United States Senate
WASHINGTON, DC 20510

March 27, 2018

The Honorable Alex M. Azar II
Secretary
Department of Health and Human Services
200 Independence Avenue SW
Washington, D.C. 20201

Dear Secretary Azar:

We write with strong objections to the Department of Health and Human Services' ("HHS" or the "Department") proposed rule "Protecting Statutory Conscience Rights in Health Care; Delegations of Authority," which attempts to dramatically expand existing harmful refusal laws in ways that are intended to encourage health care providers and institutions to discriminate against patients. We call on the Department to withdraw the proposed rule in its entirety.

Not only would the proposed rule go beyond congressional intent, it would also create uncertainty and confusion about rights and obligations under existing federal civil rights laws. This rule seeks to expand the ways in which religious and moral objections can dictate access to care for patients, exacerbating health disparities and existing barriers to care and services for vulnerable populations. It is the Administration's latest attempt to prioritize ideology over the Department's core mission to promote patient health and well-being – in this instance by rolling back health care access and rights for women, children, LGBTQ individuals, and other marginalized populations.

The Proposed Rule Broadens the Scope of Refusal Laws Contrary to Congressional Intent

The proposed rule attempts to expand existing law in dangerous new ways and goes beyond the intentions of Congress in the passage of the underlying statutes. The proposed rule takes the expansive refusal provisions that already threaten patient health – namely, the Weldon, Church, and Coats-Snowe Amendments, as well as two dozen other laws – and broadens and misinterprets them. For example, lead sponsor Senator Snowe stated that one of the primary purposes of the Coats-Snowe Amendment was to "make sure that women have access to quality health care with the strictest standards." Yet, the proposed rule attempts to undermine the intent of the Amendment by expanding the scope of religious refusals.

Furthermore, the legislative histories of the Church, Coats-Snowe, and Weldon Amendments suggest no intent to ignore or displace the nondiscrimination principles underpinning landmark civil rights laws and the balances they seek to strike. In contrast, the proposed rule fails to acknowledge the balance struck in laws such as Title VII of the Civil Rights Act and Section 1557 of the Affordable Care Act to respect religious beliefs while also ensuring access to vital information and services. Therefore, any efforts to interpret the Church, Coats-Snowe, and Weldon Amendments must be read to incorporate the protections contained in critical civil rights laws. The proposed rule not only fails to mention these key laws, but also fails to provide guidance for any covered entities on how to observe both the directives contained in the proposed rule and obligations under existing civil rights laws.

In addition, the proposed rule attempts to combine terms already defined by Congress to expand religious refusals, contrary to congressional intent. Specifically, under the Coats-Snowe and Weldon Amendments, "health care entity" is defined to encompass a limited and specific range of individuals and entities. Even though Congress clearly defines the term in both statutes, the proposed rule includes a far broader definition for "health care entity" that goes beyond either of the definitions in statute. The proposed definition also describes the list of potentially covered entities as "illustrative, not exhaustive," leaving open the possibility to expand the definition even further. Such an attempt to expand the meaning of a statutory term Congress already took the time to define goes directly against congressional intent.

The Proposed Rule's Attempt to Expand the Scope of Refusal Laws Exceeds the Department's Authority

The proposed rule suggests new definitions for a number of terms in ways that misconstrue their meaning in current law or practice and undermine definitions contained in laws that prohibit discrimination. For example, the proposed rule greatly expands the definition of "assist in the performance" of a program or activity to which an individual objects, expanding both the types of services that can be refused and the individuals who can refuse to provide those services. Specifically, the definition includes those participating "in any program or activity with an articulable connection to a procedure, health service, health program, or research activity…." "Articulable connection" is an exceptionally broad term that creates an irrationally tenuous connection to the procedure. Furthermore, it is not defined in the proposed rule, which could allow HHS' Office for Civil Rights (OCR) to loosely interpret the already very vague term in a way that could even more significantly hamper the practice of medicine, research, and access to health care broadly. For example, a receptionist in a physician's office could refuse to schedule appointments for activities he or she objects to, or an ambulance driver could refuse to transport a woman who needs care for a miscarriage, both by claiming that doing so would "assist[]in the performance" of such procedures.

The proposed rule also defines "referral" in a way that has never been applied in statute or regulation and goes beyond the plain meaning of the term. The proposed rule defines "referral" to include the provision of "any information" by "any method" pertaining to health care that could help a person obtain the care they need, requiring only that the health care entity believe that the service they object to is a "possible outcome" of providing information. This means that refusal laws that were initially intended to narrowly exempt providers who object to providing a referral in the plain meaning of the word can now be exempted from providing *any* information to a patient that can be remotely connected to a procedure to which they object. This definition of referrals could hamper patients' ability to get information they need for their care.

