United States Conference of Catholic Bishops

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March 11, 2022

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

Dear Secretary Becerra,

We understand that the U.S. Department of Health and Human Services ("HHS") plans to revise its regulations implementing Section 1557 of the Affordable Care Act. We are mindful that the Section 1557 regulations promulgated in 2016 (the "2016 Rule") imposed severe burdens on religious liberty, and that HHS may be considering reinstating the provisions in question. We are also aware of a June 8, 2021 memorandum from the Leadership Conference requesting a host of additional regulations that, if implemented, would burden religious exercise still more severely. We are writing therefore, as chairmen of committees of the U.S. Conference of Catholic Bishops (USCCB) on how HHS might approach the religious liberty issues raised by these regulations. Our purpose here is not to provide an exhaustive treatment or detailed legal analysis, nor to articulate the fullness of Church teaching on the implicated matters, but rather to identify certain key principles that might help inform HHS on the specific question of how and why these regulations could be crafted to respect religious freedom and so avoid needless church-state conflict.

I. For Catholics, health care is religious exercise

Catholics have been called to care for the sick since the earliest days of our faith. Here in America, the Ursuline nuns ran the Royal Hospital in New Orleans before our country declared its independence from Britain.[1] Today, with hundreds of hospitals and health care facilities affiliated with the Catholic Church in operation, Catholic entities taken together are the largest nonprofit health care provider in this country.[2] We do this in fulfillment of the direct command of Jesus Christ (Mt. 10:8-10)[3] and in imitation of his divine ministry here on Earth.

We serve all in need, without regard to race, religion, sex, or any other characteristic, because we believe that health care is a basic human right. As the USCCB's predecessor organization, the National Conference of Catholic Bishops, stated in 1993, "This right flows from the sanctity of human life and the dignity that belongs to all human persons, who are made in the image of

[1] John E. Salvaggio, *New Orleans' Charity Hospital: A Story of Physicians, Politics, and Poverty* 8 (1992).
[2] Catholic Health Ass'n, Catholic Health Care in the United States, at 1 (Mar. 2021), www.chausa.org/about/about/facts-statistics.
[3] "Cure the sick, raise the dead, cleanse lepers, drive out demons. Without cost you have received; without cost you are to give. Do not take gold or silver or copper for your belts; no sack for the journey, or a second tunic, or sandals, or walking stick. The laborer deserves his keep."

God."[4] The same core beliefs about human dignity and the wisdom of God's design that motivate Catholics to care for the sick also shape our convictions about care for preborn children, marriage, sex, and the immutable nature of the human person. These commitments are inseparable.

These foundational beliefs also positively affect the quality of the care we provide. Nonprofit religiously affiliated hospitals "save more lives, release patients from the hospital sooner, and have better overall patient satisfaction ratings."[5] Religious hospitals "demonstrated significantly better results than for-profit and government hospitals on inpatient and 30-day mortality, patient safety, length of stay, and patient satisfaction."[6] Catholic hospitals care for more than one of seven hospital patients in the United States.[7]

Because health care ineluctably raises questions of religious significance – of life and death, and what it means to be healthy and flourish – the protection of religious freedom in health care is particularly important. This is true not only of health care providers, as described above, but of health care consumers as well. A healthcare industry devoid of any sensitivity to, or understanding of, the religious beliefs of its patients would not well serve our religiously diverse citizenry.

II. Religious liberty is a strong civil right

A proper understanding of how to respect religious liberty in health care must begin with an acknowledgment that religious liberty is itself a civil right – indeed, one of foundational importance. It is a right that flows from the inherent dignity of every human person. In our country, we are fortunate that this right is also deeply rooted in our country's history and law, ultimately enshrined in the First Amendment to our Constitution and continuing throughout every level of law and regulation. The harmony between this fundamental right of the human person and the laws of our nation has proven essential to the flourishing of American society. Religious liberty is not limited to the right to worship or to hold religious beliefs in private, but protects religious *exercise* – that is, *actions* based on religious beliefs, whether in private or in the public square. This right is not boundless, but it is still robust, yielding only to government interests of the highest order that cannot be served in any other way. Accordingly, HHS should not treat religious liberty as a second-tier right.

III. HHS should be proactive in protecting religious liberty

When government accommodates religious differences, it "follows the best of our traditions."[8] Such accommodations should be embraced and maximized, rather than shunned and minimized. But in the 2016 Rule, HHS did not include any religious exemption at all, taking the position that Section 1557's rule against discrimination "on the ground prohibited under… title IX" did not incorporate Title IX's religious exemption, which provides that certain acts by religious organizations are not prohibited under Title IX. Subsequent lawsuits brought by religious

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[4] https://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/health-care-comprehensive-care.pdf
[5] David Foster et al., Hospital Performance Differences by Ownership 1 (June 2013), http://docplayer.net/13886677-Hospital-performance-differences-by-ownership.html.
[6] *Id.* at 2.
[7] Catholic Health Ass'n, *supra*, note 2.
[8] *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

organizations detailed the ways in which the 2016 Rule burdened religious exercise, and the federal district courts in the cases of *Franciscan Alliance* and *Sisters of Mercy* enjoined HHS from enforcing certain aspects of the rule against those organizations.

