August 13, 2019

VIA ELECTRONIC SUBMISSION

U.S. Department of Health and Human Services
Office for Civil Rights
Attention: Section 1557 NPRM, RIN 0945-AA11
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue, SW
Washington, DC 20201

Re: Comment on Nondiscrimination in Health and Health Education Programs or Activities (RIN 0945-AA11), Respectfully Submitted by Interfaith Alliance Foundation

To Whom It May Concern:

Interfaith Alliance Foundation provides the following comments in response to Nondiscrimination in Health and Health Education Programs or Activities, a proposed rule published by the Department of Health and Human Services ("HHS") in the Federal Register on June 14, 2019 at 84 Fed. Reg. 27,846.

Interfaith Alliance Foundation ("IAF") is a national policy and advocacy organization committed to advancing true religion freedom for all Americans. The only national interfaith organization dedicated to protecting the integrity of both religion and democracy, IAF's membership is made up of individuals rather than institutions, in all 50 states and serving overseas in the U.S. military, and adhering to more than 75 faith traditions and belief systems.

This year, IAF celebrates twenty-five years at the forefront of the movement to promote true religious freedom. While the notion of religious freedom has been used – and misused – by various groups over the course of our history, IAF's work remains true to the foundational promise of the U.S. Constitution: that every American has the right to believe as they choose, with the secure knowledge that our government will not play favorites or favor religion over non-religion. Through our federal policy programs, we champion the rights all Americans to follow the faith of their choosing, or no faith, and to be free from discrimination in public life.

For the reasons detailed below, we urge HHS to withdraw the Proposed Rule and leave the current healthcare nondiscrimination regulations unchanged. This Proposed Rule poses a profound threat to the religious freedom of patients and providers across the country and, if finalized, would remove nondiscrimination protections for people of color, women, the LGBTQI community, persons with disabilities, and people of limited English proficiency. In addition, this rulemaking violates the United States Constitution and the Administrative Procedure Act ("APA").

For these reasons, we strongly encourage HHS/OCR to withdraw this Proposed Rule, given the significant negative impact its finalization would have on the religious freedom and civil rights of historically disadvantaged communities.

I. The Impact of the ACA

The Patient Protection Affordable Care Act, (hereinafter "ACA")[1] had a transformative impact on all aspects of health care, increasing the scope of benefits and improving access to coverage for millions of Americans. The ACA has reduced health care costs for individuals and employers while at the same time reducing uncompensated care by more than $7.4 billion.[2] In addition, the ACA included critical provisions ensuring full and equitable access to essential services without discrimination.

The ACA is an essential source of health care coverage for America's traditionally underserved communities including individuals and families living in poverty, people of color, women, immigrants, LGBTQI individuals, individuals with disabilities, seniors, and individuals with limited English proficiency. Moreover, the ACA reduced the number of individuals without insurance to historic lows, including a reduction of 39 percent among the lowest income individuals.[3]

Furthermore, the ACA has been instrumental in covering a wide range of preventive services, ensuring that patients have access to life-saving cancer care and access to affordable contraception and reproductive health care services. Similarly, plans are sharply limited in their ability to impose formularies, prior authorization requirements, and other administrative barriers to preventive care services or to benefit designs that may discriminate against persons with specific disease states.

Section 1557 is the heart of the ACA. This critical mechanism ensures that all patients have meaningful access to healthcare, regardless of who they are. Section 1557 prohibits hospitals, doctors, and insurers from discriminating against persons seeking health care services or health care coverage. It specifically prohibits discrimination on the basis of race, color, national origin, sex, age, or disability by any programs or activities that receive federal financial assistance, such as credits and subsidies (monetary and nonmonetary).

The Proposed Rule, however, would erode the scope of those protections and, correspondingly, impair access to critical services by communities who need health care the most.

II. Summary of the Proposed Rule

The Proposed Rule would undo key components of the healthcare nondiscrimination provisions, leaving millions of patients at risk of being denied of care.

