

March 3, 2023

**Submitted electronically**

The Honorable Secretary Xavier Becerra  
U.S. Department of Health & Human Services  
200 Independence Ave., S.W.  
Washington, D.C. 20201

Re: Safeguarding the Rights of Conscience as Protected by Federal Statutes

Dear Secretary Becerra:

We write in response to your request for comments on the Notice of Proposed Rulemaking (the NPRM) entitled Safeguarding the Rights of Conscience as Protected by Federal Statutes, 88 Fed. Reg. 820 (proposed Jan. 5, 2023) (to be codified at 45 C.F.R. pt. 88).

Since our earliest days, America has been a place of shelter for people with moral or religious objections. We have protected Quakers from bearing arms and prison officials from administering lethal injections. Unfortunately, some abortion advocates would rather discard that heritage and force doctors and nurses to either perform abortions or exit the medical profession entirely. Such a position is un-American and harmful to the patients these compassionate doctors and nurses are serving who would be left without their care. That is why, as Members of Congress, we crafted laws to protect them. Shortly after *Roe v. Wade*, 410 U.S. 113 (1973), Congress passed the “Church Amendments.” The amendments’ sponsor, Senator Frank Church of Idaho, foresaw that the right to access abortion might be morphed into the power to compel providers to perform or participate in abortions. His concerns were prescient. Today, there are “more than 30 statutory provisions that recognize the rights of conscience-based objectors in the health care arena.”<sup>1</sup> This comment focuses on two of the most significant protections—the Coats-Snowe Amendment and the Weldon Amendment (the Amendments).

The authors of this comment are two former members of Congress: Daniel Coats, who served for sixteen years as a United States Senator from Indiana, and Dr. David Weldon, a practicing physician who served for fourteen years as a United States Representative from Florida’s 15th congressional district.<sup>2</sup> Senator Coats was a sponsor of the Coats-Snowe Amendment, now codified at 42 U.S.C. § 238n (2018), which protects physicians, residency programs, and residents from discrimination for refusing to provide or participate in abortion training. Representative Weldon

---

<sup>1</sup> *New York v. U.S. Dep’t of Health & Human Servs.*, 414 F. Supp. 3d 475, 496 (S.D.N.Y. 2019).

<sup>2</sup> The Robertson Center for Constitutional Law at Regent University School of Law assisted in the preparation of this comment.

sponsored the Weldon Amendment, which is even broader. It deprives of federal funds any governmental entity that discriminates on the basis that a health care entity does not provide, pay for, provide coverage of, or refer for abortions.<sup>3</sup>

For these protections to be effective, they must be enforceable. That is why interpreting these pieces of legislation correctly is crucial to the Department's task here.

The May 21, 2019, final rule (the 2019 Rule) entitled, "Protecting Statutory Conscience Rights in Health Care; Delegations of Authority,"<sup>4</sup> was based, in part, on the Coats-Snowe and Weldon Amendments. It implemented bipartisan congressional support for the understanding that it is wrong to force someone who has dedicated his or her career to *saving* lives to perform a procedure that he or she sincerely believes to be lethal to a human life.

When a district court vacated the 2019 Rule in *New York v. United States Department of Health & Human Services (New York v. HHS)*,<sup>5</sup> Senator Coats and Representative Weldon filed the attached *amicus* brief on appeal at the Second Circuit in support of reversal.<sup>6</sup> The brief explained that the Amendments bolster the Department's authority to protect conscience by defining "health care entity" and "discrimination" as it did in the 2019 Rule.

The NPRM at issue here would gut those protections by discarding the definitions that appeared at § 88.2 of the 2019 Rule.<sup>7</sup> To get there, the Department relies on *New York v. HHS* as one of three district court decisions holding that, among other things, the 2019 Rule's definitions of "health care entity" and "discrimination" exceeded the Department's authority and undermined the balance struck by Congress.<sup>8</sup>

But, as we explained in the attached brief, the district court's ruling was based on an incomplete and incorrect understanding of the relevant underlying legislation. Congress struck the correct balance in the Amendments through inclusive definitions and a departure from the Title VII framework. In giving the Amendments teeth, the 2019 Rule merely *preserved* that balance. Anything less endangers America's heritage of protecting the conscientious objector.

