

March 2, 2023

The Honorable Xavier Becerra
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

Re: Safeguarding the Rights of Conscience as Protected by Federal Statutes (RIN 0945-AA18)

Dear Secretary Becerra:

On behalf of the physician and medical student members of the American Medical Association (AMA), I appreciate the opportunity to provide comments to the Department of Health and Human Services (HHS or Department) in response to the Notice of Proposed Rulemaking (2023 proposed rule or 2023 proposal) on “Safeguarding the Rights of Conscience as Protected by Federal Statutes,” published in the *Federal Register* on January 5, 2023. HHS proposes to partially rescind and partially retain the provisions from a May 2019 final rule promulgated by the Trump Administration that sought to expand the scope and enforcement of federal conscience protection statutes, which prohibit recipients of certain federal funds from coercing physicians and other health care providers into participating in actions they find religiously or morally objectionable. As noted by HHS, because the 2019 Final Rule never took effect due to legal challenges, the Department is still operating under the conscience rights final rule adopted in 2011, i.e., “Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws” (2011 Final Rule).

For the reasons expressed in more detail below, the AMA has concerns about the approach taken in the 2023 proposed rule, particularly with respect to retaining the expanded scope of statutes to which the conscience rule would apply, as well as the retention of expanded complaint and investigations provisions. **In short, we believe that retaining the expanded scope of categories would undermine patients’ access to medical care and information, impose barriers to physicians’ and health care institutions’ ability to provide treatment, and create confusion and uncertainty among physicians, other health care professionals, and health care institutions about their legal and ethical obligations to treat patients.** We are concerned that the proposed rule would legitimize discrimination against underserved and vulnerable patients and in fact create a right to refuse to provide certain treatments or services, particularly access to comprehensive reproductive health care, including pregnancy termination services, as well as transgender care.

The AMA supports conscience protections for physicians and other health care professional personnel. We believe that no physician or other professional personnel should be required to perform an act that violates good medical judgment, and no physician, hospital, or hospital personnel should be required to perform any act that violates personally held moral principles. As moral agents in their own right, physicians are informed by and committed to diverse cultural, religious, and philosophical traditions and beliefs. According to the [AMA Code of Medical Ethics \(AMA Code\)](#), “physicians should have

considerable latitude to practice in accord with well-considered, deeply held beliefs that are central to their self-identities.”

Conscience protections for medical students and residents are also warranted. The AMA supports educating medical students, residents, and young physicians about the need for physicians who provide termination of pregnancy services, the medical and public health importance of access to safe termination of pregnancy, and the medical, ethical, legal, and psychological principles associated with termination of pregnancy, while maintaining that the observation of, attendance at, or any direct or indirect participation in abortion should not be required.

Nonetheless, while the AMA supports the legitimate conscience rights of individual health care professionals, the exercise of these rights must be balanced against the fundamental obligations of the medical profession and physicians’ paramount responsibility and commitment to serving the needs of their patients. As advocates for our patients, we strongly support patients’ access to comprehensive reproductive health care, including abortion, and freedom of communication between physicians and their patients, and oppose government interference in the practice of medicine or the use of health care funding mechanisms to deny established and accepted medical care to any segment of the population. This is even more critical in the post-*Dobbs* environment, in which access to abortion has been banned in 13 states and gestational limits between 15 and 22 weeks exist, and access to medication abortion is under severe legal threat.

According to the *AMA Code*, physicians’ freedom to act according to conscience is not unlimited. Physicians are expected to provide care in emergencies, honor patients’ informed decisions to refuse life-sustaining treatment, and respect basic civil liberties and not discriminate against individuals in deciding whether to enter into a professional relationship with a new patient. Physicians have stronger obligations to patients with whom they have a patient-physician relationship, especially one of long-standing; when there is imminent risk of foreseeable harm to the patient or delay in access to treatment would significantly adversely affect the patient’s physical or emotional well-being; and when the patient is not reasonably able to access needed treatment from another qualified physician. The *AMA Code* provides guidance to physicians in assessing how and when to act according to the dictates of their conscience. Of key relevance to the 2023 proposed rule and the Final 2019 Rule, the *AMA Code* directs physicians to:

- Take care that their actions do not discriminate against or unduly burden individual patients or populations of patients and do not adversely affect patient or public trust.
- Be mindful of the burden their actions may place on fellow professionals.
- Uphold standards of informed consent and inform the patient about all relevant options for treatment, including options to which the physician morally objects.
- In general, physicians should refer a patient to another physician or institution to provide treatment the physician declines to offer. When a deeply held, well-considered personal belief leads a physician also to decline to refer, the physician should offer impartial guidance to patients about how to inform themselves regarding access to desired services.
- Continue to provide other ongoing care for the patient or formally terminate the patient-physician relationship in keeping with ethics guidance.