Elimination of Nondiscrimination on the Basis of Gender Identity and Sex Stereotyping

[1] Pub. L. No. 111-148, 124 Stat. 119–1025 (2010).
[2] U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, New Report Details Impact of the Affordable Care Act (Dec. 13, 2016), https://www.hhs.gov/about/news/2016/12/13/new-report-details-impact-affordable- careact.html (available at http://wayback.archive-it.org/3926/20170127135924/https://www.hhs.gov/about/news/2016/12/13/new-report-details-impact-affordable-care-act.html).
[3] Kelsey Avery, Kenneth Finegold and Amelia Whitman, *Affordable Care Act Has Led to Historic, Widespread Increase in Health Insurance Coverage*, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES ASPE ISSUE BRIEF, (Sep. 29, 2016) https://aspe.hhs.gov/system/files/pdf/207946/ACAHistoricIncrease Coverage.pdf.

The Proposed Rule would remove the inclusion of gender identity[4] and sex stereotyping[5] from discrimination "on the basis of sex." Currently, health insurers are prohibited from excluding coverage of health care services for persons seeking gender transition or limiting coverage on the basis of a person's gender identity. The Proposed Rule would embolden institutions and providers to discriminate.

Elimination of Nondiscrimination on the Basis of Termination of Pregnancy

The Proposed Rule would not include termination of pregnancy as a prohibited basis of discrimination on the basis of sex. The Proposed Rule also "does not adopt a position" as to whether termination of pregnancy constitutes discrimination on the basis of sex based on miscarriage or medical complications.

Narrowing Scope of Nondiscrimination Protections by Eliminating Definition of "Covered Entity

The Proposed Rule would abandon the definition of "covered entity" and the corresponding extension of nondiscrimination protections. Instead, the Proposed Rule would narrow Section 1557's application to the following programs or activities:

- Health programs or activities any part of which receive Federal financial assistance from the Department of Health and Human Services ("HHS");
- Any program or activity administered by HHS under Title I of the ACA; and,
- Any program or activity administered by an entity established by Title I of the ACA.

Thus, Section 1557's protections would no longer extend to all of a health insurer's operations. Instead, under the Proposed Rule, Section 1557 would apply only to the subset of an insurer's operations that receive Federal financial assistance from HHS such as qualified health plans offered on an exchange.

Elimination of Notice Requirements and Narrowing of Language Access Requirements

The Proposed Rule would eliminate the requirement that a covered entity notify beneficiaries, applicants, and the public that the covered entity does not discriminate on the bases protected by Section 1557, that timely language assistance and other aid is available without charge upon request, and how to contact OCR to file a complaint. The Proposed Rule also would eliminate the requirement that covered entities include taglines in the top 15 languages spoken by Limited English Proficiency ("LEP") persons in the relevant state.

III. The Proposed Rule Undermines Religious Freedom and Would Harm Patients by Encouraging Providers to Deny Care Based on Their Personal Beliefs.

Religious freedom includes both the right to believe as one chooses as well as the freedom from the beliefs of others. We cannot, of course, follow our religious or moral traditions when we are forced to

[4] The current regulation defines "gender identity" as ''an individual's internal sense of gender, which may be male, female, neither, or a combination of male and female, and which may be different from an individual's sex assigned at birth.'' 81 Fed. Reg. 31,375, 31,467 (May 18, 2016) (codified at 45 CFR § 92.4). The current regulation The regulation requires covered entities to treat individuals ''consistent with their gender identity'' except that covered entities ''may not deny or limit health services that are ordinarily or exclusively available to individuals of one sex, to a transgender individual based on the fact that the individual's sex assigned at birth, gender identity, or gender otherwise recorded is different from the one to which such health services are ordinarily or exclusively available.'' 45 C.F.R. §§ 92.206 and 92.207(b)(3).

