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March 27, 2018

VIA ELECTRONIC SUBMISSION

U.S. Department of Health and Human Services
Office for Civil Rights

Attention: Conscience NPRM, RIN 0945-ZA03

Hubert H. Humphrey Building, Room 509F

200 Independence Avenue SW

Washington, DC 20201

To Whom It May Concern:

We submit the following comments on the Proposed Rule “Protecting Statutory Conscience Rights in Health Care; Delegations of Authority” (“the rule”). The Public Rights/Private Conscience Project (PRPCP) brings legal, policy, and academic expertise to bear on the multiple contexts in which fundamental religious liberty rights are at stake and can be in tension with or undermine other fundamental rights to equality and liberty. As such, we write to condemn the rule not only because it fails to ensure that patients have access to necessary health care, but also because, by preferring particular religious beliefs over others, it violates rather than protects religious liberty.

Under the proposed rule, health care providers with moral or religious objections to abortion, sterilization, and certain other services would never be obligated to provide such care, regardless of the policies of the institution where they work, the religious or moral beliefs of their patient, or the standards of care of the medical profession generally. In contrast, medical professionals whose religious or moral beliefs require them to provide patients with the full range of reproductive health services may be prohibited by their employer from acting on this belief.¹ For example, the rule would permit a Catholic hospital to forbid doctors from providing abortion care within the facility, even if such prohibition would violate a doctor’s conscience. Such imbalanced regulations belie the agency’s purported interest in protecting “religious liberty” generally, revealing its actual aim to be in protecting *only* religious adherents who oppose comprehensive reproductive health care. By giving a preference to certain religious beliefs over others, the regulation clearly conflicts with religious liberty law and policy that requires, at a minimum, even-handed accommodation of religious beliefs.

¹ For an in-depth discussion of the conscience rights of pro-choice medical providers and asymmetrical religious refusal laws, see Elizabeth Sepper, *Taking Conscience Seriously*, 98 Virginia L. Rev. 1501 (2012).

A. People of Faith Hold a Wide Range of Views on Sexual and Reproductive Health Care

PRPCP endorses the comments submitted by numerous organizations, including the National Women’s Law Center, demonstrating that the proposed rule poses significant harms to patients by failing to protect their access to necessary medical care, particularly during medical emergencies. However, we are also concerned that the proposed rule fails to protect the very right it claims to defend—freedom of conscience. The proposed rule provides blatantly lopsided, and therefore legally suspect, right to religious exemptions. Communities and people of faith hold a wide spectrum of views regarding the health services implicated by the rule, including abortion, sterilization, contraception, LGBTQ+ health care, and end of life care. By rigorously shielding those who seek to *deny* health care, regardless of the impact such refusals have on others, while simultaneously failing to ensure any religious or moral right to *provide* care, the proposed rule in fact advances not religious freedom but only particular religious views. The First Amendment clearly prohibits government agencies from favoring particular religious views over others.

As acknowledged by the Supreme Court in *Roe v. Wade*, religious denominations, communities, and individuals hold a wide range of views on both the morality and the legality of abortion.² So too do religious practitioners vary considerably in their religious and moral opinions regarding sterilization, contraception, and LGBTQ+ health care. A number of mainstream faiths, including the Presbyterian Church,³ Reform⁴ and Conservative⁵ Judaism, the United Church of Christ,⁶ and

² *Roe v. Wade*, 410 U.S. 113, 160-61 (1973) (“It should be sufficient to note briefly the wide divergence of thinking on this most sensitive and difficult question. There has always been strong support for the view that life does not begin until live birth. This was the belief of the Stoics. It appears to be the predominant, though not the unanimous, attitude of the Jewish faith.”). *See also id.* at 116 (acknowledging “the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One’s philosophy, one’s experiences, one’s exposure to the raw edges of human existence, one’s religious training, one’s attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one’s thinking and conclusions about abortion.”).

³ PRESBYTERIAN CHURCH (U.S.A.) OFFICE OF THE GENERAL ASSEMBLY, *Report of the Special Committee on Problem Pregnancies and Abortion* 11 (1992), http://www.pcusa.org/site_media/media/uploads/oga/pdf/problem-pregnancies.pdf (“We do not wish to see laws enacted that would attach criminal penalties to those who seek abortions or to appropriately qualified and licensed persons who perform abortions in medically approved facilities”).

