AMERICANS UNITED FOR LIFE

March 27, 2018

Submitted Electronically

Secretary Alex M. Azar II
U.S. Department of Health and Human Services
Office for Civil Rights
Attn: Conscience NPRM, RIN 0945-ZA03
Hubert H. Humphrey Building
Room 509F
200 Independence Avenue SW
Washington, DC 20201

Re: Proposed Rule Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, RIN 0945-ZA03

Dear Secretary Azar:

On behalf of Americans United for Life, I write in response to your request for comments on the Notice of Proposed Rulemaking on conscience rights in health care.

Americans United for Life (AUL) is the oldest and most active pro-life non-profit advocacy organization. Founded in 1971, before the Supreme Court's decision in *Roe v. Wade*,[1] AUL has over 45 years of dedicated commitment to comprehensive legal protections for human life from conception to natural death, including promoting conscience rights in health care.

For example, in 1980, AUL successfully defended the Hyde Amendment in *Harris v. McRae*[2] before the United States Supreme Court, which upheld federal and state prohibitions on public funding of abortion except in the case of the life of the mother. In the wake of the Affordable Care Act (ACA), AUL spoke out against its unprecedented threat to the conscience right of insurers and purchasers of insurance, and supported legislation that would modify the ACA to protect conscience rights by comprehensively prohibiting both funding for abortion and insurance coverage for abortion through the ACA.[3] In addition,

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[1] 410 U.S. 113 (1973).
[2] 448 U.S. 297 (1980).
[3] *See, e.g.*, Memorandum, AUL, The Respect for Rights of Conscience Act and its Application to the Affordable Care Act (June 25, 2012), http://www.realhealthcarerespectslife.com/wp-content/uploads/2012/06/ AUL-Respect-for-Rights-of-Conscience-Act-memo-June-2012.pdf; Memorandum, AUL, The Protect Life Act and its

AUL filed 29 *amicus* briefs explaining how the ACA's contraception mandate violated sincerely held religious beliefs and the freedom of conscience.[4] Most recently, AUL filed several *amicus* briefs supporting pregnancy centers' rights of conscience against state and city laws targeting pro-life speech.[5]

I. The freedom of conscience is a fundamental right affirmed by our Founders, the Supreme Court, and Congress.

As the proposed rule so aptly explains, America has a long tradition of protecting conscience rights, religious freedom, and the right to be free from unlawful discrimination. Freedom of conscience is a fundamental right that has been protected since the founding of our Nation. Since that time, the paramount importance of this right has been affirmed by our Founders, the United States Supreme Court, and Congress. History, tradition, and jurisprudence affirm that a person cannot be forced to commit an act that is against his or her moral, religious, or conscientious beliefs.

A. Freedom of conscience is a fundamental right affirmed by our Founders.

The First Amendment promises that Congress shall make no law prohibiting the free exercise of religion. U.S. Const. amend. I. At the very root of that promise is the guarantee that the government cannot force a person to commit an act in violation of his or her religion.[6]

The signers to the religion provisions of the First Amendment were united in a desire to protect the "liberty of conscience." Having recently shed blood to throw off a government that dictated and controlled their religion and practices, a government that guaranteed freedom of conscience was to them of upmost importance.[7]

Application to the Affordable Care Act (June 25, 2012), http://www.realhealthcarerespectslife.com/wp-content/uploads/2012/06/AUL-Protect-Life-Act-memo-June-2012.pdf.

[4] *See* Press Release, AUL, AUL's Legal Team Files 29th Brief Defending Conscience Rights of Americans Opposed to Life-Ending Drugs (Jan. 11, 2016), http://www.aul.org/2016/01/auls-legal-team-files-29th-brief-defending-conscience-rights-of-americans-opposed-to-life-ending-drugs/.