[5] The Section 1557 Final Rule defines ''sex stereotypes'' as ''stereotypical notions of masculinity or femininity, including expectations of how individuals represent or communicate their gender to others, such as behavior, clothing, hairstyles, activities, voice, mannerisms, or body characteristics. These stereotypes can include the expectation that individuals will consistently identify with only one gender and that they will act in conformity with the gender-related expressions stereotypically associated with that gender. Sex stereotypes also include gender expectations related to the appropriate roles of a certain sex.'' 81 Fed. Reg. at 31,468 (codified at 45 C.F.R. § 92.4).

live according to someone else's. But this is precisely the effect of the Proposed Rule, which would expressly allow businesses and individuals to impose their beliefs on patients seeking their care.

The Proposed Rule fails both as a matter of policy and as a violation of the Constitution. The First Amendment protects each individual's right to exercise their religious beliefs. By enabling institutions and individuals to impose a particular set of beliefs on their patients, thereby preventing those patients from accessing the healthcare services they need, the Proposed Rule places an unconstitutional thumb on the scales in favor of one set of beliefs over another.

A. The Proposed Rule Would Violate the Religious Freedom of Both Patients and Providers.

The Section 1557 Final Rule, presently in effect, provides: "Insofar as the application of any requirement of this part would violate applicable Federal statutory provisions for religious freedom and conscience, such application shall not be required."[6] Nothing more is necessary to adequately protect the religious- and conscience-related beliefs as required by current law.

Discrimination or other violations of an individual's civil rights should not be permissible based on religious or conscience exemptions.[7] And yet the Proposed Rule encourages that result by expressly enabling institutions to impose their disingenuously claimed "beliefs" upon their employees, and enabling individual providers to impose their beliefs on their patients.

Perversely, the Proposed Rule would encourage institutions that wish to discriminatorily restrict the care they offer to instruct their providers regarding what care they may or may not provide, ignoring the many providers with deeply held moral convictions that affirmatively motivate them to provide patients with much needed care. The institution's violation of civil rights is thus two-fold: both on the provider *and* the patient. Moreover, the provider prohibited from providing necessary care could also face negative repercussions if such denials would result in violations of professional and ethical duties separately required of the provider.

Moreover, in May 2019, HHS promulgated a Denial of Care Rule (described by some as the "Conscience Rule")[8] that broadens the application of at least 25 federal laws related to the application of religious- or conscience-based beliefs to health care. Immediately challenged in court, HHS has agreed to delay implementation of the Denial of Care Rule pending the outcome of this legal challenge. Those legal challenges concern issues similarly implicated in the Proposed Rule.[9] At the very least, HHS should delay finalizing any rule, including this Proposed Rule, that could fall on the same grounds.

B. The Proposed Rule Unconstitutionally Prioritizes the Religious Beliefs of the Few Over Those of the Many.

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[6] 45 C.F.R. § 92.2.

[7] *Cf. Miller v. Davis*, 123 F. Supp. 3d 924, 941 (E.D. Ky. 2015) (finding it unlikely that clerk refusing to issue marriage licenses to same-sex couples would succeed in establishing a violation of her constitutional rights if required to do so, and instead that allowing her to refuse to issue such licenses would likely violate others' constitutional rights); *see also Obergefell v. Hodges*, 135 S.Ct. 2584, 2607 (2015); *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719,1727 (2018) ("Nevertheless, while those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.").

[8] U.S. Dep't of Health and Human Servs., "Protecting Statutory Conscience Rights in Health Care; Delegations of Authority," 84 Fed. Reg. 23,170 (May 21, 2019).

[9] Katie Keith, "Provider Conscience Rule Delayed Due to Lawsuits," HealthAffairs (July 2, 2019), https://www.healthaffairs.org/do/10.1377/hblog20190702.497856/full/.

The First Amendment to the Constitution reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . . ."[10] The Proposed Rule violates the Free Exercise and Establishment of Religion Clauses of the First Amendment because it enables an individual or institution receiving government funds to discriminate against a patient due to the patient's beliefs or immutable characteristics.