⁴ CENTRAL CONFERENCE OF AMERICAN RABBIS, *Resolution Adopted by the CCAR On Abortion and the Hyde Amendment*, (1984) <https://www.ccarnet.org/ccar-resolutions/abortion-1984/> (stating that “the Central Conference of American Rabbis has gone on record in 1967, 1975, and 1980 in affirming the right of a woman or individual family to terminate a pregnancy.”); UNION FOR REFORM JUDAISM, *Reproductive Rights* (last visited Mar. 13, 2018) <https://urj.org/what-we-believe/resolutions/reproductive-rights>.

⁵ THE RABBINICAL ASSEMBLY, *Resolution on Reproductive Freedom*, (June 15, 2011), <https://www.rabbinicalassembly.org/resolution-reproductive-freedom> (“the Rabbinical Assembly urges its members to support full access for all women to the entire spectrum of reproductive healthcare, and to oppose all efforts by federal, state, local or private entities or individuals to limit such access.”).

⁶ UNITED CHURCH OF CHRIST, *General Synod Statements and Resolutions Regarding Freedom of Choice* (last visited Mar. 13, 2018), http://d3n8a8pro7vhmx.cloudfront.net/unitedchurchofchrist/legacy_url/2038/GS-Resolutions-Freedom-of-Choice.pdf?1418425637 (“for 20 years, Synods of the United Church of Christ have affirmed a woman’s right to choose with respect to abortion.”).

the Unitarian Universalist Association,⁷ support a legal right to abortion in most or all circumstances. Other faiths, such as Buddhism, Orthodox Judaism, and the National Baptist Convention, take no official stance on abortion rights.⁸

A number of denominations take more complex positions. For example, the Evangelical Lutheran Church in America (ELCA) opposes “legislation that would outlaw abortion in all circumstances” or “prevent access to information about all options available to women faced with unintended pregnancies.”⁹ At the same time, it supports “legislation that prohibits abortions that are performed after the fetus is determined to be viable, except when the mother’s life is threatened or when lethal abnormalities indicate the prospective newborn will die very soon.”¹⁰ ELCA “neither supports nor opposes” legislation that falls between these two categories.¹¹ Statements of the United Methodist Church have expressed a “reluctance to affirm absolute perspectives either supporting or opposing abortion which do not account for the individual woman’s sacred worth and agency.”¹² While the Episcopal Church has stated that abortion should be “used only in extreme situations,” it has opposed certain legal efforts to restrict abortion rights, such as parental notification laws.¹³ While these churches have expressed some uncertainty over the issue of abortion, all have openly supported contraceptive use.¹⁴

Moreover, several religious denominations hold that the right to reproductive health care is an essential aspect of religious freedom. In a resolution adopted in 1984, the Central Conference of American Rabbis, an association of Reform rabbis, stated that “freedom of choice in the issue of abortion is directly related to the First Amendment’s guarantee of religious freedom.”¹⁵ In a 2011

⁷ UNITARIAN UNIVERSALIST ASSOCIATION, *Right to Choose 1987 General Resolution* (1987) (“the 1987 General Assembly of the Unitarian Universalist Association reaffirms its historic position, supporting the right to choose contraception and abortion as legitimate aspects of the right to privacy.”).

⁸ David Masci, *Where Major Religious Groups Stand on Abortion*, PEW RESEARCH CENTER (June 21, 2016), <http://www.pewresearch.org/fact-tank/2016/06/21/where-major-religious-groups-stand-on-abortion/>.

⁹ EVANGELICAL LUTHERAN CHURCH IN AMERICA, *A Social Statement on Abortion* (1991), http://download.elca.org/ELCA%20Resource%20Repository/AbortionSS.pdf?_ga=2.200020200.771729105.1520894009-874109350.1520894009.

¹⁰ *Id.*

¹¹ *Id.*

¹² UNITED METHODIST CHURCH, *The United Methodist Church and the complex topic of abortion* (Nov. 3, 2015), <http://www.umc.org/what-we-believe/the-united-methodist-church-and-the-complex-topic-of-abortion>.

