

October 3, 2022

**PUBLIC COMMENT OF THE CHRIST MEDICUS FOUNDATION REGARDING THE
PROPOSED U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES RULE PURSUANT
TO SECTION 1557 OF THE PATIENT PROTECTION AND AFFORDABLE CARE ACT**

Introduction

The truth of human dignity and the demands of justice morally obligate the United States, as a nation and civil society, to protect the sanctity of life and to uphold the human and civil right to life from conception to natural death. Our nation’s moral obligation to protect the human dignity and uphold the right to life requires that American civil society – inclusive of the family, medical professionals, religious health institutions, public and private health care institutions, Churches, religious organizations, other nonprofit health organizations, local communities, private business enterprise, and local, state, and federal governments – facilitate, empower, and/or provide for the medical care of the sick and suffering. Our nation’s moral and religious beliefs about the obligation to care for our neighbor, to be our brother and sister’s keeper, has created the American health care system that our country benefits from today. Access to medical care, especially for vulnerable persons, is a necessity in a just society. The sanctity of all life and the basic human and civil right to life means consequently that each person has a basic right to medical care¹, that this right to medical care should never be unjustly denied, and that it is just and necessary to maintain and enforce civil rights laws that protect patients and human service recipients from unjust discrimination. While civil rights in health care are founded upon the belief in the sanctity of life for all people and upon moral conscience and religious convictions about caring for the sick, tragically, the

¹ While the right to medical care is an important human right of every person, this right does not mean that government alone must provide medical care but rather that civil society – as a whole – should work to meet the needs of the sick and suffering within its midst.

proposed U.S. Department of Health and Human Services’ (HHS) rule under Section 1557 of the Affordable Care Act (ACA) would: undermine the biological, scientific reality of the human person, erode the right to life in health care, substantially rollback religious freedom and medical conscience rights for thousands of health care professionals and religious health care institutions that serve millions, and – over time – significantly decrease access to medical care for some of the most vulnerable people in our country.

I. OCR’S INTERPRETATION OF SECTION 1557 CONFLICTS WITH OTHER RELEVANT SECTIONS OF THE AFFORDABLE CARE ACT

It is not permissible for an agency to exercise its Congressional mandate to interpret a statute in a manner that contradicts other provisions of the same statute. This proposed Rule’s interpretation of Section 1557 of the Affordable Care Act (ACA) conflicts with Section 1554 of the ACA. Section 1554 of the ACA proscribes interfering with “the full range of treatment options” between a doctor and a patient. But that is exactly what this Rule does by categorically denying the medical opinion of many doctors that sex reassignment procedures are never in the best interests of their patients. OCR simply substitutes its medical judgment for the judgment of doctors, pharmacists, and medical professionals. Contrary to the assumption of OCR, doctors who do not believe that sex reassignment procedures are in the best interests of their patients are applying their medical and ethical convictions, not parading political opinions under the guise of medicine.

OCR claims that it is only applying the non-discrimination requirements of Section 1557, but by outright dismissing the medical competence of those doctors who do not believe that gender transition procedures are ever medically beneficially, OCR is effectively making a value judgment that Congress did not authorize them to make. Furthermore, Section 1554 of the ACA “restricts the ability of healthcare providers to provide full disclosure of all relevant information to patients making healthcare

decisions.” But if a doctor tells a patient that sex reassignment will increase their risk of suicide ([Sex Reassignment Doesn’t Work. Here Is the Evidence. | The Heritage Foundation](#)) and that it is not medically indicated because their body is healthy, then the doctor would be accused of discrimination under this proposed Rule simply for doing what Section 1554 permits. Clearly, Congress did not give HHS the authority to interpret Section 1557 in a manner that violates other relevant provisions of the same statute.

II. THE PROPOSED RULE MISCONSTRUES THE EMERGENCY MEDICAL TREATMENT AND LABOR ACT (EMTALA)

The Emergency Medical Treatment and Labor Act (EMTALA) ensures that patients receive life-saving care in an emergency regardless of ability to pay. This is a vital principle of federal statutory law that safeguards the American public. But this Act has nothing whatsoever to do with the provision of abortion. This Proposed Rule follows CMS’ guidance that seeks to expand EMTALA to allow abortion in certain circumstances.² The truth is that abortion is never necessary to save the life of a pregnant mother. Women can be treated for all manner of illnesses and if their unborn children die, that is not an intentional death, and so does not constitute abortion under the law. EMTALA should not be exploited as a smokescreen for advancing abortion rights in the wake of the Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization*³ ruling that states can prohibit and regulate abortions.