Both clauses regulate how government policy interacts with moral and religious belief. In interpreting these cases, the Supreme Court has held that both the Establishment and Free Exercise clauses of the First Amendment prevent the government from shifting the cost of religious and moral accommodation from those practices onto third parties.[11] However, the Proposed Rule would do just that. When women, LGBTQI individuals and others are denied healthcare or insurance coverage, they as a third party must bear the financial, physical, and other consequences of delaying or not seeking needed treatment.

Discrimination or other violation of an individual's civil rights should not be permissible based on religious or conscience exemptions.[12] This Proposed Rule, however, would authorize and encourage these violations, jeopardizing the wellbeing of millions of patients.

IV. The Proposed Rule Would Have Serious Negative Implications for the Health of Women and LGBTQI Individuals.

One of the main benefits of the ACA is its guarantee of certain basic minimum requirements for health care policies.[13] Although only one step towards truly seamless health care, the ACA nevertheless was supposed to make it easier, not more difficult, for people to live their lives without worrying about what services may or may not be covered. This Proposed Rule is a giant step backward in the quest for adequate health care for all. By repealing the definition of "on the basis of sex," the Proposed Rule improperly encourages discrimination against people that lawfully exercise their rights or that present in a way that some may oppose.

As with its overbroad extensions of exemptions for religious- or conscience-based objections to providing care, the Proposed Rule's removal of the definition of "on the basis of sex" violates the Constitution. The Constitution, through the Fifth and Fourteenth Amendments, guarantees equal protection, for all. And yet,

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[10] U.S. CONST. AMEND. 1.

[11] *See Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985) (stating, "The First Amendment. . . gives no one the right to insist that in pursuit of their own interest others must conform their conduct to his own religious necessities."); *United States v. Lee*, 455 U.S. 252 (1982) ("When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees."); *see e.g. Cutter v. Wilkinson*, 544 U.S. 709, 720, 722 (2005) (to comply with the Establishment Clause, courts "must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries" and must ensure that the accommodation is "measured so that it does not override other significant interests") (citing *Estate of Thornton v. Caldor*, 472 U.S. 703, 710 (1985)); *see also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 n.37 (2014); *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring).

[12] *Cf. Miller v. Davis*, 123 F. Supp. 3d 924, 941 (E.D. Ky. 2015) (finding it unlikely that clerk refusing to issue marriage licenses to same-sex couples would succeed in establishing a violation of her constitutional rights if required to do so, and instead that allowing her to refuse to issue such licenses would likely violate others' constitutional rights); *see also Obergefell v. Hodges*, 135 S.Ct. 2584, 2607 (2015); *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719,1727 (2018) ("Nevertheless, while those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.").

[13] To the extent those policies are not eligible under a grandfather clause.

the Proposed Rule, if finalized, would enable government-subsidized discrimination by allowing the denial of care to particular groups of people.

A. Negative Effects of Health Care Discrimination Extend Beyond the Particular Services Denied.

Patients being refused care based on religious or moral beliefs of providers or the disingenuously claimed "beliefs" of hospitals and clinics may suffer devastating health consequences.[14] These consequences extend far beyond those services most associated with reproduction or gender identity that providers may believe they are allowed to deny to individuals under rules such as the Proposed Rule. For example, nearly 60% of women use contraception to help treat several medical conditions specific to women, not necessarily for contraceptive purposes.[15]

Transition and other gender identity-related care are likewise vital to the health of a historically disadvantaged group. The Section 1557 Final Rule relied on research demonstrating the barriers confronted by LGBTQI individuals, including refusal from medical treatment, lack of protection from gender identity discrimination, and challenges in obtaining health insurance coverage.[16]

One such survey, cited by the Section 1557 Final Rule, found that a quarter of transgender individuals reported being subject to harassment in medical settings.[17] In fact, "the data show that health care providers most often discriminate against transgender people *simply for being who they are* –not based on the care they need."[18] HHS received "many comments expressing anecdotal evidence of these statistics."[19] Additional research confirms the pervasiveness of these barriers. Eight percent of lesbian, gay, bisexual, and queer people and twenty-nine percent of transgender people reported that a doctor or other healthcare provider had refused to see them because of their actual or perceived sexual orientation in the year before the survey.[20]

