf>
- <sup>9</sup> *Ibid.* At 3893.
- <sup>10</sup> NPR, Harvard (2017).
- <sup>11</sup> Movement Advancement Project. (2017.) *State Religious Exemption Laws*. Available online at: [http://www.lgbtmap.org/equality-maps/religious\\_exemption\\_laws](http://www.lgbtmap.org/equality-maps/religious_exemption_laws)
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- <sup>13</sup> Lambda Legal. (2016, April 6.) Frequently asked questions about Mississippi’s HB 1523. <http://www.lambdalegal.org/msfaq#What>
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- <sup>15</sup> U.S. Department of Health and Human Services. (2017, September.) *Draft Strategic Plan FY 2018-2022*. <https://www.hhs.gov/about/strategic-plan/index.htm>
- <sup>16</sup> Attorney General Jeff Sessions. (2017, October 6.) *Federal law protections for religious liberty. Memorandum for all executive departments and agencies*. Washington, DC. <https://www.justice.gov/opa/press-release/file/1001891/download>
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- <sup>19</sup> Diamond D, Haberkorn, J. Administration to shield health workers who refuse to perform abortions or treat transgender patients. *Politico*. January 16, 2018. <https://www.politico.com/story/2018/01/16/conscience-abortion-transgender-patients-health-care-289542>
- <sup>20</sup> NeJaime D, Siegel RB. 2015. Conscience wars: Complicity-based conscience claims in religion and politics. *Yale Law Journal*. 124: 2516-2591.
- <sup>21</sup> *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005).
- <sup>22</sup> *Id.* at 726.
- <sup>23</sup> *Id.* at 720, 722; *See also* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 (2014); *Estate of Thornton v. Caldor*, 472 U.S. 703, 710 (1985) (“unyielding weighting” of religious exercise “over all other interests...contravenes a fundamental principle” by having “a primary effect that impermissibly advances a particular religious practice.”); *Texas Monthly, Inc. v. Bullock*, 480 U.S. 1, 18 n.8 (1989) (religious accommodations may not impose “substantial burdens on nonbeneficiaries”).
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- <sup>26</sup> Columbia University School of Law. 2016. Memorandum regarding Mississippi HB 1523 and the Establishment Clause. [http://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/memo\\_regarding\\_ms\\_hb1523.pdf](http://web.law.columbia.edu/sites/default/files/microsites/gender-sexuality/files/memo_regarding_ms_hb1523.pdf)
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