III. THE PROPOSED RULE WILL SERIOUSLY UNDERMINE HEALTH CARE ACCESS FOR THE MOST VULNERABLE

² [QSO-22-22-Hospitals \(cms.gov\)](#).

³ [Dobbs v. Jackson Women's Health Organization :: 597 U.S. \(2022\) :: Justia US Supreme Court Center](#).

OCR erroneously assumes that if doctors are unable to practice according to their faith, they will violate their faith and continue practicing medicine. In this assumption, OCR could not be more wrong. There are many doctors and other medical professionals who would rather leave the practice of medicine altogether than violate their conscience and offend God. The proposed Rule's exclusion of conscience protections will expedite the exit of good doctors from the healthcare profession, leaving patients with fewer choices and particularly disadvantaging minority communities that already suffer a shortage of health care professionals. Research shows a projected deficit of 100,000 doctors by 2030,⁴ and this projection does not include the impact of this proposed Rule, which will only increase the deficit of healthcare professionals. It should be the policy of HHS to ensure access to healthcare for the American public by respecting the conscience rights of doctors and other medical professionals. The proposed Rule would have a catastrophic effect on access to healthcare for the American public in the coming decades.

IV. THE PROPOSED RULE VIOLATES THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION

Amendment I of the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The establishment clause is grammatically and functionally in service to the free exercise clause. The goal of the First Amendment is to protect the free exercise of religion, and that includes the free exercise of religion in healthcare. Doctors are not agents of the state, and it is unconstitutional for the federal government to give private doctors an ultimatum: either violate your conscience as a doctor and do what we tell you, or else you will be prosecuted and prohibited from practicing medicine in accordance with your religious convictions. The

⁴ [Research Shows Shortage of More than 100,000 Doctors by 2030 | AAMC.](#)

free-exercise rights of doctors to practice their faith in medicine is violated not by the federal statutory provisions of Section 1557 of the ACA, but by this proposed Rule.

Furthermore, this violation of the First Amendment free-exercise rights of doctors will negatively impact patients. Patients want their doctors to be free to exercise their own medical judgment, which is why they go for second opinions and carefully choose their doctors. In the wake of a pandemic and vaccine mandates that undermined the independence and integrity of the medical profession, forcing doctors to either perform medical procedures against their faith or exit medicine is only going to intensify the lack of trust between doctors and patients, and further destabilize the field of healthcare.

V. **CONGRESS HAS NOT AUTHORIZED THE INCLUSION OF SEXUAL ORIENTATION AND GENDER IDENTITY IN ACA SECTION 1557'S EXCLUSION OF SEX-BASED DISCRIMINATION**

The proposed Rule argues that sex discrimination under 1557 includes sexual orientation and gender identity. In support, it cites to *Bostock v. Clayton County*,⁵ where the Supreme Court ruled that sex discrimination under Title VII includes sexual orientation and gender identity. But a Supreme Court decision on Title VII in 2020 does not retroactively change Congressional intent when it passed the Affordable Care Act. There is zero evidence that Congress intended to include sexual orientation and gender identity in its exclusion of sex-based discrimination in Section 1557 of the Affordable Care Act and, therefore, OCR has no authority to retroactively change the meaning of sex-based discrimination in that statute. It is up to Congress to decide any legal change in the definition of sex-based discrimination in Section 1557 of the ACA. OCR should not assume that because sex-based discrimination includes

⁵ [BOSTOCK v. CLAYTON COUNTY | Supreme Court | US Law | LII / Legal Information Institute \(cornell.edu\)](#).

sexual orientation and gender identity in Title VII, it likewise has the same meaning in the Affordable Care Act.

Conclusion

For these five reasons, we strongly urge OCR to substantially revise this Rule to be in conformity with ACA Section 1557, ACA Section 1554, all federal and statutory laws protecting medical conscience and religious freedom, including the Religious Freedom and Restoration Act, and the First Amendment of the U.S. Constitution which requires the free exercise of religion in healthcare as in every other sector of American society. This proposed Rule is unacceptable, disenfranchises the rights of people of faith throughout the country, and would very likely be struck down by the Federal Courts if OCR continues to advance its radical agenda under the guise of administering Section 1557 of the ACA.

Respectfully submitted,

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