¹³ The Episcopal Church, *Oppose Certain Legislation Requiring Parental Consent for Termination of Pregnancy*, (1991) https://episcopalarchives.org/cgi-bin/acts/acts_resolution.pl?resolution=1991-C037; see also <https://www.episcopalchurch.org/library/article/religious-leaders-support-maintaining-status-quo-abortion-health-care-reform>.

¹⁴ EVANGELICAL LUTHERAN CHURCH IN AMERICA, *A Social Statement on Abortion*, *supra* note 9 (We recognize the need for contraceptives to be available, for voluntary sterilization to be considered, and for research and development of new forms of contraception); UNITED METHODIST CHURCH, *Social Principles: The Nurturing Community* (last visited Mar. 13, 2018) <http://www.umc.org/what-we-believe/the-nurturing-community> (“The Church shall encourage ministries to reduce unintended pregnancies such as . . . advocacy in regard to contraception”); THE EPISCOPAL CHURCH, *Episcopal Church Official Voices Support for Abortion-Prevention Bill* (July 24, 2009) <https://www.episcopalchurch.org/library/article/episcopal-church-official-voices-support-abortion-prevention-bill> (statement supporting legislation that “restores and expands family planning programs for low-income women.”).

¹⁵ CENTRAL CONFERENCE OF AMERICAN RABBIS, *Resolution Adopted by the CCAR On Abortion and the Hyde Amendment*, *supra* note 4.

Resolution on Reproductive Freedom, The Rabbinical Assembly, an international association of Conservative rabbis, stated that to “deny a woman and her family full access to the complete spectrum of reproductive healthcare, including contraception, abortion-inducing devices, and abortions, among others, on religious grounds is to deprive these women of their Constitutional right to religious freedom.”¹⁶

In 1971, the Eighth General Synod of the United Church of Christ issued a resolution stating that “The theological...views on when human life begins are so numerous and varied that that one particular view should not be forced on society through its legal system.”¹⁷ The sixteenth General Synod in 1987 further stated that “women and men must make decisions about unplanned or unwanted pregnancies that involve their physical, emotional, and spiritual well-being.”¹⁸ The Unitarian Universalist Association, in a 1987 general resolution, found that any legislative attempt to restrict abortion access is “an infringement of the principle of separation of church and state in that it tries to enact private morality into public law.”¹⁹ Acknowledging the spectrum of views on abortion held by its members, the ELCA has stated that “[f]or some, the question of pregnancy and abortion is not a matter for governmental interference, but a matter of religious liberty and freedom of conscience protected by the First Amendment.”²⁰

The Presbyterian Church has issued several lengthy documents on abortion rights over the past forty years, acknowledging that its membership holds varying views on this issue. In 1983 document “Covenant and Creation: Theological Reflections on Contraception and Abortion,” the Church affirmed “Christian freedom and responsibility (Christian conscience) in the process of deciding whether to abort,” and supported “national policy that embodies that conviction, carefully guarding the separation of church and state with respect for the freedom of the individual’s conscience.”²¹ A subsequent report on abortion affirmed “the ability and responsibility of women, guided by the Scriptures and the Holy Spirit, in the context of their communities of faith, to make good moral choices in regard to problem pregnancies.”²² Similarly, the United Methodist Church has stated that “Governmental laws and regulations do not provide all the guidance required by the informed Christian conscience. Therefore, a decision concerning abortion should be made only after thoughtful and prayerful consideration

¹⁶ THE RABBINICAL ASSEMBLY, *Resolution on Reproductive Freedom*, *supra* note 5.

¹⁷ UNITED CHURCH OF CHRIST, *General Synod Statements and Resolutions Regarding Freedom of Choice*, *supra* note 6.

¹⁸ *Id.*

¹⁹ UNITARIAN UNIVERSALIST ASSOCIATION, *1987 General Resolution* (1987), <https://www.uua.org/action/statements/right-choose>.

²⁰ EVANGELICAL LUTHERAN CHURCH IN AMERICA, *A Social Statement on Abortion*, *supra* note 9.

²¹ THE 195TH GENERAL ASSEMBLY, *The Covenant of Life and The Caring Community & Covenant and Creation: Theological Reflections on Contraception and Abortion*, 104-05 (1983) available at <https://www.presbyterianmission.org/wp-content/uploads/8-covenant-of-life-and-covenant-and-creation-1993.pdf>.