In another recent study, nearly one in five LGBTQ people, including thirty-one percent of transgender people, said that it would be very difficult or impossible to get the healthcare they need at another hospital if they were turned away.[21] That rate was substantially higher for LGBTQ people living in non- metropolitan areas, with forty-one percent reporting that it would be very difficult or impossible to find an alternative

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[14] For documented instances where religious health care providers denied care to patients on the basis of religious beliefs, *see* Compl. 2, *ACLU of Mich. v. Trinity Health Corp*., 2016 U.S. Dist. LEXIS 30690 (E.D. Mich. Mar. 10, 2016); Freedman et al., *When There's a Heartbeat: Miscarriage Management in Catholic-Owned Hospitals*, 98 AM. J. PUBLIC HEALTH 1774 (2008), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2636458/; National Women's Law Center, *Refusals to Provide Health Care Threaten the Health and Lives of Patients Nationwide*, https://nwlc.org/resources/refusals-to-provide-health-care-threaten-the-health-and-lives-of-patients- nationwide/ (last visited Oct. 20, 2017).

[15] Jones, R.K. (2011). Beyond Birth Control: The Overlooked Benefits of Oral Contraceptive Pills. Retrieved from http://www.guttmacher.org/pubs/Beyond-Birth-Control.pdf. Over 99% of sexually-active women using at least one method of contraception at some point during their lifetime. Guttmacher Institute, *Contraceptive Use in the United States,* (September 2016) https://www.guttmacher.org/fact-sheet/contraceptive-use-united-states.

[16] Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. at 31,460 (codified at 45 C.F.R. pt 92).

[17] *Id.*

[18] Sharita Gruberg & Frank J. Bewkes, CENTER FOR AMERICAN PROGRESS, "The ACA's LGBTQ Nondiscrimination Regulations Prove Crucial" (Mar. 7, 2018), https://cdn.americanprogress.org/content/uploads/2018/03/06122027/ACAnondiscrimination-brief2.pdf (emphasis added).

[19] *Id.*

[20] *See* Jaime M. Grant et al., *Injustice at Every Turn: a Report of the National Transgender Discrimination Survey*, NATIONAL GAY AND LESBIAN TASK FORCE & NATIONAL CTR. FOR TRANSGENDER EQUALITY (2011), http://www.thetaskforce.org/static_html/downloads/reports/reports/ntds_full.pdf.

[21] Shabab Ahmed Mirza & Caitlin Rooney, *Discrimination Prevents LGBTQ People from Accessing Health Care,* 2016, https://www.americanprogress.org/issues/lgbt/news/2018/01/18/445130/discrimination-prevents-lgbtq- people-accessing-health-care.

provider.[22] In the Proposed Rule, HHS provides no reasoned explanation for disregarding these factual underpinnings of the previous policy, nor do they provide any facts, studies, or data to refute the findings in the Section 1557 Final Rule.

These concerns are not hypothetical: the Center for American Progress documented a case where a transgender man was denied insurance coverage for genetic testing for breast cancer—*even where the testing was recommended by the patient's doctor*.[23] HIV-positive individuals have also been denied care—even a simple flu shot.[24] These types of circumstances have resulted in transgender individuals avoiding seeking care altogether, for fear of discrimination.[25]

In a profession guided by the directive to "do no harm," authorizing discrimination against women and LGBTQI individuals would have precisely that effect. The consequences of this Proposed Rule would extend well beyond the specific denial of care to significantly harm patients' financial, physical, and overall wellbeing while acting as a deterrent against seeking care in the future.

B. The Proposed Rule Would Sow Confusion Regarding Provider Duties Under the Emergency Medical Treatment and Active Labor Act.