The proposed rule omits critical statutory language from multiple laws it cites requiring that patients be informed of the provider's refusal—undermining Congress' deliberate use of language intended to include basic patient protections to mitigate the harm of refusals. Such a language change could even encourage providers to withhold necessary information from patients or leave patients unaware about their state of care.

The proposed rule expands the universe of entities that can claim religious or moral exemptions, by expanding the definitions of "entity" and "health care entity." The proposed rule adds "a plan sponsor,

issuer, or third party administrator" to the definition of "health care entity." It also contains a separate definition of "entity," which includes any "person" defined in 1 U.S.C. 1, such as corporations, joint stock companies, a state, or any public agency or institution. These expansive definitions could provide cover for a number of new entities not to do their jobs. The new definitions could also mean entities not previously covered by refusal laws will have to accommodate their individual employee's refusals to provide care or more broadly "assist" in any practice to which he or she is opposed. Under the proposed rule, all the newly covered entities would also be subject to burdensome new notice and compliance requirements.

In short, the new definitions for a number of terms in the proposed rule exceed the Department's authority and will undoubtedly compromise the health of patients, burden providers, and deny patients the protections Congress provided them.

The Proposed Rule Conflicts with Federal Laws that Protect Patient Access to Care and the Constitution

The proposed rule attempts to undermine federal laws enacted with the express purpose of protecting access to health care. Specifically, Section 1557 of the Affordable Care Act was intended to provide robust protection for women and LGBTQ individuals. As the cornerstone of Congress' nondiscrimination requirement in health care, Section 1557 holds that a patient cannot be refused care because of race, color, national origin, sex, age, or disability. The proposed rule attempts to undermine Section 1557 and seeks to entrench discrimination against women and LGBTQ individuals in health care.

In addition, the proposed rule fails to acknowledge the Emergency Medical Treatment and Active Labor Act ("EMTALA"). EMTALA requires hospitals that have a Medicare provider agreement and an emergency room or department to provide to anyone requesting treatment an appropriate medical screening to determine whether an emergency medical condition exists, and to stabilize the condition or, if medically warranted, to transfer the person to another facility. Instead, this proposed rule attempts to protect providers who seek to turn away patients based on personal belief, greatly endangering patient lives. This could result in patients in emergency circumstances not receiving necessary care, a clear violation of EMTALA. Congressional intent clearly does not support the undermining of EMTALA's protections for patients.

Furthermore, the proposed rule raises substantial concerns about compliance with the Establishment Clause of the First Amendment of the Constitution. The Establishment Clause mandates that when considering a religious exemption, the Department adequately account for the burdens that any exemption may impose on non-beneficiaries. It also prohibits exemptions that materially harm any third party. It is clear that the proposed rule does not adequately account for the significant harm it would cause patients, and thus, it would be in tension with the constitutional do-no-harm principle.

The Proposed Rule Reaches Further than the 2008 Rule

The Department falsely claims the proposed rule is only a reinstatement of the rule promulgated by the Bush Administration in 2008 ("2008 rule"), a rule that was rescinded almost entirely by the Obama Administration. Even if this proposed rule was merely a reinstatement of the 2008 rule, the proposed

rule would be dangerous. The 2008 rule was the subject of widespread opposition, including from 28 U.S. Senators (many of whom are on the current comment letter), 131 Members of the U.S. House of Representatives, Commissioners on the U.S. Equal Employment Opportunity Commission, 14 state attorneys general, and 27 state medical societies, including the American Medical Association, American Hospital Association, National Association of Community Health Centers, and American College of Emergency Physicians. But, the proposed rule reaches much further than the 2008 rule. When compared to the 2008 rule, the proposed rule seeks to allow more individuals and more entities to refuse care to patients as well as allow more services to be refused. The proposed rule also forces more entities to allow their employees to refuse care, imposes additional, unnecessary notice and compliance requirements, and invites states to further expand religious refusal laws.