²² OFFICE OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.), *Report of the Special Committee on Problem Pregnancies and Abortion*, 10-11 (1992) available at http://www.pcusa.org/site_media/media/uploads/oga/pdf/problem-pregnancies.pdf. The denomination’s website similarly states that “[h]umans are empowered by the spirit prayerfully to make significant moral choices, including the choice to continue or end a pregnancy.” PRESBYTERIAN CHURCH (U.S.A.), *Abortion Issues* (last visited Mar. 23, 2018), <https://www.presbyterianmission.org/what-we-believe/social-issues/abortion-issues/>.

by the parties involved, with medical, family, pastoral, and other appropriate counsel.”²³ The Episcopal Church in 1994 expressed its “deep conviction that any proposed legislation on the part of national or state governments regarding abortions must take special care to see that the individual conscience is respected, and that the responsibility of individuals to reach informed decisions in this matter is acknowledged and honored.”²⁴

The views about abortion held by smaller religious organizations and individuals are even more varied. Many individual houses of worship or faith leaders believe the provision of reproductive health care is a moral good. For example, clergy members including a Baptist pastor, Hindu priest, and Jewish rabbi have participated in ceremonies to bless abortion clinics.²⁵ Faith organizations including Catholics for Choice, Presbyterians Affirming Reproductive Options, Religious Coalition for Reproductive Choice, the Religious Institute, and National Council of Jewish Women advocate for comprehensive access to contraception and abortion. Before *Roe v. Wade* legalized abortion across the country in 1973, the Clergy Consultation Service, a network made up of an estimated 2,000 faith leaders nationwide, assisted hundreds of thousands of people access abortion care.²⁶ According to recent data from the Pew Research Center, 57% of U.S. adults say that abortion should be legal; this includes many people of faith including 83% of Jews, 82% of Buddhists, 79% of Episcopalians, 68% of Hindus, 65% of Presbyterians, 65% of Evangelical Lutherans, and 55% of Muslims.²⁷ Many members of religious denominations that oppose abortion nevertheless support the right to abortion access, including nearly half (48%) of Catholics, nearly a third (30%) of Southern Baptists, and over a quarter (27%) of Mormons.²⁸

Perhaps most importantly for the purpose of this rule, some medical providers’ religious faith and moral convictions motivate them not only to support the right to abortion, but to actively provide their patients with comprehensive reproductive health care. In his recent book *Life’s Work: A Moral Argument for Choice*, abortion provider Dr. Willie Parker detailed his personal and spiritual journey from refusing to provide abortions to becoming a dedicated abortion provider and advocate. He writes of his moment of conversion on this issue, inspired by the biblical story of the Good Samaritan:

“It was like a punch, all at once, in my spiritual gut. The Scripture came alive and it spoke to me. For the Samaritan, the person in need was the fallen traveler. For me, it was a pregnant woman. The earth spun, and with it, this question turned on its head. It

²³ UNITED METHODIST CHURCH, *Social Principles: The Nurturing Community* (last visited Mar. 23, 2018), <http://www.umc.org/what-we-believe/the-nurturing-community#abortion>.

²⁴ THE ARCHIVES OF THE EPISCOPAL CHURCH, *Reaffirm General Convention Statement on Childbirth and Abortion* (1994), https://episcopalarchives.org/cgi-bin/acts/acts_resolution.pl?resolution=1994-A054.

²⁵ Julie Zauzmer, *Clergy Gather to Bless One of the Only U.S. Clinics Performing Late-Term Abortions*, THE WASHINGTON POST (Jan. 29, 2018), https://www.washingtonpost.com/news/acts-of-faith/wp/2018/01/29/clergy-gather-to-bless-an-abortion-clinic-which-provides-rare-late-term-abortions-in-bethesda/?utm_term=.760670a044d7.

²⁶ JOSHUA D. WOLFF, *MINISTERS OF A HIGHER LAW: THE STORY OF THE CLERGY CONSULTATION SERVICE ON ABORTION 110* (1998) available at http://classic.judson.org/images/Ministers_of_a_Higher_Law_Chapter_4.pdf.

