October 3, 2022

Submitted Electronically via Federal Rulemaking Portal

Secretary Xavier Becerra
U.S. Department of Health and Human Services
Office for Civil Rights
Attn: 1557 NPRM (RIN 0945–AA17)
Hubert H. Humphrey Building
Room 509F
200 Independence Avenue SW
Washington, DC 20201

Re: Nondiscrimination in Health Programs and Activities (RIN 0945–AA17)

Dear Secretary Becerra:

On behalf of Americans United for Life ("AUL"), I am writing in opposition to the Proposed Rule, "Nondiscrimination in Health Programs and Activities," 87 Fed. Reg. 47824. AUL is the oldest and most active pro-life nonprofit advocacy organization in the country. Founded in 1971, before the Supreme Court's decision in *Roe v. Wade*,[1] AUL has dedicated over fifty years to advocating for comprehensive legal protections for human life from conception until natural death. AUL attorneys are legal experts on constitutional law and bioethics, and regularly testify before state legislatures and Congress on abortion issues.[2] Supreme Court abortion opinions have cited AUL briefs and scholarship in *Akron v. Akron Center for Reproductive Health*,[3] *Webster v. Reproductive Health Services*,[4] *June Medical Services L.L.C. v. Russo*,[5] and *Dobbs v. Jackson Women's Health Organization*.[6]

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[1] 410 U.S. 113 (1973).
[2] *See, e.g.*, *Revoking Your Rights: The Ongoing Crisis in Abortion Care Access Before the H. Comm. on the Judiciary*, 117th Cong. (2022) (testimony of Catherine Glenn Foster, President & CEO, Americans United for Life); *What's Next: The Threat to Individual Freedoms in a Post-Roe World Before the H. Comm. on the Judiciary*, 117th Cong. (2022) (testimony of Catherine Glenn Foster, President & CEO, Americans United for Life).
[3] 462 U.S. 416, 426 n.9 (1983).
[4] 492 U.S. 490, 530 (1989) (O'Connor, J., concurring in part and concurring in the judgment).
[5] 140 S. Ct. 2103, 2156 n.3 (2020) (Alito, J., dissenting).
[6] 142 S. Ct. 2228, 2266 (2022) (citing Clarke D. Forsythe, ABUSE OF DISCRETION: THE INSIDE STORY OF *ROE V. WADE* 127, 141 (2012)).

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AUL attorneys have comprehensively analyzed and prepared legal white papers and scholarship on the decision in *Dobbs v. Jackson Women's Health Organization*[7] and abortion litigation in a post-*Roe* world.[8] AUL publishes a quarterly litigation report that tracks and evaluates bioethics litigation across the nation, including the contentious litigation over the Emergency Medical Treatment and Labor Act ("EMTALA")[9] abortion mandate[10] in *United States of America v. State of Idaho*[11] and *State of Texas v. Becerra.*[12]

Based on AUL's legal expertise, I urge HHS not to include termination of pregnancy within the Affordable Care Act's Section 1557 definition of "sex discrimination," nor incorporate the EMTALA abortion mandate within the Final Rule. Below, I elaborate how (I) HHS does not have the power to set a national abortion policy following the *Dobbs* decision; (II) HHS cannot act contrary to federal pro-life policy; and (III) HHS does not have the legal authority to slip the EMTALA abortion mandate within the Section 1557 Final Rule.

Integrating abortion within the definition of sex discrimination and inserting the EMTALA abortion mandate within the Final Rule would be arbitrary and capricious, without a legal basis, antithetical to federal pro-life policy, and ultimately would condone abortion violence against women, children, and families across America.

I. HHS Does Not Have the Power to Set a National Abortion Policy Following *Dobbs v. Jackson Women's Health Organization.*

The Proposed Rule "seek[s] comment on what impact, if any, the Supreme Court decision in *Dobbs v. Jackson Women's Health Organization* has on the implementation of Section 1557 and these regulations."[13] *Dobbs* is critical to the Proposed Rule. HHS promulgated the 2016 Section 1557 Rule ("2016 Rule") and 2020 Section 1557 Rule ("2020 Rule"), as well as the Title IX Rule while there was a

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[7] Carolyn McDonnell, Dobbs v. Jackson Women's Health Organization: *The Overturn of* Roe v. Wade, AMS. UNITED FOR LIFE (July 5, 2022), https://aul.org/wp-content/uploads/2022/07/Dobbs-v.-Jackson-Womens-Health-Organization-The-Overturn-of-Roe-v.-Wade.pdf.