In the preamble to the recent proposed rule regarding discrimination in plans on the Exchanges, HHS acknowledged that the Religious Freedom Restoration Act (RFRA) and other laws might require exemptions or accommodations from the rule's requirements, but did not provide a religious exemption in the text of the proposed rule. In our comments on that proposed rule, we urged HHS to proactively include religious exemptions in the final rule, considering that HHS is well aware from prior experience that the rule will burden religious exercise, and that courts have upheld religious freedom challenges substantially the same as those the proposed rule will generate.

We similarly urge HHS to be proactive in protecting religious liberty in its revisions to Section 1557 regulations. Litigation over the 2016 Rule has demonstrated that courts will require religious exemptions to be provided for entities similarly situated to the plaintiffs in *Franciscan Alliance* and *Sisters of Mercy*. HHS should not force religious health care providers to relitigate these issues especially when the outcome is likely to again be in favor of the plaintiff-providers. Furthermore, permitting religious organizations and persons to be true to, and to act upon, their beliefs is good public policy. Our nation's health is better for the faith of those who care for it.

IV. The interplay between religious liberty and nondiscrimination protections is not a zero-sum game

It is frequently argued that purported conflicts between religious liberty and principles of nondiscrimination can only be resolved by the total subjugation of one party's religious belief to the interests of the individual claiming discrimination. Such arguments often invoke the concept of dignitary harm – the idea that simply being denied a requested medical intervention on religious grounds is necessarily discrimination and is a harm in and of itself that the law must prevent or remedy, even when the individual suffers no adverse health effects from that denial.[9] Similarly, in its defense of the HHS contraceptive mandate, HHS argued, albeit late in the litigation, that individuals employed by objecting religious organizations must be able to access contraceptives "seamlessly" – that any inconvenience at all to the employee would be too great a price to pay for the employer's right to follow its religious beliefs.

This zero-sum framing of the interplay between religious liberty and other interests degrades our nation's social fabric by pitting those who hold certain religious beliefs against those who do not. HHS can instead seek solutions that both honor religious liberty and satisfy the policy goals HHS wishes to advance. HHS has a chance to set the tone of the dialogue over religious liberty in health care. It should choose inclusion and understanding over division and strife.

V. A sound conception of religious liberty protects the right not to be complicit in actions the religious entity believes to be wrong

[9] The endorsement of this line of thinking by HHS would constitute a troublesome value judgment for the federal government to make, since it is precisely the dignity of the human person that the Church upholds through its teachings.

It is uncontroversial to hold that one can be morally culpable for assisting, facilitating, or being otherwise complicit in an action committed by another. Indeed, American law reflects this principle in numerous ways, such as by imposing criminal penalties on those who are accessories to a crime. Federal laws protecting rights of conscience in health care recognize this principle as well, as in the Weldon Amendment's protection against having to refer for abortion (as opposed to performing abortions), or the Church Amendment's protection against having to assist in performing an objectionable part of a health service program (as opposed to performing that part oneself). The U.S. Supreme Court has affirmed that the rights of free exercise protected by the First Amendment and RFRA extend to objections to being made complicit in acts the objector believes to be immoral (*Thomas v. Review Bd., Burwell v. Hobby Lobby*). In approaching its revisions to the Section 1557 regulations, HHS should decline invitations to restrict religious liberty protections to only those who would be required to directly perform the objected-to treatment or procedure.

VI. The Church's teachings promote human flourishing and the common good

With respect to matters of "gender identity," the Catholic teaching as expressed through Pope Francis understands that "'biological sex and the socio-cultural role of sex (gender) can be distinguished but not separated.'"[10] Further, each human being, "man and woman, should acknowledge and accept his sexual identity,"[11] which is both biological and God-given. Respect for the immutability of sex does not mean Catholic health care condones unjust discrimination. Persons who experience gender discordance are to receive the same care and treatment as anyone else for any given condition or indication. To continue providing this, Catholic entities must not be forced to perform procedures that, for a given indication and regardless of patients' characteristics, would violate the foregoing teachings of their faith or other tenets, such as those precluding sterilization.