²⁷ David Masci, *American Religious Groups Vary Widely in Their Views of Abortion*, PEW RESEARCH CENTER (Jan. 22, 2018), <http://www.pewresearch.org/fact-tank/2018/01/22/american-religious-groups-vary-widely-in-their-views-of-abortion/>.

²⁸ *Id.*

*became not: Is it right for me, as a Christian, to perform abortions? But rather: Is it right for me, as a Christian, to refuse them?*²⁹

Nor is Dr. Parker the only abortion provider to speak publicly about how his religious faith motivates his medical practice. Dr. George Tiller, who was murdered by an anti-abortion activist while serving as an usher in his Lutheran Church, referred to his work providing abortion care as a “ministry.”³⁰ Two members of Dr. Tiller’s staff echoed this view, stating respectively, “I felt I was doing the Lord’s work,” and “God put me here to do this work.”³¹ Dr. LeRory Carhart, an abortion provider and observant Methodist, stated in an interview, “I think what I’m doing is because of God, not in spite of God.”³² Dr. Sara Imershein has described providing abortion care as a “mitzvah”³³ and said that “No one should be able to step in the way of what I consider to be my moral obligation.”³⁴ One article on a Jewish website stated that Imershein and four other Jewish abortion providers contacted by the writer all “described the resonance between their Judaism...and their decision to provide abortion care.”³⁵ Dr. Curtis Boyd, a Unitarian, first became an abortion provider when he was asked by a minister and member of the Clergy Consultation Service to perform the procedure illegally prior to *Roe v Wade*.³⁶ Dr. Boyd explained, “Finally, my work had the larger meaning I’d sought. My religious ideals became immediate and personal.”

²⁹ DR. WILLIE PARKER, *LIFE’S WORK: A MORAL ARGUMENT FOR CHOICE* 36 (2017).

³⁰ *Revolution Interview with Dr. Susan Robinson: “Chasing the Abortion”*, REVOLUTION NEWSPAPER (May 16, 2014), <http://revcom.us/movement-for-revolution/stop-patriarchy/a/335/chasing-the-abortion-interview-with-dr-susan-robinson-en.html> (“What I’d like people to know about Dr. Tiller was that he believed intensely that he was making the world better one woman at a time, and that he regarded his practice of medicine as a ministry to women. So he had a very deep conviction that this was not only the right thing to do, but a life-saving thing to do.”). See also, Carol Joffe, *Working with Dr. Tiller: His Staff Recalls a Tradition of Compassionate Care at Women’s Health Care Services of Wichita*, REWIRE (Aug. 15, 2011), <https://rewire.news/article/2011/08/15/working-tiller-staff-recollections-women-health-care-services-wichita/> (“As noted earlier, Dr. Tiller was a highly spiritual person, and he periodically referred to the clinic’s work as a ‘ministry.’”).

³¹ Joffe, *supra* note 30.

³² Tiffany Arnold, *An Interview with Dr. LeRoy Carhart*, GERMANTOWN PATCH (Aug. 16, 2011), <https://patch.com/maryland/germantown/an-interview-with-dr-leroy-carhart>. In an interview, Dr. Carhart explained his religious views on abortion as consistent with his overall obligations as a health care provider, stating “I think it’s no different than with someone who has had a heart attack: If we were to save their life are we going against God’s will because if medicine didn’t intervene, the patient was going to die? Is that what God wants, for a person to die?...It’s the same thing with a flawed pregnancy. People wouldn’t think God created a flawed pregnancy to punish or test the parents. I think that it’s just like any other medical condition, something that happens. God has provided us with a way to educate people to help take care of it. I think that because a certain, small group of people don’t believe in it doesn’t mean that it’s not the right thing to do.” *Id.* In another article, Dr. Carhart noted that while “he believes in God ‘very strongly,’” he stopped going to church “when his pastor told him he was risking his safety by predictably appearing in the pews every week.” Zauzmer, *supra* note 25.

³³ A Hebrew word meaning a “commandment,” or, colloquially, a good deed.

³⁴ Steph Herold, *What It’s Like for Jewish Moms Who Are Abortion Providers*, KVELLER (May 15, 2017), <https://www.kveller.com/what-its-like-for-jewish-moms-who-are-abortion-providers/>.