The Proposed Rule Twists OCR's Authority in Ways that Will Diminish OCR's Ability to Address the Types of Discrimination that Congress Enacted Laws, Created Institutions, and Appropriated Funding to Combat

By issuing the proposed rule, the Department is attempting to use OCR's limited resources in order to affirmatively allow institutions, insurance companies, and almost anyone involved in patient care to use their personal beliefs to deny patients health care and to disregard the full suite of nondiscrimination laws that OCR is charged with enforcing. The Department is appropriating nondiscrimination laws and principles in a way that protects those who seek to discriminate by attempting to expand the scope and enforcement of federal refusal laws, rather than using the funding appropriated by Congress to combat discrimination on the basis of race, color, national origin, sex, age, or disability in health care. By taking the language of civil rights laws and regulations out of context and by excerpting portions of the law while disregarding others, the proposed rule creates a regulatory scheme that is not only unnecessary and affirmatively harmful, but is utterly unreasonable and irrational when comparing the proposed rule to congressional intent and the statutory scheme of our nation's nondiscrimination laws.

The proposed rule's attempts to expand refusals to provide care will come at the expense of devoting resources to OCR's mission of targeting well documented ongoing discrimination in health care. This effort to divert OCR's precious and limited resources away from enforcing the nation's nondiscrimination laws in health care will have real consequences for people who are currently facing discrimination on the basis of race, color, national origin, sex, age, or disability in health care settings. OCR should commit to full and robust enforcement of Section 1557 of the Affordable Care Act, which provides critical protections for women and LGBTQ patients across the country. Instead, the proposed rule seeks to de-prioritize the needs of people who require protection from discrimination and instead provide a pretext to attack the rights, health care, and equality of women and LGBTQ individuals.

The proposed rule indicates a fundamental misunderstanding of OCR's role in combatting discrimination in health care. The Department should operate under the policy that a patient's health must always come first. Instead, through this proposed rule, HHS and the Trump Administration are allowing ideology, not medical needs, to dictate health care access.

The Proposed Rule Ignores the Core Function of the Department and Particularly Impacts Populations Already Facing Barriers to Accessing Care

The proposed rule reflects a fundamental misunderstanding of the mission of HHS to protect the health and well-being of all individuals. OCR was established with the express purpose of furthering HHS's mission by enforcing federal laws that protect patients, prohibit discrimination, and address health disparities. The proposed rule attempts to enforce provisions that would have the opposite effect.

By attempting to allow hospitals, providers, and anyone loosely involved in the provision of health care to determine a patient's care based on their personal beliefs—not based on what is best for the patient—the proposed rule will harm those who already face barriers to care and prevent them from accessing the care and coverage they need. For many people who face barriers to care, including people of color, LGBTQ individuals, low-income children and families, people with disabilities, people facing language barriers, people living in provider shortage areas, and uninsured populations, finding another provider simply is not a viable option, and being refused care because of a provider's or administrator's personal beliefs can amount to having their health care dangerously delayed or even denied entirely. In ignoring these inevitable harms of the proposed rule, HHS is ignoring its mission.

Women

The proposed rule seeks to allow providers and health care entities to discriminate against women and deny them the care and information they need. Religious beliefs have already been used to deny access to services most often needed by women, such as abortion, sterilization, certain infertility treatments, and miscarriage management. Such refusals have serious health consequences for women and can result in infertility, infection, and even death. The rule could embolden refusals and lead to more women being turned away when seeking care. This discrimination disproportionately affects women of color who already face additional barriers to accessing reproductive health care.

LGBTQ Individuals

The proposed rule seeks to allow providers and health care institutions to refuse care to LGBTQ patients. This is particularly harmful given that LGBTQ individuals already face significant discrimination in health care settings. For example, a nationally representative survey by the Center for American Progress found that eight percent of LGBTQ respondents and 29 percent of transgender respondents reported that a doctor or other health care provider had refused to see them in the past year because of their actual or perceived sexual orientation or because of their actual or perceived gender identity, respectively. A national survey of transgender adults by the National Center for Transgender Equality found 33 percent of respondents who saw a doctor during the past year were turned away or mistreated because of being transgender. The rates of discrimination for LGBTQ people of color, or LGBTQ individuals with disabilities, are even higher. The proposed rule's sweeping language, and its troubling reliance on a case involving discrimination against a transgender patient, signal an attempt to expand refusal laws to transition-related care—ignoring not only the well-established consensus in the medical community that transition-related care is medically necessary, but also Congress' clear intent to apply those laws to a limited set of procedures. We are also troubled by indications the Department intends the proposed rule to be interpreted even more broadly. For example, the proposed rule's vague and sweeping language can encourage providers to refuse any care to an LGBTQ patient simply because of the provider's personal disapproval of his or her patient's sexuality or gender identity. Moreover, both readings are beyond the intent of the refusal laws.