[8] Carolyn McDonnell, *The Attorney General's Playbook for a Post-*Roe *World*, AMS. UNITED FOR LIFE (June 28, 2022), https://aul.org/wp-content/uploads/2022/06/AG-Playbook-for-a-Post-Roe-World.pdf; Carolyn McDonnell, *Post-*Dobbs *Abortion Litigation Under Federal and State Constitutional Law*, 5 SOC'Y ST. SEBASTIAN (2022), https://www.societyofstsebastian.org/summer2022-post-dobbs-laws-mcdonnell.

[9] 42 U.S.C. § 1395dd.

[10] Ctrs. for Medicare & Medicaid Servs., Memorandum on Reinforcement of EMTALA Obligations Specific to Patients Who Are Pregnant or Are Experiencing Pregnancy Loss to State Survey Agency Directors (rev. Aug. 25, 2022) (contending EMTALA preempts state abortion abolition statutes, and physicians may perform abortions as emergency medical treatment regardless of contrary state laws).

[11] No. 1:22-cv-329 (D. Idaho filed Aug. 2, 2022).

[12] No. 5:22-cv-185 (N.D. Tex. filed July 14, 2022).

[13] Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. 47,824, 47,879 (proposed Aug. 4, 2022).

purported constitutional right to abortion under *Roe*. HHS must reconsider the Proposed Rule in light of *Dobbs*, which holds there is no federal right to abortion. Neither is there a federal interest in promoting, providing, or paying for abortion, as the Nation's laws and regulations provide. Consequently, HHS has no authority to promulgate rules in support of abortion. The abortion issue has returned to the democratic process. Congress has not authorized HHS to make rules in support of abortion, and under the major questions doctrine, HHS cannot set an abortion policy without explicit authorization from Congress. Accordingly, HHS should not include abortion within the definition of sex discrimination.

A. HHS Cannot Rely Upon the 2016 and 2020 Section 1557 Rules and the Title IX Rule, Because the Agency Promulgated Them Prior to *Dobbs v. Jackson Women's Health Organization*.

The Section 1557 Proposed Rule considers adding a provision preventing the "discrimination on the basis of pregnancy-related conditions" as sex-based discrimination.[14] This "discrimination" would include "termination of pregnancy" on its list of "pregnancy-related conditions."[15] The Proposed Rule recognizes that "neither the 2016 nor the 2020 Rules included a stand-alone provision prohibiting discrimination on the basis of pregnancy-related conditions."[16] However, the Proposed Rule seeks to bolster its fiction of a stand-alone provision protecting abortion within the definition of sex discrimination. It notes "the 2016 Rule defined discrimination 'on the basis of sex' to include, *inter alia*, discrimination on the basis of '. . . termination of pregnancy . . . .'"[17] Although the 2020 Rule did not include a definition of "on the basis of sex," it incorporated Title IX's definition of discrimination, which "includes a provision expressly prohibiting discrimination on the basis of . . . termination of pregnancy."[18] Accordingly, the Proposed Rule concludes that "[the Final Rule] would not deviate from the 2016 or the 2020 Rule" by "including the regulation prohibiting discrimination on the basis of pregnancy-related conditions, including . . . termination of pregnancy."[19]

This conclusion ignores an obvious fact: the Supreme Court just decided a landmark case that returned the abortion issue to the democratic process.[20] *Dobbs v. Jackson Women's Health Organization* has changed abortion jurisprudence, overturning both *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania*

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[14] *Id*. at 47,878.
[15] *Id*.
[16] *Id*.
[17] *Id*.
[18] *Id*.
[19] *Id*.
[20] *Dobbs*, 142 S. Ct. 2243.

v. Casey.[21] At the time HHS promulgated the 2016 Rule, 2020 Rule, and Title IX Rule, the U.S. Constitution purportedly protected abortion as a constitutional right.

The Supreme Court first conceived that the "right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy" in *Roe* in 1973.[22] In 1992, the *Casey* Court clarified that abortion was a substantive due process right and reaffirmed the right to a pre-viability abortion "is the most central principle of *Roe v. Wade*."[23] Accordingly, the Supreme Court crafted the undue burden standard to analyze the constitutionality of abortion regulations. The test was a "shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[24]

Dobbs challenged *Casey*'s undue burden standard and *Roe*'s purported abortion right. The majority in *Dobbs* "[held] that *Roe* and *Casey* must be overruled," and, accordingly, "return[ed] the issue of abortion to the people's elected representatives."[25] Following *Dobbs*, the issue of abortion policy belongs entirely to the democratic process, not HHS officials who lack clear guidance and authority from Congress.