³⁵ *Id.*

³⁶ Dr. Curtis Boyd, *How the First Legal Abortion Clinic in Texas Came to Be*, THE HUFFINGTON POST (Nov. 3, 2016), https://www.huffingtonpost.com/entry/how-the-first-legal-abortion-clinic-in-texas-came-to_us_581a08dde4b0bd7151a2535c.

Many abortion providers have described their work as a moral duty. For example, Dr. Leah Torres has called it her “moral and ethical obligation” to provide abortion care.³⁷ Dr. David Gunn, who was also murdered by anti-abortion extremists, travelled 1,000 miles and worked six days a week providing abortion care because, according to his son, he believed “people would suffer without care if he refused.”³⁸ Dr. Warren Hern has described his decision to provide abortion care even at great personal risk in deep-seated moral terms, stating that “women need my help” and that “If women are not free to make decisions about their own lives and health, they are not free. And if women are not free, none of us are free.”³⁹ As a corollary, some providers have argued that limitations on their patient’s right to access abortion, or their right to provide abortion care, are *immoral*. Dr. Susan Robinson explained her belief that “it’s deeply immoral for people to feel that it’s appropriate to impose their religious views on other people, ‘cause [abortion] is essentially a religious issue.”⁴⁰ Dr. Parker, describing the decision of a chief administrator at the clinic where he worked to ban abortion care, wrote “it wasn’t acceptable to deny [patients] a safe and legal procedure. It wasn’t right.”⁴¹

Even doctors who do not feel morally obligated to perform abortions under most circumstances may feel obliged to do so when the life or health of a patient is at risk, in cases of severe fetal anomaly, or in other extenuating circumstances. In one study, an overwhelming 91% of OB/GYNs surveyed—including some who generally refused to assist with abortion services—said that they would help a patient obtain an abortion if she had been recently diagnosed with breast cancer and required chemotherapy and radiation.⁴² Other studies and articles have described conflicts between physicians who wish to provide emergency care to patients, including evacuation of the uterus during a miscarriage with complications, and religious rules prohibiting such care in faith-based medical facilities.⁴³

People and communities of faith hold a complex array of views on abortion and other reproductive health care. While some medical providers’ moral and religious beliefs lead them to

³⁷ Leah Torres, *The Danger of Utah's Abortion Law*, CNN (Mar. 31, 2016),

<https://www.cnn.com/2016/03/31/opinions/utah-abortion-law-torres/index.html>.

³⁸ Letter by David Gunn, Jr., *published by* LADY PARTS JUSTICE LEAGUE (Mar. 10, 2018),

<https://ladypartsjusticeleague.com/remembering-dr-david-gunn-abortion-providers-appreciation-day/>.

³⁹ Warren M. Hern, *An Abortion Doctor Speaks Out About Decades of Threats and Violence*, STAT NEWS (Dec. 4, 2015), <https://www.statnews.com/2015/12/04/abortion-doctor-violence/>.

⁴⁰ *Revolution Interview with Dr. Susan Robinson*, *supra* note 30.

⁴¹ Willie Parker, *supra* note 29 at 31.

⁴² Lisa H Harris, Alexandra Cooper, Kenneth A Rasinski, Farr A Curlin & Anne Drapkin Lyerly, *Obstetrician–Gynecologists’ Objections to and Willingness to Help Patients Obtain an Abortion* 118 OBSTETRICS & GYNECOLOGY 905 (2011), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4185126/> (correction unrelated to results made in 118 OBSTETRICS & GYNECOLOGY 1424 (2011)).

⁴³ Lori R. Freeman & Debra B. Stulberg, *Conflicts in Care for Obstetric Complications in Catholic Hospitals*, 4 AJOB PRIMARY RESEARCH 1 (2013) available at https://www.aclu.org/sites/default/files/assets/conflicts_in_care.pdf; Angel M. Foster, Amanda Dennis, Fiona Smith, *Do Religious Restrictions Influence Ectopic Pregnancy Management? A National Qualitative Study*, IBIS REPRODUCTIVE HEALTH, 21 WOMEN’S HEALTH ISSUES 24, 24 (2011), <https://www.ncbi.nlm.nih.gov/pubmed/21353977>; Amy Littlefield, *Catholic Rules Forced This Doctor to Watch Her Patient Sicken—Now, She’s Speaking Out*, REWIRE (Sep. 7, 2017), <https://rewire.news/article/2017/09/07/catholic-rules-forced-doctor-watch-patient-sicken-now-shes-speaking/>.