The Emergency Medical Treatment and Active Labor Act ("EMTALA") requires all hospitals—including those that are private, public, and religiously affiliated— that receive Medicare funds to provide appropriate medical screening to any patient who presents to an emergency room and, if the patient is suffering from a medical emergency, to either stabilize the condition or transfer the patient to another facility that is more equipped to handle the condition.[26]

Repealing the Section 1557 Final Rule's definition of "on the basis of sex" would create confusion in the provision of care because, in conjunction with the Denial of Care rule, the Proposed Rule could be interpreted so as to allow providers to violate EMTALA by refusing to provide care to, for example, transgender men or women with emergency complications that requiring the termination of a pregnancy.

The question of whether EMTALA overrules the Denial of Care Rule and/or the Proposed Rule is particularly concerning considering the number of religiously-affiliated hospitals with emergency departments that are the only available providers for miles in certain rural areas. While we anticipate, based on its response to comments in the preamble to the Denial of Care Rule issued in May 2019, HHS will claim that EMTALA and religious exemption will be applied "harmoniously,"[27] their inevitable conflict could lead to violations of this guarantee for emergency care.

V. The Proposed Rule Violates the Rulemaking Requirements of the Administrative Procedure Act.

The discussion above demonstrates that the Proposed Rule is unconstitutional and, simply put, bad policy. In addition, the Proposed Rule violates basic principles of law applicable to agency decision-making, further demonstrating why it should not be finalized and why the Section 1557 Final Rule should remain in place.

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[22] *Id.*
[23] Gruberg & Bewkes, *supra* n.18.
[24] *Id.* at 6.
[25] *Id.* at 7.
[26] *See* 42 U.S.C. §1395d(e)(3)(A); 42 U.S.C. §1395dd(b).
[27] 84 Fed. Reg. 23, 170, 12, 188 (May 21, 2019).

As a rulemaking exercise of an executive branch agency, the Administrative Procedure Act ("APA") applies to the Proposed Rule. The APA imposes important procedural requirements on the actions of executive branch agencies, including when agencies are "formulating, amending or repealing" a rule.[28] The APA requires courts to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,"[29] "contrary to a constitutional right,"[30] or "in excess of statutory jurisdiction."[31]

Here, the Proposed Rule fails in a number of respects, but two are of particular note. First, the Proposed Rule violates Section 1557 by enabling individuals and institutions to deny care that Section 1557 requires they provide. As such, HHS lacks the statutory authority to promulgate the Proposed Rule. Second, HHS' rationale for the Proposed Rule is arbitrary and capricious. HHS has failed to provide a reasoned explanation for why the facts and rationale it relied upon just three years ago when promulgating the Section 1557 Final Rule are no longer persuasive, and why such an opposite result should obtain today. Additionally, HHS has justified the Proposed Rule based on cost considerations, but has analyzed only one side of the equation, completely ignoring costs to patients.

As a result, the Proposed Rule should not be finalized before these required steps are taken.

A. Section 1557 Prohibits the Discrimination the Proposed Rule Would Enable.

The APA requires courts to set aside rules that run contrary to the statute they purport to interpret.[32] Section 1557 of the ACA, by its own terms, prohibits sex discrimination in certain health programs and activities.[33] By permitting objecting institutions to deny coverage for contraceptives, transition-related services, and numerous other services; and by improperly narrowing the scope of beneficiary protections to only health care programs and activities and to programs and activities administered by executive agencies, the Proposed Rule enables violations of the statute it intends to interpret, and must be set aside on that basis.