[5] *See* Brief *Amicus Curiae* of the American Association of Pro-life Obstetricians and Gynecologists et al. in Support of Petitioners, *Nat'l Inst. of Family & Life Advocates v. Becerra*, No. 16-1140 (U.S. Jan. 16, 2018); Brief *Amicus Curiae* of Heartbeat International, Inc. in Support of Petitioner, *First Resort v. Herrera*, No. 17-1087 (U.S. Mar. 5, 2018); *Amicus Curiae* Brief of National and Local Pregnancy Care organizations in Support of Plaintiff-Appellee and Affirmance of the Lower Court, *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, 879 F.3d 101 (4th Cir. 2018) (No. 16-2325).

[6] *See generally* Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409 (1990).

[7] The Founders often used the terms "conscience" and "religion" synonymously. *See* Thomas C. Berg, *Free Exercise of Religion, in* THE HERITAGE GUIDE TO THE CONSTITUTION (2017), https://www.heritage.org/constitution/?_ga=2.206579667.1146380870.1522167719-1135445140.1522167719#!/amendments/1/essays/139/free-exercise-of -religion. Thus, adoption of the "religion" clauses does not mean that the Founders were ignoring freedom of conscience. The two were inextricably intertwined.

Thomas Jefferson, the most often quoted Founder and author of the Declaration of Independence, made it clear that freedom of conscience is not to be submitted to the government:

> [O]ur rulers can have no authority over such natural rights only as we have submitted to them. The rights of conscience we never submitted, we could not submit. We are answerable for them to our God.[8]

Jefferson also stated that no provision in the Constitution "ought to be dearer to man, than that which protects the rights of conscience against the enterprises of civil authority."[9]

Jefferson further maintained that forcing a person to contribute to a cause to which he or she abhorred was "tyrannical."[10] This belief formed the basis of Jefferson's bill in Virginia, which prohibited the compelling of a man to furnish money for the propagation of opinions to which he was opposed.[11]

Likewise, James Madison, considered the Father of the Bill of Rights, was also deeply concerned that the freedom of conscience of Americans be protected. In his famous *Memorial and Remonstrance Against Religious Assessments*, Madison stated: "The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is in its nature *an unalienable right*."[12]

In fact, Madison described the conscience as "the most sacred of all property."[13] Madison also amended the Virginia Declaration of Rights to state that all men are entitled to full and free exercise of religion, "according to the dictates of conscience."[14]

Madison understood that if man cannot be loyal to himself, to his conscience, then a government cannot expect him to be loyal to less compelling obligations, including rules, statutes, judicial orders, and professional duties. If the government demands that he betray his conscience, the government has eliminated the only moral basis for obeying any law.

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[8] THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 235 (8th Am. ed. 1801).
[9] Letter from Thomas Jefferson to the Society of the Methodist Episcopal Church at New London, Connecticut (Feb. 4, 1809).
[10] Thomas Jefferson, A Bill for Establishing Religious Freedom (June 18, 1779), *in* 2 THE PAPERS OF THOMAS JEFFERSON, January 1777 to June 1779, 545–53 (Julian P. Boyd ed., Princeton Univ. Press 1950).
[11] Thus, not only is Jefferson the author of the Declaration of Independence, but he is also the author of one of this Nation's first statutes granting the right to refuse to participate or to act because of conscientious convictions. Jefferson was so proud of this accomplishment that he had "Author of the . . . Statute of Virginia for Religious Freedom . . ." etched on his gravestone.
[12] James Madison, Memorial and Remonstrance Against Religious Assessments ¶ 15 (1785) (emphasis added).
[13] James Madison, *Article in the National Gazette* (Mar. 29, 1792), *in* THE QUOTABLE FOUNDING FATHERS: A TREASURY OF 2,500 WISE AND WITTY QUOTATIONS 37 (Buckner F, Melton, Jr. ed., 2004).
[14] Madison's Amendments to the Declaration of Rights (29 May–12 June 1776), *in* 1 THE PAPERS OF JAMES MADISON, 16 MARCH 1751–16 DEC. 1779, 174–75 (William T. Hutchinson et al. eds., Univ. of Chi. Press 1962).