HHS cannot assert that the 2016 Rule, 2020 Rule, or Title IX Rule support a stand-alone Section 1557 provision protecting abortion as a form of sex discrimination. HHS promulgated those rules prior to *Dobbs*. Rather, HHS must provide clear evidence as to what authority is available post-*Dobbs* to set a federal abortion policy. HHS has not, and cannot, provide such evidence. As discussed below, there is no federal right or interest in abortion, and *Dobbs* undercuts HHS' misguided attempt to protect abortion under the Section 1557 definition of sex discrimination.

B. *Dobbs* Held that Abortion Statutes Are Not a Sex-Based Classification Under the Equal Protection Clause.

Dobbs abrogated any constitutional protection of abortion under sex-discrimination. The Court foreclosed any claim that abortion is protected under the Equal Protection Clause. As the Court writes, "a State's regulation of abortion is not a sex-based classification and is thus not subject to the 'heightened scrutiny' that applies to such classifications."[26] "[T]he 'goal of preventing abortion' does not constitute 'invidiously discriminatory animus' against women."[27] The majority concluded that "laws regulating or prohibiting abortion are not subject to heightened

[21] *Id*. at 142 S. Ct. at 2279 ("We hold that *Roe* and *Casey* must be overruled.").
[22] 410 U.S. at 153.
[23] *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 871 (1992).
[24] *Id*. at 877.
[25] *Dobbs*, 142 S. Ct. at 2279.
[26] *Id*. at 2245.
[27] *Id*. at 2246.

scrutiny. Rather, they are governed by the same standard of review as other health and safety measures."[28]

HHS cannot force a federal abortion policy founded on sex-discrimination post-*Dobbs* as the Court made clear there is no protection for abortion founded on equal protection. Inserting abortion into the Section 1557 definition of sex discrimination directly contradicts *Dobbs*' equal protection holding. As discussed below, no federal statute protects the "right" to abortion, let alone as a sex-based classification. Consequently, HHS has no authority to manufacture abortion within the definition of sex discrimination.

C. There is No Federal Right or Interest in Abortion Following *Dobbs*.

There is no federal right or interest in abortion, nor was there before *Roe* concocted such. Accordingly, HHS has no authority to protect abortion within the definition of sex discrimination. *Roe* was a consequence of abortionists turning to judicial activism as a means of creating an abortion "right." The Supreme Court in *Roe* held the "right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[29] As Justice Alito wrote in *Dobbs*,

> *Roe* . . . was remarkably loose in its treatment of the constitutional text. It held that the abortion right, which is not mentioned in the Constitution, is part of a right to privacy, which is also not mentioned . . . And that privacy right, *Roe* observed, had been found to spring from no fewer than five different constitutional provisions—the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.[30]

The *Roe* Court then concocted an arbitrary trimester test for determining the constitutionality of abortion regulations.

Casey subsequently clarified that abortion was a substantive due process right and reaffirmed the right to a pre-viability abortion "is the most central principle of *Roe v. Wade*."[31] Justice Alito noted in *Dobbs* that, "[t]he *Casey* Court did not defend [*Roe*'s] unfocused analysis and instead grounded its decision solely on the theory that

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[28] *Id*.
[29] *Roe,* 410 U.S. at 153.
[30] *Dobbs*, 142 S. Ct. at 2245.
[31] *Casey*, 505 U.S. at 871.

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the right to obtain an abortion is part of the 'liberty' protected by the Fourteenth Amendment's Due Process Clause."[32]

Dobbs refuted *Roe* and *Casey*'s faulty foundations by holding there is no constitutional right to abortion. The Due Process Clause protects rights guaranteed by the first eight Amendments, and, at issue in *Dobbs*, unenumerated fundamental rights. However, for fundamental rights, the Court must "ask[] whether the right is 'deeply rooted in [our] history and tradition' and whether it is essential to our Nation's 'scheme of ordered liberty.'"[33] After analyzing abortion under this test, the Court held "[t]he inescapable conclusion is that a right to abortion is not deeply rooted in the Nation's history and traditions."[34]

Further, there is no federal statute protecting a right to abortion. HHS must have a statutory basis for implementing a federal abortion policy given there is no constitutional provision. HHS cannot point to such a statute since none exists. In order to include abortion within the definition of sex discrimination, HHS *must* explicitly point to a provision providing authority to create a national abortion policy. HHS is unable to do so due to *Dobbs*' ruling that there is no constitutional right to abortion, and the issue has properly returned to the authority of the democratic process.

D. *Dobbs* Returned the Abortion Issue to the Democratic Process, Not to Unelected HHS Officials Who Do Not Have the Power to Set a National Abortion Policy Under the Major Questions Doctrine.

