INSTITUTE FOR REGULATORY ANALYSIS AND ENGAGEMENT
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M E M O R A N D U M

To: Hon. Xavier Becerra, Secretary, US Department of Health and Human Services
From: Andrew Langer, Chairman, Institute for Regulatory Analysis and Engagement
Date: March 6, 2023
Re: Comments Regarding the HHS Notice of Proposed Rulemaking, Safeguarding the Rights of Conscience as Protected by Federal Statutes, Federal Register Number 2022-28505

Secretary Becerra:

The following are the comments of the Institute for Regulatory Analysis and Engagement (IRAE) on the United States Department of Health and Human Services Notice of Proposed Rulemaking, Safeguarding the Rights of Conscience as Protected by Federal Statutes, HHS-OCR-2023-0001-0001, Federal Register Number 2022-28505, posted January 5, 2023.

IRAE is a non-profit, non-partisan research, education and advocacy organization. Our mission is to inject a common-sense perspective into the regulatory process, to ensure that risks and costs of regulation are fully considered based on sound scientific and economic evidence and to ensure the voices, interests and freedoms of Americans, and especially of small business, are fully represented in the regulatory process and debates. Finally, we work to ensure that regulatory proposals address real problems, that the proposals serve to ameliorate those problems, and, perhaps most-important, that those proposals do not, in fact, make public policy problems worse.

We are especially interested in issues with a fundamental constitutional bearing, as this proposal certainly is. While many regulatory analyses start and end with an underlying statutory framework and how a proposed rule aligns with an agency's obligations under the Administrative Procedure Act, this analysis focuses squarely on the constitutional questions underlying the latest HHS proposal.

To be clear, we fundamentally oppose what HHS is proposing to do here. Not only is it a departure from existing federal law, but is has enormous implications for the rights of conscience of medical care providers currently protected by HHS regulations.

We understand the important political issues the current administration faces. We do not agree with them, but we certainly understand them. This proposal comes as the collision of two different forces: an administration already wanting to undo the regulatory decisionmaking of the previous administration; while at the same time contending with the political repercussions of a Supreme Court Decision on abortion in the last term, the *Dobbs* decision, which overturned *Roe v. Wade*.

The administration was already going to work to undo the previous HHS rulemaking in this vein, the 2019 rule enacted by the Trump administration. That rulemaking worked to restore the regulatory structure created in 2008 by the George W. Bush administration, that went into effect on January 20, 2009, and was almost immediately undone by the Obama administration (the 2019 rulemaking worked to restore the 2008 rulemaking).

In the same way that the Obama-era rulemaking was unnecessary and violative of rights of conscience, so is this proposal here.

Rights of conscience are "first liberty principles," called such because they cement the bedrock of the rights protected under our Constitution. Not granted by, protected under. This is why the First Amendment to our Constitution precedes all the rest, and says (in part), "Congress shall make no law respecting an establishment of religion, or ***prohibiting the free exercise thereof…***"

As Justice Robert H. Jackson wrote in *West Virginia State Board of Education v. Barnette* (1943), ***"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."***

The limitations proposed in this NPRM will do just that. By reining in the scope of who's conscience is protected under federal law, HHS is, by definition, compelling more people to act against their own conscience.

Worse, HHS couches their justification for doing this in the language of pure democracy:

"Though the Department received comments supporting and opposing the 2018 Proposed Rule (the basis for the 2019 Final Rule), the overwhelming majority of comments were in opposition to the rule." (HHS NPRM, Section II)

This justification for the current rulemaking defies both our constitutional structure and the essence of what the Administrative Procedure Act (APA) stands for. Our constitutional republic is ***not*** a pure democracy—in fact, our founders were inherently opposed to pure democracy specifically because majoritarianism can descend in to mobocracy and run roughshod over the rights of political minorities. This is why our political system balances the decisions of political majorities against the rights of political minorities.

As some have said, a democracy is two wolves and a sheep deciding what to have for dinner. In the United States, we make sure that the sheep isn't served up by the wolves.

Moreover, the APA doesn't account for majoritarian decisionmaking when assessing comments submitted in a rulemaking process. The standard in the APA isn't to ensure that a decision isn't "arbitrary, capricious, an abuse of discretion, otherwise not in accordance of the law, ***AND*** what the majority of commenters want." The standard is that it isn't arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law.

Politicians might care about how many comments were filed in favor of X and how many or opposed, but our regulations aren't supposed to be developed that way—our rulemaking process, the entirety of the APA, rests on the idea that a rulemaking process is supposed to be thoughtful, deliberate, and substantive.

In fact, one might submit that a rulemaking initiated in no small measure because of how someone counts comments for or against a proposal is the very thing that the APA's four-prong standard protects against. It ***is*** capricious, it ***is*** an abuse of discretion. It is ***not*** in accordance with the law.

Substance matters. This is why the APA doesn't demand a response from an agency when thousands of individuals might file identical comments with a regulatory docket. The APA demands a response when some person or entity files ***substantive*** comments in that docket.

Conclusion

This proposal is bad policy. It is being enacted for political reasons, not substantive ones. It is being done to assuage an administration's political base in a year after that administration's supporters feel as though they lost a Supreme Court case, and in the year before a presidential election year so that the administration can run for re-election assuring its base that it is fighting on abortion issues.

And in creating this proposal for political reasons, the Administration, specifically the Department of Health and Human Services, is ignoring the fundamental rights of conscience of millions of Americans, especially those in the practice of medicine.

This. Is. Wrong.

The First Amendment stands as the first in the Bill of Rights for a reason. James Madison felt that it was the bedrock which undergirded all other rights he was seeking to protect.

HHS should withdraw this proposal completely.