Madison considered it "the particular glory of this country, to have secured the rights of conscience which in other nations are least understood or most strangely violated."[15]

Our first president, George Washington, explained, "the establishment of Civil and Religious Liberty was the Motive that induced me to the field of battle,"[16] and he advised Americans to "[l]abor to keep alive in your breast that little spark of celestial fire called conscience."[17] President Washington also maintained that the government should accommodate religious persons:

> [T]he Conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard to the protection and essential interests of the nation may justify and permit.[18]

Founding Father and President John Adams stated that "no subject shall be hurt, molested, or restrained, in his person, liberty, or estate, for worshipping God in the manner most agreeable to the dictates of his own conscience."[19] And Patriot leader Samuel Adams wrote that the liberty of conscience is an "original right."[20]

Forcing individuals to participate in actions to which they are conscientiously opposed eviscerates the very purpose for which this Nation was founded and formed. As Thomas Jefferson charged us:

> [W]e are bound, you, I, and every one, to make common cause, even with error itself, to maintain the common right of freedom of conscience. We ought with one heart and one hand to hew down the daring and dangerous efforts of those who would seduce the public opinion to substitute itself into . . . tyranny over religious faith . . . ."[21]

B. Freedom of conscience is a fundamental right affirmed by the United States Supreme Court.

For decades, the United States Supreme Court has sought to guarantee the freedom of conscience of every American. And "freedom of conscience" is referenced explicitly throughout Supreme Court jurisprudence. *See, e.g.*, *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971) ("The First Amendment gives freedom of mind the same security as freedom of

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[15] James Madison, Speech in Congress (Dec. 22, 1790).
[16] MICHAEL NOVAK & JANA NOVAK, WASHINGTON'S GOD: RELIGION, LIBERTY, AND THE FATHER OF OUR COUNTRY 111 (2006).
[17] George Washington, *Rules of Civility* (1745), *in* THE QUOTABLE FOUNDING FATHERS, *supra*, at 36.
[18] Letter from George Washington to the Religious Society Called Quakers (Oct. 1789).
[19] John Adams, *A Declaration of the Rights of the Inhabitants of the Commonwealth of Massachusetts*, *in* THE REPORT OF A CONSTITUTION OR FROM OF GOVERNMENT FOR THE COMMONWEALTH OF MASSACHUSETTS (1779).
[20] 2 THE WRITINGS OF SAMUEL ADAMS, 1770-1773, 350–59 (Harry Alonzo Cushing ed., 1906).
[21] Letter from Thomas Jefferson to Edward Dowse (Apr. 19, 1803).

conscience."); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 n.2 (1969) (acknowledging the "constitutionally protected freedom of conscience").

For example, the Supreme Court has stated that "[f]reedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law." *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (emphasis added). While the "freedom to believe" is absolute, the "freedom to act" is not; but "in every case," regulations on the freedom to act cannot "unduly [] infringe the protected freedom." *Id.* at 303–04.

In the 1940s, the Supreme Court considered regulations requiring public school students to recite the pledge to the American flag, ultimately vindicating the students' freedom of conscience. After initially ruling against a group of Jehovah's Witnesses who sought to have their children exempted from reciting the pledge, *see Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940),[22] the Supreme Court reversed its decision three short year later in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), explaining:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. . . . [L]ocal authorities [may not] transcend[] constitutional limitations on their power and invade[] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."

Id. at 642. The Court further explained, "[F]reedom to differ is not limited to things that do not matter much. . . . The test of its substance is the right to differ as to things that touch the heart of the existing order." *Id.*[23]

Barnette has been affirmed on numerous occasions, including in *Planned Parenthood v. Casey*, in which the Supreme Court stated:

> It is conventional constitutional doctrine that where reasonable people disagree the government can adopt one position or the other. That theorem, however, assumes a state of affairs in which the choice does not intrude upon

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[22] Even though *Gobitis* was ultimately decided incorrectly, Justice Felix Frankfurter, writing the majority opinion, recognized that a balance must be struck between the interest of the schools and the interest of the students so as to "prevent either from destroying the other." *Gobitis*, 310 U.S. at 594. Nonetheless, because the liberty of conscience is so fundamental, "every possible leeway should be given to the claims of religious faith." *Id.*

[23] "The very purpose of a *Bill of Rights* was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's . . . freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *Barnette*, 319 U.S. at 638 (emphasis in original).