---

<sup>3</sup> Congress has included the Weldon Amendment in each appropriations act for the Departments of Labor, Health and Human Services, and Education since 2005. *See* Safeguarding the Rights of Conscience as Protected by Federal Statutes, 88 Fed. Reg. 820, 822 (proposed Jan. 5, 2023) (to be codified at 45 C.F.R. pt. 88).

<sup>4</sup> Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23,170 (May 21, 2019).

<sup>5</sup> 414 F. Supp. 3d at 496.

<sup>6</sup> The Robertson Center for Constitutional Law assisted in the preparation of this brief.

<sup>7</sup> *See* 84 Fed. Reg. at 23,263–64.

<sup>8</sup> *See* 88 Fed. Reg. at 826 (citing *New York v. HHS*, 414 F. Supp. 3d. at 523).

*First*, both the Coats-Snowe Amendment and the Weldon Amendment define “health care entity” flexibly and non-exclusively. In the Coats-Snowe Amendment, “[t]he term ‘health care entity’ *includes* an individual physician, a postgraduate physician training program, and a participant in a program of training in the health professions.”<sup>9</sup> In the Weldon Amendment, “the term ‘health care entity’ *includes* an individual physician or *other health care professional*, a hospital, a provider-sponsored organization, a health maintenance organization, a health insurance plan, *or any other kind of health care facility, organization or plan.*”<sup>10</sup>

Both definitions conspicuously use the word “includes” instead of “means”—a significant decision according to the legislation drafting guides of the U.S. Senate and U.S. House of Representatives. The Senate’s *Legislative Drafting Manual* directs drafters to “use ‘includes’ to specify that a term includes certain elements (and may also include other elements).”<sup>11</sup> By contrast, the verb “means,” when used in a legislative definition, “establish[es] comprehensive meanings.”<sup>12</sup> The House’s *Manual on Drafting Style* similarly explains that the word “‘means’ should be used for *establishing complete meanings* and ‘includes’ when the purpose is to make clear that a term *includes a specific matter.*”<sup>13</sup> The fact that Congress chose “includes” when it passed each of the Amendments denotes an inclusive definition of “health care entity.”

Representative Weldon’s floor statements support this interpretation of the Weldon Amendment. Reflecting his unique insights as a practicing physician, Representative Weldon consistently expressed an understanding that the scope of “health care entity” reaches beyond the enumerated classes. For instance, “[t]he reason” Representative Weldon “sought to include this provision in the bill . . . is that the majority of *nurses, technicians, and doctors*” that he interacted with had personal objections to participating in abortions—even those who supported abortion politically.<sup>14</sup> This was true even though neither “nurses” nor “technicians” are explicitly named in the definition of “health care entity” in the Weldon Amendment. Similarly, Representative Weldon said that “[t]his provision is intended to protect the decisions of physicians, *nurses, clinics*, hospitals, *medical centers*, and even *health insurance providers* from being forced by the government to provide, refer, or pay for abortions.”<sup>15</sup>

---

<sup>9</sup> 42 U.S.C. § 238n(c) (emphasis added).

<sup>10</sup> *Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019*, Pub. L. No. 115-245, Div. B, § 507(d), 132 Stat. 2981, 3118 (2018) (emphases added).

<sup>11</sup> *Legislative Drafting Manual*, Off. Legis. Couns., U.S. Senate § 316(a)(2) (Feb. 1997).

<sup>12</sup> *Id.* § 316(a)(1).

<sup>13</sup> *House Legislative Counsel’s Manual on Drafting Style*, Off. Legis. Couns., U.S. House of Representatives, § 351(i)(6)(A) (Nov. 1995) (emphases added).

<sup>14</sup> 150 Cong. Rec. H10,090 (Nov. 20, 2004) (statement of Rep. Weldon) (emphasis added).

<sup>15</sup> *Id.* (emphases added).

That inclusive language was used to avoid placing hard limits on the scope of the protected class. The result is that “health care entity,” the term that sets the scope of the protected class, extends for the Coats-Snowe and Weldon Amendments *beyond* the listed examples. Thus, the 2019 Rule was in harmony with the underlying legislation to the extent that it enforced a broad definition of “health care entity.”