The Proposed Rule also arbitrarily fails to recognize the large amount of case law contrary to HHS' view. Instead of examining this case law in determining the ability of HHS to promulgate the Proposed Rule, HHS relies on the preliminary injunction issued in *Franciscan Alliance Inc. v. Burwell* as justifying HHS' change in policy. But a preliminary injunction in a district court case does not require a change in HHS policy, and in any event is contrary to the weight of case law. Over twenty years ago a court recognized that discrimination based on the fact that a woman had had an abortion was sex discrimination, *i.e.*, discrimination "on the basis of sex."[34]

Moreover, being prohibited from discriminating against someone because they had an abortion is in no way related to any requirement to provide abortions. Indeed, Title IX itself expressly does not permit penalties based on a woman's prior termination of pregnancy.[35] Nor does Title IX exclude gender identity from its protections. For example, the court in *Adams v. School Board of St. Johns Cty.* held that "the meaning of 'sex' in Title IX includes 'gender identity' for the purposes of its application to transgender

[28] 5 U.S.C. § 551(5).
[29] 5 U.S.C. § 706(2)(A).
[30] 5 U.S.C. § 706(2)(B).
[31] 5 U.S.C. § 706(2)(C).
[32] 5 U.S.C. § 706.
[33] 42 U.S.C. § 18116.
[34] *Turic v. Holland Hosp., Inc.*, 85 F.3d 1211, 1214 (6th Cir. 1996) (holding an employer who discriminates against an employee who has exercised right to access abortion violates Title VII prohibition on sex discrimination).
[35] 20 U.S.C. § 1688.

students."[36] The NPRM correctly notes that the U.S. Supreme Court has not settled the matter for purposes of Title IX; however, in a related context—Title VII of the Civil Rights Act—the Court stated:

> *[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.*[37]

The NPRM ignores entirely that the Sixth Circuit has applied this reasoning to extend Title VII's protections, ruling that "[s]ex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior."[38] Although Section 1557 does not expressly incorporate Title VII, it does incorporate Title IX, and this Title VII protection has also been applied in the Title IX context.[39]

Relying instead on litigation positions in unsettled matters as HHS does here by invoking *Franciscan Alliance* offers no support for HHS' policy change and does not provide a sound basis for a reasoned analysis under the APA.[40] Moreover, HHS' wholesale avoidance of *any* contrary case law in the Proposed Rule demonstrates the one-sided nature of the agency's decision making, yet another reason it violates the APA.

B. HHS Failed to Justify an Abrupt About-Face from the Section 1557 Final Rule, or Otherwise Provide a Reasoned Explanation for the Proposed Rule.

When an agency proposes a change in position, it must "display awareness that it is changing position" and "show that there are good reasons for the new policy."[41] The agency must provide a more detailed justification where, as here, "its new policy rests upon factual findings that contradict those which underlay its prior policy; or when its prior policy has engendered serious reliance interests that must be taken into account."[42] Ultimately, "a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy."[43]

With this Proposed Rule, HHS proposes to remove important protections offered by the Section 1557 Final Rule.[44] HHS has failed to provide a reasoned analysis for why it decided to change in position, much less the substance of those changes. HHS fails to account for the extensive history of health care discrimination that LGBTQI individuals and individuals seeking reproductive care have suffered as noted above, and it provides no contrary data to counter the original factual findings in the Section 1557 Final Rule. Furthermore, individuals have reasonably placed their reliance upon the federal government to

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[36] 318 F. Supp. 3d 1293, 1325 (M.D. Fla. July 26, 2018); *see also A.H. v. Minersville Area Sch. Dist.*, 290 F. Supp. 3d 321 (M.D. Pa. Nov. 22, 2017) (holding that plaintiff successfully stated a claim where plaintiff alleged discrimination based on gender identity).
[37] *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (internal quotation marks and citation omitted).
[38] *Smith v. City of Salem, Ohio*, 378 F.3d 566, 575 (6th Cir. 2004).
[39] *Johnston v. Univ. of Pittsburgh of Com. Sys. of Higher Educ.*, 97 F. Supp. 3d 657, 680 (W.D. Pa. 2015), *appeal dismissed*, No. 15-2022 (3d Cir. Mar. 30, 2016) (applying Title VII sex-stereotyping rulings to Title IX claims of transgender individual).
[40] *See* 84 Fed. Reg. at 27,853.
[41] *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).
[42] *Id.*; *see also Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199 (2015) (reaffirming that an agency must provide "more substantial justification" when its previous policy engendered serious reliance interests or its new policy relies on facts contrary to those relied on for the previous policy).
[43] *F.C.C. v. Fox Television Stations,* 556 U.S. at 516.
[44] 45 C.F.R. pt. 92.

protect their civil rights as explained in the Section 1557 Final Rule. The Proposed Rule fails entirely to address these concerns, and as such is arbitrary and capricious.