> a protected liberty. Thus, while some people might disagree about whether or not the flag should be saluted, or disagree about the proposition that it may not be defiled, we have ruled that a State may not compel or enforce one view or the other.

505 U.S. 833, 851 (1992) (citing *Barnette*, 319 U.S. 624) (other citations omitted).

In the 1960s and 1970s, the Supreme Court continued to protect Americans' freedom of conscience. In a notable example, the Supreme Court protected men who were conscientiously opposed to war. Section 6(j) of the Universal Military Training and Service Act contained a conscience clause exempting men from the draft who were conscientiously opposed to military service because of "religious training and belief."[24] In *United States v. Seeger* and *Welsh v. United States*, the Supreme Court extended draft exemptions to "all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war." *Welsh*, 398 U.S. 333, 344 (1970); *see also id.* at 335 (affirming *Seeger*, 380 U.S. 163 (1965)).

Welsh acknowledged that § 6(j) protected persons with "intensely personal" convictions—even when other persons found those convictions "incomprehensible" or "incorrect." *Welsh*, 398 U.S. at 339. Seeger and Welsh "held deep conscientious scruples against taking part in wars where people were killed. Both strongly believed that killing in war was wrong, unethical, and immoral, and their consciences forbade them to take part in such an evil practice." *Id.* at 337. As Welsh explained:

> I believe that human life is valuable in and of itself; in its living; therefore I will not injure or kill another human being. . . . I cannot, therefore, conscientiously comply with the Government's insistence that I assume duties which I feel are immoral and totally repugnant.

Id. at 343. The holdings of these two cases demonstrate a strong commitment to freedom of conscience by the Supreme Court.

C. Freedom of conscience is a fundamental right affirmed by Congress.

Congress likewise has considered and passed a number of measures expressing the federal government's commitment to protecting the freedom of conscience.

For example, Congress addressed the issue of conscience protections just weeks after the Supreme Court handed down its decision in *Roe v. Wade*. And in 1973, Congress passed the

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[24] Section 6(j) does not embody a "new" idea. Early colonial charters and state constitutions spoke of freedom of conscience as a right, and during the Revolutionary War, many states granted exemptions from conscription to Quakers, Mennonites, and others with religious beliefs against war.

first of the Church Amendments.[25] Taken together, the original and subsequent Church Amendments protect healthcare providers from discrimination by recipients of HHS funds on the basis of their objection, because of religious belief or moral conviction, to performing or participating in any lawful health service or research activity.

In 1996, Section 245 of the Public Health Service Act, known as the Coats Amendment, was enacted to prohibit the federal government and state or local governments that receive federal financial assistance from discriminating against individual and institutional healthcare providers, including participants in medical training programs, who refused to receive training in abortions; require or provide such training; perform abortions; or provide referrals or make arrangements for such training or abortions.[26] The measure was prompted by a 1995 proposal from the Accreditation Council for Graduate Medical Education to mandate abortion training in all obstetrics and gynecology residency programs.