*Second*, the Amendments intentionally deviate from Title VII’s reasonable accommodation-undue hardship standard by defining “discrimination” broadly. The district court erroneously concluded that “the [2019] Rule’s definition of ‘discrimination’ is game-changing” because it foregoes the reasonable accommodation-undue hardship formulation of Title VII.<sup>16</sup>

But the Amendments were meant to be game-changing. Unlike Title VII, which protects employees only from religious discrimination (and then exempts employers from accommodating if they can demonstrate an undue hardship), the Amendments protect employees for *all* reasons for objecting to participation in abortion training. As Senator Coats stated before Congress, the Coats-Snowe Amendment extends protection to “religious reasons,” “moral reasons,” “practical reasons,” “economic reasons,” reputational reasons, or any other conceivable reasons.<sup>17</sup> Similarly, the Weldon Amendment places a categorical ban on discriminating against a health care entity for failing to participate in abortions—no religious or moral practice required.<sup>18</sup>

There is no basis to assume, as the district court did, that Congress intended to graft Title VII standards onto this legislation. To the contrary, Congress rejected the application of Title VII standards and protected *all* reasons for objection, not just religious or moral ones. What’s more, as we explain in the attached brief (at 12), none of the statutes at issue in *New York v. HHS* explicitly adopted the Title VII reasonable accommodation-undue hardship framework either.<sup>19</sup> Thus, the 2019 Rule’s departure from the Title VII framework in defining “discrimination” corresponds to the underlying legislation.

The Department now assumes, despite a record to the contrary, that the 2019 Rule’s application of inclusive and broadly protective language somehow “departed from the federal statutes.”<sup>20</sup> The Coats-Snowe and Weldon Amendments were *meant* to provide expansive protection—and they were drafted accordingly. We knew that

---

<sup>16</sup> *New York v. HHS*, 414 F. Supp. 3d 475, 523–24 (S.D.N.Y. 2019).

<sup>17</sup> 142 Cong. Rec. S2265 (Mar. 19, 1996) (statement of Sen. Coats).

<sup>18</sup> *Cf.* 42 U.S.C. § 2000e(j).

<sup>19</sup> *See City & Cty. of San Francisco v. Azar*, 411 F. Supp. 3d 1001, 1020 (N.D. Cal. 2019) (“[N]o federal conscience statute ever defined ‘discriminate’ or ‘discrimination,’ ever referred to Title VII, or itself provided any undue hardship exception. At first blush, therefore, it is a bit hard to grasp plaintiffs’ grievance.”).

<sup>20</sup> 88 Fed. Reg. at 826.

to be true when we sponsored the Amendments. Congress knew it when it passed them. And the Department knew it when it released the 2019 Rule. The NPRM's about-face cannot be reconciled with that reality.

The “district court decisions” that the Department claims “raise significant questions” as to the validity of the 2019 Rule cannot change those facts. Incorrect rulings do not relieve the Department of its duty to act reasonably.<sup>21</sup> When an agency adopts rules, it must have a rational basis for doing so. And it must avoid arbitrary and capricious actions—such as reliance on “rationale contradicting the evidence before [the agency].”<sup>22</sup> Interpreting *inclusive* language to read *exhaustively* is such an error. And it is flat wrong to adopt the rationale of the *New York v. HHS* court to the extent that it conflated Title VII standards with the Amendments’ entirely distinct framework.

At bottom, the Department’s rationale here is self-defeating. The NPRM does not retain the balance Congress struck with its conscience protections. Instead, it undercuts congressional intent, neuters the Coats-Snowe and Weldon Amendments, and threatens conscience rights nationwide. That result cannot be squared with the text or history of those provisions—it is an affront to our nation’s longstanding history of accommodating individuals with moral or religious objections.

Thus, we urge the Department to reject erroneous district court decisions and cribbed readings of plain legislative provisions. We request that the Department apply the laws Congress passed in the way Congress intended.

Sincerely,

s/ Sen. Daniel Coats  
s/ Rep. David Weldon

---

<sup>21</sup> See 5 U.S.C. § 706(2)(A) (stating that reviewing courts shall set aside agency actions found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”).

<sup>22</sup> See *Associated Fisheries of Me., Inc. v. Daley*, 127 F.3d 104, 109 (1st Cir. 1997).