Roe and *Casey* were based on tenuous legal reasoning, and incorrectly took the abortion issue away from the democratic process. As the Court in *Dobbs* recognized, "*Roe* was egregiously wrong from the start. Its reasoning was exceptionally weak, and the decision has had damaging consequences. And far from bringing about a national settlement of the abortion issue, *Roe* and *Casey* have enflamed debate and deepened division."[35]

There is no federal right or interest in abortion, and therefore HHS *cannot* interfere with Congress' and the States' authority to legislate on abortion issues. *Dobbs* held: "Abortion presents a profound moral question. The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion. *Roe* and *Casey* arrogated that authority. We now overrule those decisions and return that authority to the people and their elected representatives."[36] According to the Court in *Dobbs*, "[o]rdered liberty sets limits and defines the boundary between competing

[32] *Dobbs*, 142 S. Ct. at 2245.
[33] *Id*. at 2244.
[34] *Id*. at 2253.
[35] *Id*. at 2243.
[36] *Id*. at 2284.

interests."[37] *Roe* and *Casey* had arbitrarily drawn a line between the interests of a woman seeking an abortion and the interests in prenatal human life. States may seek to draw different lines between these interests. Accordingly, *Dobbs* returned the abortion issue to the democratic process, but particularly noted that *Congress and the States* have a legitimate interest that "include[s] respect for and preservation of prenatal life at all stages of development."[38] The competing interests clearly belong to Congress and the States alone, not for any federal agency to arrogate without explicit authorization.

HHS has not shown how it has the authority to become the "*ex officio* medical board" in setting a national abortion policy.[39] The Court in *Planned Parenthood of Central Missouri v. Danforth* noted that the Court finding a constitutional right to abortion allowed the Court to become the nation's "*ex officio* medical board with powers to approve or disapprove medical and operative practices and standards [on abortion] throughout the United States."[40] The Court cannot appropriately weigh the "imponderable values" involved in the practice of abortion.[41] That difficult task belongs to the "legislators, not judges."[42] "[F]oreclosing all democratic outlet for the deep passions this issue arouses, [and] banishing the issue from the political forum" only inflamed the divisive debate on abortion policy.[43] Post-*Dobbs*, the legislatures have the authority to govern abortion and the federal government may not act as a commanding medical board. Abortion policy, as we have learned through the *Roe* era, is best left to elected representatives chosen by the people.

Dobbs restored the legislatures' authority to create abortion policy, and now HHS *must* have *explicit* authority from Congress to regulate abortion under the major questions doctrine. The doctrine "refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted."[44] As the Court recognized, "there are 'extraordinary cases' that call for a different approach—cases in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority."[45]

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[37] *Id*. at 2257.
[38] *Id*. at 2284.
[39] Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 99 (1976) (White, J., concurring in part and dissenting in part); *see also* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2326 (2016) (Thomas, J., dissenting); *Webster*, 492 U.S. at 519 (Rehnquist, J.) (plurality opinion) (citation omitted); *City of Akron*, 462 U.S. at 456 (O'Connor, J., dissenting) (citation omitted)).
[40] *Danforth*, 428 U.S. at 99 (White, J., concurring in part and dissenting in part).
[41] *June Med. Servs.*, 140 S. Ct. at 2136 (Roberts, C.J., concurring in the judgment).
[42] *Id.*
[43] *Casey*, 505 U.S. at 1002 (Scalia, J., concurring in the judgment in part and dissenting in part).
[44] West Virginia v. Env't Prot. Agency, 142 S. Ct. 2587, 2609 (2022).
[45] *Id*. at 2605 (citation omitted) (alteration in original).

Just as the Court "f[oun]d it 'highly unlikely that Congress would leave' to 'agency discretion' the decision of how much coal-based generation there should be over the coming decades" in *West Virginia v. Environmental Protection Agency*,[46] it is equally unlikely that the Affordable Care Act authorizes HHS to set a national abortion policy by protecting abortion under the guise of sex discrimination. Abortion is a highly contentious issue.[47] Section 1557 says nothing about protecting abortion, let alone defining it as a form of sex discrimination. Since the abortion issue has returned to the democratic process, Congress holds the federal power to legislate on the abortion issue. HHS must show that Congress has delegated that authority, but it cannot.

Similarly, the Proposed Rule claims that *Franciscan Alliance, Inc. v. Azar*'s holding, which vacated "termination of pregnancy" from the definition of "discrimination on the basis of sex," does not apply.[48] HHS's sole justification is that the agency disagrees with the decision and finds it non-binding. Following *Dobbs*' recognition that there is no federal right to an abortion, HHS must maintain an abortion neutral policy if it does not follow federal pro-life policy. Since the Supreme Court overturned *Roe* and *Casey*, and there is no federal statute protecting abortion, HHS does not have the legal power to manufacture a pro-abortion policy.