It is similar with regard to the class of "sexual orientation." Individuals who experience same-sex attraction are to be "accepted with respect, compassion, and sensitivity,"[12] including in health care settings where they or their loved ones receive care. This does not mean, however, that providers can be compelled to act contrary to the principle that sexual conduct is specially reserved for lifelong marriage between one man and one woman, ordered by its nature toward the good of the spouses and to the procreation and education of children,[13] who in turn have a right to a mother and a father.[14]

This regard for both marriage and children also illumines the inadmissibility of many assisted reproductive technologies and practices, such as in vitro fertilization or gestational surrogacy (which can also involve the destruction of human life) and contraception. Pope Francis reminds us that "[a] child deserves to be born of that love, and not by any other means, for 'he or she is not something owed to one, but is a gift', which is 'the fruit of the specific act of the conjugal

[10] Pope Francis, Apostolic Exhortation *Amoris Laetitia*, no. 56 (2016).
[11] Catechism of the Catholic Church, nos. 2333, 2393.
[12] Catechism of the Catholic Church, no. 2358.
[13] *See* Catechism of the Catholic Church, nos. 2360, 2363; *Gaudium et Spes*, no. 48 (1965).
[14] *See* Pope Francis, colloquium on "The Complementarity of Man and Woman," Rome, 17 Nov. 2014; Pope Francis, audience with International Catholic Child Bureau, 11 Apr. 2014.

love of the parents.'"[15] Married couples who experience infertility, of course, must be offered pastoral care and community, and encouraged in additional ways of living out their love. Appropriate medical research and means to relieve infertility are to be supported.[16]

The Church teaches that the sexual union of husband and wife is meant to express the full meaning of marriage, marital love, and the gift of life, as well as its power to bind a couple together and its openness to new life. For legitimate reasons of responsible parenthood, married couples may limit the number of their children by natural means. Regarding contraceptive interventions, the Church teaches that "every action, whether in anticipation of the conjugal act, or in its accomplishment, or in the development of its natural consequences, has the purpose, whether as an end or as a means, to render procreation impossible" is intrinsically evil.[17] Such interventions violate "the inseparable connection, established by God…between the unitive significance and the procreative significance which are both inherent to the marriage act."[18]

With respect to abortion, the Church teaches that "human life must be respected and protected absolutely from the moment of conception…[and] must be recognized as having the rights of a person--among which is the inviolable right of every innocent being to life."[19] Therefore, since the first century "the Catholic Church has affirmed the moral evil of every procured abortion. This teaching has not changed and remains unchangeable"[20] because abortion is an "intrinsically evil act."[21]

Abortion is not healthcare; it is the antithesis of healthcare. As Pope Francis stated, "I…appeal to all politicians, regardless of their faith convictions, to treat the defense of the lives of those who are about to be born and enter into society as the cornerstone of the common good." And further, "Their killing in huge numbers…undermines…justice [and] compromise[es] the proper solution of any other human and social issue." [22]

Catholic teaching also states clearly that "direct sterilization, that is, whose aim tends as a means or as an end at making procreation impossible – is a grave violation of the moral law and therefore illicit. Not even the public authority has any right, under the pretext of any 'indication' whatsoever, to permit it, and still less to require it…"[23] Because of this teaching "direct sterilization of either men or women, whether permanent or temporary, is not permitted in a Catholic health care institution."[24]

We appreciate HHS's consideration of these principles as you formulate your proposed revisions to the Section 1557 regulations. If you wish to discuss these matters further, we would welcome the opportunity.

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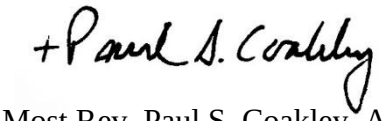
[15] Pope Francis, Apostolic Exhortation *Amoris Laetitia*, no. 81 (2016) (*citing* Catechism of the Catholic Church, no. 2378, *and* Congregation for the Doctrine of the Faith, *Donum Vitae*, II, 8 (1987)).
[16] Catechism of the Catholic Church, no. 2375.
[17] Catechism of the Catholic Church, no. 2370.
[18] Pope Paul VI, Encyclical Letter on the Regulation of Birth *Humanae Vitae*, no. 12 (1968).
[19] Catechism of the Catholic Church, no. 2270.
[20] Catechism of the Catholic Church, no. 2271.
[21] Forming Consciences for Faithful Citizenship, no 34.
[22] https://www.vaticannews.va/en/pope/news/2019-02/pope-francis-pro-life-movement-politicians-defend-life.html
[23] Pius XII, Allocution to Midwives, October 29, 1951; Catechism of the Catholic Church, no. 2297.
[24] Ethical and Religious Directive for Catholic Health Care Institutions, no. 53.

His Eminence Timothy Cardinal Dolan, Archbishop of New York
Chairman, Committee for Religious Liberty

Most Rev. William E. Lori, Archbishop of Baltimore
Chairman, Committee on Pro-Life Activities



Most Rev. Paul S. Coakley, Archbishop of Oklahoma City
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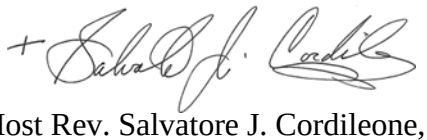

Most Rev. Salvatore J. Cordileone, Archbishop of San Francisco
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