Congress has also acted to provide specific conscience protections in the provision of contraceptives. For instance, in 1999, Congress prohibited health plans participating in the federal employees' benefits program from discriminating against individuals who refuse to prescribe contraceptives.[27] Similarly, in 2000, Congress passed a law requiring the District of Columbia to include a conscience clause protecting religious beliefs and moral convictions in any contraceptive mandate.[28]

One of the most recent federal conscience protections, the Hyde-Weldon Amendment, which was first enacted in 2005, provides that no federal, state, or local government agency or program that receives funds under the Labor, Health and Human Services appropriations bill may discriminate against a healthcare provider because the provider refuses to provide, pay for, provide coverage of, or refer for abortion.[29] The Amendment is subject to annual renewal and has survived multiple legal challenges brought by pro-abortion groups.[30]

These laws highlight the deeply held desire of the American people to protect individuals and employers from mandates or other requirements forcing them to violate their consciences, religious convictions, and moral beliefs.

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[25] 42 U.S.C. §300a-7.

[26] 42 U.S.C. §238n.

[27] *See* Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999, Pub. L. No. 105-277, § 656, 112 Stat. 2681, 530 (1998).

[28] *See* D.C. Appropriations Act, 2001, Pub. L. No. 106-522, § 147, 114 Stat. 2440, 2472 (2000).

[29] Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, § 508(d), 121 Stat. 1844, 2209 (2007).

[30] Many similar conscience provisions related to federal funding have been passed over the last 45 years. *See, e.g.*, Pub. L. No. 108-25, 117 Stat. 711, 733 (2003); 48 C.F.R. § 1609.7001(c)(7) (1998); 42 U.S.C. § 1395w-22(j)(3)(B) (1997); 42 U.S.C. § 300a-7(e) (1979); 42 U.S.C. § 300a-7(c)(2), (d) (1974); 42 U.S.C. § 300a-7(b), (c)(1) (1973).

II. Healthcare conscience rights are not adequately protected and enforced.

In my career as a constitutional and civil rights litigator, I have had the privilege of representing many courageous doctors, nurses, and other healthcare professionals as they have fought in the courts to secure their right to live and work by their conscience. They include nurse Cathy DeCarlo, who called me, crying into the phone, after Mt. Sinai Hospital forced her to assist in an elective abortion—even though they knew she was a pro-life Roman Catholic who had asserted her right to accommodation for her religious beliefs. Likewise, half a dozen labor and delivery nurses at the New Jersey University of Medicine and Dentistry were ordered to staff abortion cases at the hospital, but they dauntlessly refused to obey because of their pro-life convictions. And in Vermont, where the state health department took the position that all practitioners staffing "terminal" cases had to offer or refer for assisted suicide, dozens of licensed healthcare workers challenged the action in federal court. In each of these cases, and in others, conscientious professionals faced an uphill battle because they lacked an implied right of action to bring suit to enforce the provisions of the Weldon Amendment, the Church Amendments, and other important conscience protections in the law. Thankfully, in Ms. DeCarlo's case, HHS OCR intervened and forced Mt. Sinai to change course and respect her pro-life convictions. With the stronger protections for rights of conscience contemplated by the proposed rule, and HHS's renewed determination to fulfill its statutory mandate to fully investigate and enforce these protections, I am confident that caring healthcare professionals like these individuals will increasingly see their fundamental rights vindicated and respected.

III. HHS OCR is in the best position to protect and enforce health care conscience rights.

As more and more states and cities seek to force health care providers to participate, facilitate, and advertise for procedures to which many have deeply-held conscientious objections, it is even more important that conscientious objectors be free from discrimination and never have to choose between violating their conscience and losing their job.

The healthcare conscience rights laws passed by Congress mean nothing if they are not enforced. As the proposed rule explains, many courts have found that conscientious objectors who have been discriminated against have no private right of action to seek relief from violations of their rights, leaving them without adequate recourse or proper protection. This proposed rule will allow HHS OCR to fill this gap by educating the public about the conscience protection laws passed by Congress, ensuring employers and local laws comply with federal protections, vigorously enforcing the numerous health care conscience right laws already passed by Congress, and vindicating the rights of those who have been discriminated against.

As such, AUL urges HHS to adopt this rule to protect and enforce the fundamental rights of conscience for all Americans.

Sincerely,

Steven H. Aden, Esq.
Chief Legal Officer & General Counsel
Americans United for Life