II. HHS Has Not Shown It Has the Power to Act Contrary to Federal Pro-Life Policy.

Federal policy is pro-life policy. Following *Dobbs*, there is no federal right or interest in promoting, providing, or paying for abortion. Rather, there is a plethora of statutes protecting women, unborn children, families, and medical professionals from the harms of abortion violence. Congress maintains a pro-life policy, and HHS cannot act contrary to that policy by manufacturing abortion protections within the Section 1557 Final Rule.

The Born-Alive Infants Protection Act recognizes that children born-alive after attempted abortion are legal persons under federal law and cannot be left to die without medical care.[49] The Partial Birth Abortion Ban Act prohibits the horrific abortion method that induces labor just to kill the child when she is partially born.[50] Federal law bars the use of the United States postal service or private carriers from mailing abortion-inducing drugs, including the chemical abortion regimen of mifepristone and misoprostol.[51]

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[46] *Id*. at 2596.
[47] *Dobbs*, 142 S. Ct. at 2243 ("And far from bringing about a national settlement of the abortion issue, *Roe* and *Casey* have enflamed debate and deepened division.")
[48] Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. 47,878 (citing *Franciscan All., Inc. v. Azar*, 414 F. Supp. 3d 928 (N.D. Tex. 2019).
[49] 1 U.S.C. § 8.
[50] 18 U.S.C. § 1531.
[51] 18 U.S.C. § 1461; 18 U.S.C. § 1462.

Over the past half century, Congress has enacted numerous statutes protecting medical professionals that conscientiously object to taking a human life through abortion, including the Church Amendment,[52] Coats-Snowe Amendment,[53] and Weldon Amendment.[54] There are conscience protections throughout federal law, such as in the Danforth Amendment to Title IX's definition of sex discrimination,[55] amendments regulating managed-care providers in the Medicare and Medicaid programs,[56] and Affordable Care Act provisions regarding insurance.[57]

Congress regularly restricts public funding of elective abortion. The Hyde Amendment has been a cornerstone of every federal health and welfare appropriations bill since Congressman Henry Hyde first proposed it in 1976.[58] The present version of the Hyde Amendment restricts abortion funding except for medical emergencies and cases of rape or incest.[59] Congress also restricts abortion in other areas. The Dornan Amendment prohibits the District of Columbia from expending public funds for abortion except if the mother's life is at risk or in cases of rape or incest.[60] Federal programs often include explicit abortion funding prohibitions, such as in Title X, which restricts recipients from using public funds "in programs where abortion is a method of family planning."[61]

These statutes show that federal policy opposes abortion violence. Moreover, Congress has repeatedly rebuffed anti-life bills that would concoct legal protections for abortion.[62] Again, there is no federal right or interest in elective abortion following the *Dobbs* decision. Rather, federal abortion policy protects infants born-alive after a

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[52] 42 U.S.C. § 300a-7.
[53] 42 U.S.C. § 238n.
[54] *See*, *e.g.*, Consolidated Appropriations Act of 2021, Pub. L. No. 116-260, div. H, tit. V § 507(d)(1), 134 Stat. 1182, 1622 (2020). Since 2004, every HHS appropriations bill has readopted the Weldon Amendment. Office for Civil Rights, *Conscience Protections for Health Care Providers*, U.S. Dep't of Health & Hum. Servs. (last reviewed Sept. 14, 2021), https://www.hhs.gov/conscience/conscience-protections/index.html.
[55] 20 U.S.C. § 1688.
[56] Lynn D. Wardle, *Protection of Health-Care Providers' Rights of Conscience in American Law: Present, Past, and Future*, 9 AVE MARIA L. REV. 1, 31–32 (2010); *see* 42 U.S.C. § 1395w-22(j)(3)(B) (protecting conscience rights in Medicare program) *and* 42 U.S.C. § 1396u-2(b)(3)(B) (codifying conscience protections in Medicaid program).
[57] 42 U.S.C. § 18023(b)(4) ("No qualified health plan offered through an Exchange may discriminate against any individual health care provider or health care facility because of its unwillingness to provide, pay for, provide coverage of, or refer for abortions.")
[58] *See* Pub. L. No. 94-439 tit. II, § 209, 90 Stat. 1418, 1434 (1976) ("None of the funds contained in this Act shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term.").
[59] Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, div. H., tit. V, §§ 506–507, 136 Stat. 49, 496 (2022).
[60] *Id*. div. G, tit. VIII, § 810, 136 Stat. 309.
[61] 42 U.S.C. § 300a-6.
[62] *See*, *e.g.*, Women's Health Protection Act of 2021, H.R. 3755, 117th Cong. (2021) (seeking to extend legal protection to abortion but failing to pass the Senate); Women's Health Protect Act of 2019, H.R. 2975, 116th Cong. (2019) (seeking to extend legal protection to abortion but failing to pass the House).