abstain from providing such care, other providers feel morally required to provide it—especially when their patient’s life or health is at risk. As is clear from the examples given above, support for abortion rights is neither a new nor an unusual religious belief. To the contrary, the fact that many health care providers feel a strong faith-based commitment to respecting the reproductive decisions made by women was the reason that the U.S. Catholic Conference and the National Right to Life Committee opposed the passage of the Religious Freedom Restoration Act when it was pending in Congress in 1992; these organizations were concerned that RFRA could be used by people of faith to support access to abortion.⁴⁴

B. The HHS Regulation Provides Far Stronger Protections for Certain Religious Beliefs Regarding Abortion

The proposed HHS rule would enact sweeping protections for medical providers, health care facilities, insurance plans, and even employers who believe that abortion and other health care services are morally wrong. In contrast, it provides extremely limited protections to those whose religious or moral beliefs lead them to offer their patients the full range of sexual and reproductive health care.

The proposed rule greatly expands the scope of existing religious refusal laws by allowing providers to refuse not just care that is *directly related* to the provision of an abortion, sterilization, or other procedure but to refuse “to participate in any program or activity *with an articulable connection to*” the service to which a provider objects.⁴⁵ It would expand the definition of a “health care entity” who is permitted to refuse care to include not only medical providers, health facilities, and insurance plans but “a plan sponsor, issuer, or third-party administrator, or any other kind of health care organization, facility, or plan,” and even “components of State or local governments.”

The definition of a health care referral under the proposed rule is also extremely broad. The rule would allow a health care entity to refuse to provide “*any information...pertaining to a health care service, activity, or procedure...that could provide any assistance in a person obtaining, assisting, training in, funding, financing, or performing a particular health care service, activity, or procedure, where the entity or health care entity making the referral sincerely understands that particular health care service, activity, or procedure to be a purpose or possible outcome of the referral.*”⁴⁶ This definition is so all-encompassing that it would appear to include even basic

⁴⁴ See e.g., *The Religious Freedom Restoration Act: Hearing on S. 2969 Before the Comm. on the Judiciary of the United States Senate*, 102nd Cong. 2, 129-35 (Sept. 18, 1992) (Statement of Mark Chopko, General Counsel, United States Catholic Conference) (“The Conference has legitimate concerns that S. 2969 will be utilized to attempt to promote the destruction of innocent unborn human lives”) available at <http://www.justice.gov/sites/default/files/jmd/legacy/2014/02/13/hear-j-102-82-1992.pdf>. See *id.* (Statement of James Bopp, Jr., General Counsel, National Right to Life Committee, titled “Why The Religious Freedom Restoration Act Much Expressly Exclude a Right to Abortion.”).

⁴⁵ Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 83 Fed. Reg. 3880 (proposed Jan. 26, 2018) (*to be codified at* 45 C.F.R. pt. 88) (emphasis added).

⁴⁶ *Id.* (emphasis added).

diagnostic information about a patient’s health or pregnancy if the medical provider believes abortion to be a “possible outcome” of providing the diagnosis. By potentially limiting access even to accurate medical *information*, the rule may limit a patient’s ability to make health care decisions based on her own moral and religious views.

Thus, under the proposed rule, an enormous number of people—including non-medical providers, such as employers—may permissibly refuse to undertake nearly any act that could be remotely linked to a health service to which they morally or religiously object, regardless of the beliefs or medical needs of their patients. Furthermore, a religiously-affiliated health care entity that believed the *denial* of health care to be immoral could not mandate that its employees offer all medically appropriate care to patients; regardless of an employer’s religious or moral beliefs to the contrary, medical providers under the rule have an absolute right to refuse services.

Meanwhile, providers whose religious or moral beliefs lead them to provide abortion, sterilization, contraception, and LGBTQ+ health care may be prohibited from acting on their sincerely-held beliefs by their employer. The Church Amendments prohibit employers from refusing to hire medical providers because they “performed or assisted in the performance of a lawful sterilization procedure or abortion...or because of [their] religious beliefs or moral convictions respecting sterilization procedures or abortions.”⁴⁷ However while the Amendments do not allow employers to punish medical providers because of their acts or beliefs related to abortion *outside the scope of their employment*, employers may still forbid health care providers from acting on their religious and moral commitment to provide patients with all medical options. The proposed rule therefore fails to protect all religious beliefs about abortion, sterilization, and other medical care equally.