The ethical responsibilities of physicians are also reflected in the AMA’s long-standing policy protecting access to care, especially for vulnerable and underserved populations, and our anti-discrimination policy, which opposes any discrimination based on an individual’s sex, sexual orientation, gender identity, race, religion, disability, ethnic origin, national origin or age. In our [comments on the 2019 proposed rule](#), we

were very concerned that by allowing individuals and health care entities which receive federal funding to refuse to provide *any* part of a health service or program based on religious beliefs or moral convictions, discrimination would be allowed against patients, health inequities exacerbated, and patients' access to care undermined. **While we appreciate that HHS has rescinded the 2019 Final Rule's expansive definitions in this proposed rule, we remain concerned about the likely negative consequences of retaining the expanded scope of federal health care provider conscience protection statutes in the 2023 proposed rule.**

As acknowledged by HHS in the preamble to the 2023 proposed rule, no statutory provision requires the promulgation of rules to interpret or implement various conscience laws that have been in existence for years. We believe physicians are aware of their legal obligations under these requirements and do not think that the promulgation of this rule is necessary to enforce the conscience provisions under existing law. As we noted in our comments on the 2018 proposed rule, HHS failed to provide adequate reasons or a satisfactory explanation for the proposal as required under the Administrative Procedure Act (APA). At that point, according to HHS, between 2008 and November 2016, the HHS Office of Civil Rights (OCR) had received 10 complaints alleging violations of federal conscience laws; OCR received an additional 34 similar complaints between November 2016 and January 2018. In comparison, during a similar time period, from fall 2016 to fall 2017, OCR received over 30,000 complaints alleging violations of either HIPAA or civil rights. These numbers demonstrated that the 2018 proposed rule to enhance enforcement authority over conscience laws was not necessary.

Likewise, in the preamble to the 2023 proposed rule, HHS does not provide any updated data about more recent conscience complaints or allegations of conscience statute violations, and the HHS Office of Conscience and Religious Freedom website lists very few recent complaints, investigations, or actions taken against providers. Given this paucity of data, the AMA does not believe the provisions added by the 2019 Final Rule were necessary then or are necessary now. **We do not think that there is a sufficient record or justification giving rise to the need for retaining the expanded scope of federal health care provider conscience protection statutes that were added in the 2019 Final Rule, and recommend that HHS fully rescind the 2019 Final Rule and continue to operate under the 2011 Final Rule framework.** Such an action is bolstered by the three federal district court decisions that vacated the 2019 Final Rule prior to it taking effect, as summarized in the preamble to the 2023 proposed rule. **We support alternatives to rulemaking, such as education and outreach, as well as sub-regulatory guidance, to ensure that physicians and other providers and health care entities are fully aware of their rights and responsibilities under the numerous federal conscience protection laws.**

The AMA continues to believe that the 2019 Final Rule set up a conflict between conscience rights and federal, state, and local anti-discrimination laws, as well as policies adopted by employers and other entities and ethical codes of conduct for physicians and other health professionals. These laws, policies, and ethical codes are designed to protect individuals and patients against discrimination on the basis of race, gender, gender identity, sexual orientation, disability, immigration status, religion, and national origin. It was unclear under the 2019 Final Rule how these important anti-discrimination laws, policies, and ethical codes would apply in the context of the expanded conscience rights finalized by HHS. The 2019 Final Rule also failed to account for those physicians and other health care providers who have strongly held moral beliefs that motivate them to treat and provide health care, especially abortion, end-of-life care, and transition-related care, to patients. The Biden Administration has shown its strong commitment to enforcing anti-discrimination and civil rights laws, protecting patient access to health care, and reducing and eliminating health disparities. There remains much more work to be done in these areas given disparities in racial and gender health outcomes and high rates of discrimination in health care experienced by LGBTQ patients, as well as the loss of a federal right to abortion in the post-*Dobbs*

The Honorable Xavier Becerra

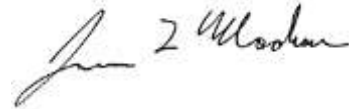
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environment. **The 2019 Final Rule was a step in the wrong direction and would have harmed patients. The AMA urges HHS to rethink its approach in the 2023 proposed rule and fully rescind the 2019 Final Rule.**

Thank you for considering our comments. If you have any questions, please contact Margaret Garikes, Vice President, Federal Affairs, at margaret.garikes@ama-assn.org or 202-789-7409.

Sincerely,

A handwritten signature in black ink, appearing to read "James L. Madara". The signature is written in a cursive style with a large initial "J" and "M".

James L. Madara, MD