botched abortion, prohibits gruesome partial-birth abortions, bans the mailing of abortion-inducing drugs, safeguards conscientious objections towards abortion, and restricts the public funding of abortion. Accordingly, federal policy is pro-life policy. Injecting abortion into the Section 1557 definition of sex discrimination would directly conflict with federal pro-life policy. Similarly, discarding *Franciscan Alliance*'s abortion neutrality provision would undercut federal pro-life policy. HHS has not shown it has the authority to disregard and act contrary to Congress' pro-life policy stance.

III. HHS Does Not Have the Authority to Incorporate an Abortion Mandate Under EMTALA.

Congress enacted the Emergency Medical Treatment and Labor Act ("EMTALA") in 1986 to address the issue of patient dumping, so that patients could receive medical screening and care regardless of the patient's ability to pay for the medical services. EMTALA applies to hospitals participating in Medicare. Under EMTALA, if a patient presents to a hospital emergency department and requests a medical examination or treatment, then "the hospital must provide for an appropriate medical screening examination within the capability of the hospital's emergency department . . . ."[63] If the patient has an emergency medical condition, the hospital must provide "further medical examination and such treatment as may be required to stabilize the medical condition," or provide an appropriate transfer to another medical facility.[64]

On July 8, 2022, President Biden passed Executive Order 14076 ("E.O. 14076"), entitled "Protecting Access to Reproductive Healthcare Services."[65] E.O. 14076 was a direct response to the *Dobbs* decision's recognition that *Roe v. Wade* was egregiously wrong, and the United States Constitution never extended protection to abortion violence.[66] In E.O. 14076, President Biden directed HHS to "consider[] updates to current guidance on obligations specific to emergency conditions and stabilizing care under the Emergency Medical Treatment and Labor Act, 42 U.S.C. 1395dd, and [to] provid[e] data from the Department of Health and Human Services concerning the implementation of these efforts."[67] Notably, E.O. 14076 only asked HHS to consider updating guidance on EMTALA's requirements regarding reproductive healthcare services. The executive order did not conclude that EMTALA imposes abortion violence upon pro-life states that have abolished the practice.

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[63] 42 U.S.C. § 1395dd(a).
[64] *Id.* § 1395dd(b)(1).
[65] Exec. Order No. 14,076, 87 Fed. Reg. 42,053 (July 8, 2022).
[66] *Id.* § 1, 87 Fed. Reg. 42,053; *see Dobbs*, 142 S. Ct. at 2243 ("*Roe* was egregiously wrong from the start.")
[67] Exec. Order No. 14,076 § 3(a)(iii), 87 Fed. Reg. 42,054.

Nevertheless, HHS' guidance found that abortion could be "the stabilizing treatment necessary to resolve [a patient's] condition."[68] Consequently, HHS made the audacious, legally baseless assertion that "[w]hen a state law prohibits abortion and does not include an exception for the life of the pregnant person—or draws the exception more narrowly than EMTALA's emergency medical condition definition—*that state law is preempted*."[69]

The proposed Section 1557 rule seeks to incorporate this guidance in the Final Rule. The Proposed Rule describes that under EMTALA, "[i]f that [patient] has an 'emergency medical condition,' the hospital must provide available stabilizing treatment, *including abortion*, or an appropriate transfer to another hospital that has the capabilities to provide available stabilizing treatment, notwithstanding any directly conflicting state laws or mandate that might otherwise prohibit or prevent such treatment."[70] Notably, the Proposed Rule did not provide a citation or any legal support for its arbitrary conclusion that EMTALA extends to abortion violence, nor could it.[71] HHS has no legal authority to rewrite EMTALA to include an abortion mandate.

A. The EMTALA Abortion Mandate Contravenes EMTALA's Text and Intent.

The EMTALA abortion mandate has no legal basis. EMTALA requires "[n]ecessary stabilizing treatment for emergency medical conditions and labor."[72] Under the statute, "to stabilize" means "to provide such medical treatment of the condition as may be necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from a facility, or, with respect to [a woman in labor], to deliver (including the placenta)."[73] Nothing in EMTALA's text discusses abortion, let alone requires states to permit the practice.[74] Under the major questions doctrine, discussed *infra* Section I(D), HHS cannot promulgate rules on highly contentious issues unless Congress has explicitly granted the agency the authority to do so. As *Dobbs* notes, there has not been "a national settlement of the abortion issues," but, rather, abortion has been a contentious issue over the past half century after "*Roe* and *Casey* [] enflamed debate and deepened division."[75] Since EMTALA says nothing about abortion, HHS does not have the power to write an abortion mandate into the statute and concoct a national abortion policy.