In addition to representing an arbitrary shift from the Section 1557 Final Rule, the Proposed Rule fails on its own merits because HHS has not adequately explain its reasoning. For example, HHS has identified cost[45] and regulatory burdens[46] as primary factors in its proposal to rescind the Section 1557 Final Rule. Setting aside the question whether factors such as cost are even relevant in a rulemaking interpreting civil rights protections, having put these factors at issue, the APA requires HHS to consider all important aspects of those factors, and adequately explain the agency's conclusions.[47]

The Proposed Rule's cost-benefit and regulatory analyses are woefully deficient, analyzing only costs and impacts to providers, not costs and other impacts to individuals needing care. Focusing on the burdens imposed by the notice and tagline requirements,[48] the NPRM offers six reasons why the costs do not justify the need.[49] Each reason focuses on either the ineffectiveness, lack of evidence of benefit, or burden of implementation.[50]

Aside from relying on questionable or attenuated data sets, HHS also fails to provide support for its position because it does not balance the considerations against any need. It overstates the import of these regulatory costs of compliance, which alone do not justify the proposed changes. HHS ignores the costs to individuals—financial, health-related, and otherwise—when services are denied, or when providers are allowed to discriminate against them in the provision of services.

The federal government should be focusing its resources expanding coverage, not arbitrarily making it easier for plans to discriminate and take coverage away. By not accounting for *any* cost or other impacts on patients or providers, HHS has "entirely failed to consider an important aspect of the problem," a hallmark of arbitrary and capricious decision making.[51]

VI. Conclusion

As a national organization committed to advancing true religion freedom for all Americans, Interfaith Alliance Foundation urges HHS/OCR to immediately withdraw the Proposed Rule for Nondiscrimination in Health and Health Education Programs or Activities. We trust that these comments, along with the many others the Department receives, demonstrate how profoundly damaging the revocation of essential nondiscrimination provisions would be for patients and providers of all faiths and of none.

This Proposed Rule turns the constitutional principle of religious freedom – including the freedom of and the freedom from religion – on its head by granting providers and healthcare entities the ability to impose a particular set of beliefs on all patients. If this rule were finalized in its current form, it would unconstitutionally interfere with the rights of individuals to make healthcare decisions consistent with their own faith, not that of their doctor or insurance provider. And, for many patients, this rule would prevent them from even getting through the door.

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[45] *See* 84 Fed. Reg. at 27, 857–60.
[46] *Id.* at 27, 872–77.
[47] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co. ("MVMA")*, 463 U.S. 29, 43 (1983).
[48] The Section 1557 Final Rule requires notices of nondiscrimination and taglines be appended to all "significant" publications and communications (larger than a postcard or brochure) sent by covered entities to beneficiaries, enrollees, applicants, or members of the public. 45 C.F.R. § 92.8(f)(1).
[49] 84 Fed. Reg. at 27,859.
[50] *Id.*
[51] *MVMA*, 463 U.S. at 44.

As human beings – regardless of our race, color, national origin, sex, age, or disability – we are often at our most vulnerable when we seek the caring assistance of medical professionals. When a patient is denied the care they need, the message they receive is that their pain is not worthy of attention. For many individuals, finding an alternative provider is all but impossible based on where they live or their source of insurance. Others will carry the shame they experienced for years to come, avoiding necessary care to protect themselves from further indignities.

We urge you to affirm the dignity and worth of all patients by preserving the nondiscrimination provisions of the Section 1557 Final Rule currently in effect. The Department has the duty to ensure that quality healthcare is truly available to all. This Proposed Rule runs directly counter to this mission.