Individuals Receiving Care in Other Countries

The proposed rule seeks to expand the definition of health care entities in a way that potentially covers global health providers, encouraging individuals working under global health programs funded by HHS to refuse critical care in international settings. In covering organizations that receive foreign aid funds through global health programs, the proposed rule extends the harm of refusals to vulnerable populations abroad. For example, in many of the countries where the Department implements global AIDS programs (PEPFAR), the populations served already face numerous barriers to care, including the broad and harmful refusal provision contained within the statute governing PEPFAR, and are therefore disproportionately impacted by the epidemic. The proposed rule opens up an additional front for discrimination against these populations by encouraging individual health care providers to deny the information and services they need. Such action undermines the purpose of global health programs, and the rights of those they intend to serve. This is particularly harmful in developing countries where many health systems are weak, there are shortages of available health care options and supplies, and individuals often travel long distances to obtain the services they need. Many of the individuals that encounter refusals will have nowhere else to go.

The Breadth of the Proposed Rule has Far Reaching Implications

The breadth of the proposed rule also has implications for those providing services and information in a wide range of areas including HIV, drug addiction, infertility, vaccinations, psychology, sexually transmitted infections, and end-of-life care, among others. For example, an oncologist working in a federally funded prostate cancer treatment program could withhold information from a patient about the option of extracting and freezing sperm before cancer treatment. The proposed rule dangerously stands in the way of the information patients need to make health care decisions for themselves and their families.

Conclusion

The proposed rule could dramatically expand the scope and applicability of refusals law in a way that contravenes congressional intent, exceeds authority, and promotes discrimination by health care providers and institutions. The proposed rule is so blatantly inconsistent with the statutory framework of our health care and nondiscrimination laws, the Constitution, and the very purpose of OCR, we see no other reasonable course but to withdraw the proposed rule. Therefore, we strongly urge the Department to halt all efforts in moving forward with this proposed rule and to withdraw it and instead focus efforts on promoting health care access and coverage as is the Department's mission.

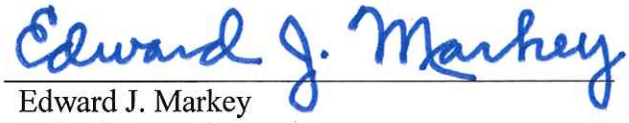
Sincerely,

Patty Murray
United States Senator

Richard Blumenthal
United States Senator

Sherrod Brown
United States Senator

Tina Smith
United States Senator



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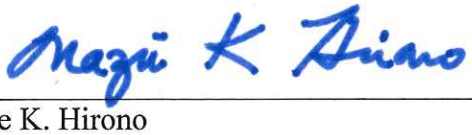

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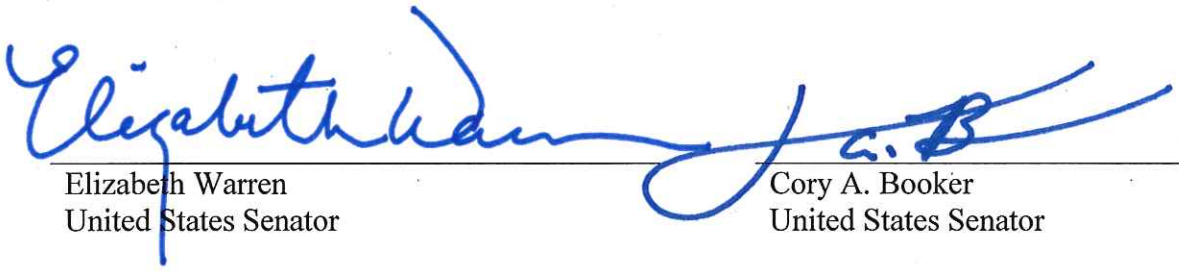

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Cory A. Booker
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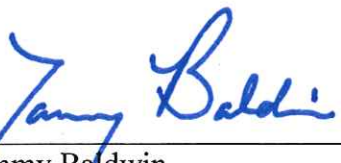

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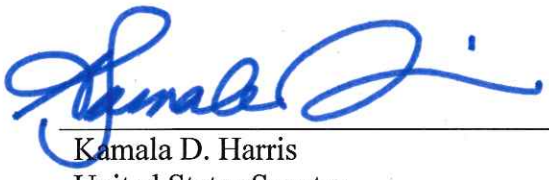
United States Senator

Bernard Sanders
United States Senator



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Margaret Wood Hassan
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