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[68] Ctrs. for Medicare & Medicaid Servs., *supra* note 10, at 1.
[69] *Id*. (emphasis in original).
[70] Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. at 47,879 (emphasis added).
[71] *See id*.
[72] 42 U.S.C. § 1395dd(b).
[73] *Id*. § 1395dd(e)(3)(A).
[74] *Id*. § 1395dd.
[75] *Dobbs*, 142 S. Ct. at 2243.

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Abortion is not appropriate medical care under state abortion abolition statutes unless the licensed medical professional follows carefully delineated statutory guidelines. In Texas, which has won a preliminary injunction against the EMTALA abortion mandate, "[a] person may not knowingly perform, induce, or attempt an abortion" unless the "pregnancy [] places the female at risk of death or poses a serious risk of substantial impairment of a major bodily function unless the abortion is performed or induced."[76] However, the licensed physician must "perform[], induce[], or attempt[] the abortion in a manner that, in the exercise of reasonable medical judgment, provides the best opportunity for the unborn child to survive" unless that procedure would create "a greater risk of the pregnant female's death" or "a serious risk of substantial impairment of a major bodily function of the pregnant female."[77]

Doctors must follow the scope of their state medical licensing. If a Texas doctor does not follow the statutory guidelines in the Texas abortion abolition statute, then she is acting outside the scope of her medical license and is subject to professional disciplinary action.[78] The EMTALA abortion mandate would rewrite state abortion health and safety laws and medical licensing statutes to permit doctors to engage in the unlicensed practice of medicine in pro-life states such as Texas. Yet the Medicare Act, which includes EMTALA, directs that "[n]othing in this subchapter shall be construed to authorize any Federal officer or employee to exercise any supervision or control over the practice of medicine or the manner in which medical services are provided."[79] Accordingly, HHS does not have the authority to alter state medical licensing statutes, nor health and safety laws that abolish abortion.

HHS cannot assert that the EMTALA abortion mandate preempts pro-life state laws. EMTALA provides a section on preemption, directing, "[t]he provisions of this section do not preempt any State or local law requirement, except to the extent that the requirement directly conflicts with a requirement of this section."[80] Again, EMTALA requires stabilizing treatment, but says nothing about abortion as a form of stabilizing treatment. In this regard, there is no direct conflict between state abortion abolition statutes and EMTALA. Consequently, per the statutory text, there is no preemption issue. Rather, Congress directs HHS to respect the authority of pro-life state laws, which only permit abortion in narrowly defined circumstances.

EMTALA's text considers the unborn child a second patient, and abortion conflicts with this understanding. EMTALA explicitly protects an "unborn child" at four separate points in the statute.[81] In transferring a woman in labor, medical professionals must certify that "the medical benefits reasonably expected from the

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[76] TEX. HEALTH & SAFETY CODE § 170A.002(a) to (b) (2021).
[77] *Id*. § (b)(3).
[78] *Id*. § 170A.007.
[79] 42 U.S.C. § 1395.
[80] *Id*. § 1395dd(f).
[81] *Id*. § 1395dd.

provision of appropriate medical treatment at another medical facility outweigh the increased risks . . . to the unborn child from effecting the transfer."[82] EMTALA defines "appropriate transfer" as "a transfer . . . in which the transferring hospital provides the medical treatment within its capacity which minimizes the risks to . . . the health of the unborn child."[83] Under the statute, an "emergency medical condition" is "a medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain) such that the absence of immediate medical attention could reasonably be expected to result in . . . placing . . . with respect to a pregnant woman, the health of the woman or her unborn child [] in serious jeopardy."[84] Regarding pregnant women having contractions, an "emergency medical condition" includes a situation in which "transfer [of the patients] may pose a threat to the health or safety of the woman or the unborn child."[85] EMTALA's consideration of the unborn child as a second patient is consistent with modern medicine. The unborn child "is a genetically distinct living member of the human species,"[86] and, accordingly, is a patient in her own right. By writing an abortion mandate into EMTALA's text, HHS would be undermining Congress' intent to protect the unborn child from harm. In sum, the EMTALA abortion mandate subverts the statute's text and intent.