C. The Government Should Not Favor Particular Religious Beliefs

Constitutional principles and federal laws and policies prohibit the government from favoring particular religious beliefs over others. “A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of ‘neutrality’ toward religion... favoring neither one religion over others nor religious adherents collectively over nonadherents.”⁴⁸ This neutrality principle has been at the core of First Amendment religious liberty jurisprudence. In the landmark decision *Sherbert v. Verner*, the Supreme Court held that Sabbatarians should be entitled to unemployment insurance benefits despite their refusal to work on Saturdays; the opinion explained that this conclusion “reflects nothing more than the governmental obligation of neutrality in the face of religious differences.”⁴⁹ The Court specifically noted that its ruling in the case did nothing “to abridge any other person’s religious liberties.”⁵⁰ In contrast, in striking down a religious exemption in *Estate of Thornton v. Caldor*, Justice O’Connor’s concurrence stressed that the law impermissibly “single[d] out Sabbath

⁴⁷ The Church Amendments, 42 U.S.C. § 300a-7 (2018).

⁴⁸ Board of Education of Kiryas Joel Village School District v. Grumet, 512 U.S. 687, 696 (1994) (internal citations omitted).

⁴⁹ *Sherbert v. Verner*, 374 U.S. 398, 409 (1963).

⁵⁰ *Id.*

observers for special and, as the Court concludes, absolute protection without according similar accommodation to ethical and religious beliefs and practices of other private employees.”⁵¹

In *Board of Education of Kiryas Joel Village School District v. Grumet*, the Court held that a law creating a separate school district for a Hasidic Jewish community improperly “single[d] out a particular religious sect for special treatment, and whatever the limits of permissible legislative accommodations may be...it is clear that neutrality as among religions must be honored.”⁵² Even language in *Corp. of Presiding Bishop v. Amos*, in which the Court upheld an exemption allowing religiously-affiliated employers to practice co-religionist hiring discrimination, supports the precept that accommodations may not preference a particular religious belief. In that opinion, the Court noted that while “[t]here is ample room under the Establishment Clause for ‘benevolent neutrality which will permit religious exercise to exist *without sponsorship* and without interference...At some point, accommodation may devolve into ‘an unlawful fostering of religion.’”⁵³ The Court was also careful to note that the religious exemption at issue was “neutral on its face”—allowing religious organizations of *all* faiths and creeds to prefer co-religionists.⁵⁴

The HHS regulation singles out particular religious beliefs about sexual and reproductive health care for special protection while failing to extend the same protection to those with other religious views. Thus, rather than merely accommodating religious liberty in general, it openly prefers anti-choice religious beliefs. To be clear, this comment does not take a particular position on the appropriate balance of rights in the event of a religious conflict between a medical facility and its employee, except to say the following: first, that any rule on this matter must ensure the ability of patients to make informed decisions about their health based on their own values and conscience, and; second, that a rule which favors particular religious views on abortion—allowing religious institutions that oppose reproductive health care to impose their views on employees while forbidding the reverse—is improper.

⁵¹ *Estate of Thorton v. Caldor*, 472 U.S. 703, 711 (1985) (O’Connor, J., concurring).

⁵² *Board of Education of Kiryas Joel*, 512 U.S. at 706-07.

⁵³ *Corporation of Presiding Bishop v. Amos*, 483 U.S. 334-35, (1987) (emphasis added). *See also* *Walz v. Tax Commission*, 397 U.S. 664, 670 (1970). In this relatively early Establishment Clause case, Justice Burger upheld a state statute exempting religious organizations from certain taxes by noting the general principle underlying the Establishment Clause: “Mr. Justice Black, writing for the Court’s majority, said the First Amendment ‘means at least this: Neither a state nor the Federal Government can pass laws which aid one religion, aid all religions, or prefer one religion over another.’ *Everson v. Board of Education*, 330 U.S. 1, 15 (1947).”)

⁵⁴ *Corporation of Presiding Bishop*, 483 U.S. at 339.