B. HHS Does Not Have the Authority to Incorporate the EMTALA Abortion Mandate as It Undergoes Contentious Litigation.

The EMTALA abortion mandate is at the center of litigation in *United States of America v. State of Idaho* ("Idaho lawsuit")[87] and *State of Texas v. Becerra* ("Texas lawsuit").[88] Although the Idaho lawsuit found the EMTALA abortion mandate preempted Idaho's abortion abolition statute on dubious legal grounds,[89] the Texas lawsuit correctly enjoined HHS officials from enforcing the EMTALA abortion mandate against the State of Texas, the American Association of Pro-Life Obstetricians and Gynecologists ("AAPLOG")'s 6,000 pro-life physicians, and the Christian Medical and Dental Association ("CMDA")'s over 12,000 members.[90] HHS has not shown it has the authority to incorporate the EMTALA abortion mandate into the Section 1557 Final Rule before the end of litigation in these two lawsuits.

HHS also has not shown it has the authority to include the EMTALA abortion mandate despite the Texas lawsuit's preliminary injunction against the mandate,

[82] *Id.* § 1395dd(c)(1)(A)(ii).
[83] *Id.* § 1395dd(c)(2)(A).
[84] *Id.* § 1395dd(e)(1)(A).
[85] *Id.* § 1395dd(e)(1)(B)(ii).
[86] Am. Ass'n Pro-Life Obstetricians and Gynecologists, *Should Elective Abortions Be Performed by Practitioners Who are Not Physicians?*, Comm. Op. No. 4, at 1 (May 16, 2019).
[87] No. 1:22-cv-329.
[88] No. 5:22-cv-185.
[89] Memorandum Decision and Order, *Idaho Lawsuit*, No. 1:22-cv-329 (D. Idaho Aug. 24, 2022).
[90] Memorandum Opinion and Order, *Texas Lawsuit*, No. 5:22-cv-185 (N.D. Tex. Aug. 23, 2022).

which not only protects Texans, but medical professionals nationwide who are members of AAPLOG and CMDA. The Texas district court held:

> That Guidance [*i.e.*, EMTALA abortion mandate] goes well beyond EMTALA's text, which protects *both* mothers and unborn children, is silent as to abortion, and preempts state law only when the two directly conflict. Since the statute is silent on the question, the Guidance cannot answer how doctors should weigh risks to both a mother and her unborn child. Nor can it, in doing so, create a conflict with state law where one does not exist.[91]

The court also found HHS violated the statutorily mandated notice and comment procedure, and, thus, was unauthorized.[92] If HHS incorporates the EMTALA abortion mandate into the Final Rule, it will subvert the Texas lawsuit's preliminary injunction. HHS does not have this authority.

The Texas lawsuit preliminary enjoined the EMTALA abortion mandate because it exceeds HHS' statutory authority and is an impermissible construction of EMTALA. [93] The district court held:

- The statute does not preempt state law unless there is a direct conflict.[94]
- If both a pregnant woman and her unborn child face emergencies, EMTALA does not prescribe particular action, and, thus, does not preempt state laws regulating that situation.[95]
- Regardless of the unborn child's health and state law, the EMTALA abortion mandate requires abortions if a physician believes it will stabilize a woman's emergency medical condition.[96]
- The Medicare Act prohibits federal interference with the practice of medicine, which "undercuts the Guidance."[97]
- HHS' remaining litigation arguments in support of the abortion mandate are unpersuasive.[98]

The district court also held that HHS did not adhere to mandatory procedures required by the Medicare Act "before imposing a statement of policy establishing a substantive legal standard."[99] The court found:

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[91] *Id*. at 1 (emphasis in original).
[92] *Id*.
[93] *Id* at 39–41.
[94] *Id*. at 43–44.
[95] *Id*. at 44–49.
[96] *Id*. at 49–52.
[97] *Id*. at 52–53.
[98] *Id*. at 54–55.
[99] *Id*. at 55–56.

- The EMTALA abortion mandate is a statement of policy that established or changes a substantive legal standard, is subject to notice and comment, but did not provide notice and comment.[100]
- The EMTALA abortion mandate does not fall under any exception to the notice and comment requirements.[101]

HHS has not shown it has the authority to act contrary to these legal conclusions. Accordingly, HHS should not insert the EMTALA abortion mandate into the Section 1557 Final Rule.

IV. Conclusion

For the foregoing reasons, HHS does not have the legal authority to include abortion within Section 1557's definition of sex discrimination, nor incorporate the EMTALA abortion mandate within the Final Rule. I urge HHS to adhere to federal pro-life policy and not insert abortion within the definition of sex discrimination, and to exclude the unlawful EMTALA abortion mandate from the Section 1557 Final Rule.

Sincerely,

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[100] *Id*. at 56–58.
[101] *Id*. at 58–59.

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