

A Solution in Search of a Problem: The Department of Health and Human Services Proposes to Weaken Conscience Protections for Health Care Workers

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KEY TAKEAWAYS

The U.S. has a long-standing commitment to the primacy of religious freedom as an inalienable right with deep, defining roots in American history.

The 2023 HHS proposed rule would weaken protections against forcing participation in medical procedures that violate individuals' religious or moral beliefs.

The 2019 rule better comported with the overriding priority—recognized by all three branches of government—of the rights of conscience and religious exercise.

The U.S. Department of Health and Human Services (HHS) issued rules in 2011¹ (2011 rule) and 2019² (2019 rule) regarding the right of conscience of health care workers. On January 5, 2023, HHS issued a notice of proposed rulemaking (2023 proposed rule)³ on this subject that would partially rescind the 2019 rule but retain the framework created by the 2011 rule. The proposed rule would eliminate certain federal conscience protections that HHS deems “redundant or confusing” or that, in HHS’ opinion, “undermine the balance Congress struck between safeguarding conscience rights and protecting access to health care.”

Modern health care practice occasionally gives rise to conflicts with the religious beliefs and moral convictions of payers, providers, and patients alike. Policymaking, which may attempt to resolve such conflicts, cannot be driven solely

This paper, in its entirety, can be found at <https://report.heritage.org/lm333>

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by political preferences or priorities. Although the Constitution gives the power to execute laws that Congress enacts to the executive branch, it also limits that power by identifying certain fundamental individual rights such as the right to freely exercise religion which, in turn, is part of the broader right of conscience. The historical importance and priority given to the right of conscience have been formalized in constitutional, statutory, and regulatory protections that set a higher bar for policy changes in this context, such as the 2023 proposed rule, than in most others.

This *Legal Memorandum* examines the 2011 and 2019 rules in the context of the overriding priority—recognized by all three branches of government—of the rights of conscience and religious exercise. It concludes that the 2019 rule better comports with that priority and that the 2023 proposed rule would undermine it. In addition, the reasoning employed by the three federal district court judges who enjoined the 2019 rule—and on which HHS relies in part for its 2023 proposed rule—is deeply flawed.

The Primacy of the Right of Conscience

The right of conscience, in general, and the right to freely exercise religion, in particular, provide the normative context within which policy decisions such as the 2023 proposed rule must be made. The primacy of the right of conscience is evident in several ways.

Inalienability. The nature of conscience rights places them in a special category. Professor Michael McConnell writes that because religious freedom is “based on the inviolability of conscience,” it is both *natural* and *inalienable*. While most natural rights “were surrendered to the polity in exchange for civil rights and protection...inalienable rights—of which liberty of conscience was the clearest and universal example—were not.”⁴ As such, the right of conscience is a “special case”⁵ rather than simply one of many ordinary competing values or interests.

Deep, Defining Roots. The right of conscience has especially deep and defining roots in American history. When enacting the International Religious Freedom Act in 1998, Congress unanimously declared that the “right to religious freedom undergirds the very origin and existence of the United States.”⁶ In 2015, the late Senator Orrin Hatch (R-UT) delivered eight Senate floor speeches that covered all aspects of religious freedom, from its origins to its continued importance. In the second of those speeches, he described how the story of religious freedom began long before American independence:

The first permanent European settlers here in America were Pilgrims seeking to escape religious oppression.... The Pilgrims' journey to Massachusetts Bay is considered such an important part of the American story that a mural depicting the embarkation of the Pilgrims hangs in the Rotunda of the U.S. Capitol... Following the success of the Puritans, other religious minorities including the Quakers, Congregationalists, Baptists, Jews, Methodists, Presbyterians, and a host of German and Dutch sects, came to the American Colonies to practice their faith in peace.⁷

In 1625, five years after the Pilgrims landed in Massachusetts, the Articles of Transfer for the Dutch colony of New Netherland guaranteed that residents could “keep and enjoy the liberty of their consciences in religion.”⁸ In 1649, the Maryland colony enacted the Act Concerning Religion, which similarly provided that no person would be “troubled...in respect of his or her religion nor in the free exercise thereof.”⁹

Colonial charters and, after independence, state constitutions continued these “longstanding protections for religious liberty”¹⁰ as “a fundamental, inviolable right.”¹¹ State constitutions “continued to broaden the protection afforded by the colonial charters—confirming the fundamental, longstanding, and ubiquitous nature of religious protections.”¹²

Several important 18th-century events in Virginia connected this already long history to the United States. On June 12, 1776, the convention assembled to draft Virginia’s constitution unanimously adopted the Virginia Declaration of Rights as “the basis and foundation of Government.” Article 16 declared that “all men are equally entitled to the free exercise of religion, according to the dictates of conscience.”¹³

On June 20, 1785, James Madison, then serving in the Virginia legislature, authored a pamphlet titled “Memorial and Remonstrance Against Religious Assessments.”¹⁴ It explained his opposition to a bill, introduced by Patrick Henry, that would impose a tax on property “for the support of Christian teachers.” Madison opened his argument that the bill was “a dangerous abuse of power” by quoting Article 16 of the Virginia Declaration of Rights. He argued that, because the rights of conscience and religious exercise are “unalienable,” they are “precedent, both in order of time and in degree of obligation, to the claims of Civil Society.”

The Virginia legislature defeated Henry’s bill and, in January 1786, passed the Virginia Statute for Religious Freedom. Thomas Jefferson had originally drafted this bill in 1777, and Madison re-introduced it as an alternative to Henry’s proposal. The statute declared that the rights of conscience and religious exercise are among “the natural rights of mankind.”¹⁵

International Commitments. This long-standing commitment to the primacy of the right of conscience has found practical application and public expression in the United States' international commitments. The International Religious Freedom Act, enacted in 1998 without opposition, asserts that freedom of religious belief and practice is "a universal human right and fundamental freedom articulated in numerous international instruments"¹⁶ which the United States has signed or ratified. These include:

- **Universal Declaration of Human Rights.** In December 1948, with the United States' vote, the United Nations General Assembly adopted Resolution 217, the Universal Declaration of Human Rights. Ratifying nations pledged to secure the "universal and effective recognition" of "fundamental" freedoms and the "inalienable rights of all members of the human family."¹⁷ These inalienable rights include religious freedom, defined broadly in Article 18 as the "freedom, either alone or in community with others and in public or private, to manifest [one's] religion or belief in teaching, practice, worship, and observance."¹⁸
- **Helsinki Accords.** The United States signed this document on August 1, 1975, at the close of the Conference on Security and Cooperation in Europe. Article VII similarly defines religious freedom as "the freedom of the individual to profess and practice, alone or in community with others, religion or belief acting in accordance with the dictates of his own conscience."¹⁹
- **Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.** The United Nations General Assembly adopted this declaration without opposition on November 25, 1981.²⁰ Echoing America's Founders, the declaration states that "freedom of religion or belief should be fully respected and guaranteed" because it is "one of the fundamental elements of [the individual's] conception of life."²¹
- **International Covenant on Civil and Political Rights.** The United States ratified this treaty on June 8, 1992. Like the Universal Declaration of Human Rights, Article 18 defines religious freedom as including "the freedom, either individually or in community with others and in public or private, to manifest [one's] religion or belief in worship, observance, practice and teaching."²²

In 2022, Secretary of State Antony Blinken, in connection with International Religious Freedom Day, described religious freedom as “a founding principle of our nation” and “a human right,” noting that the United States and dozens of other countries are now part of the International Religious Freedom or Belief Alliance.²³ According to its website, “Alliance members must fully commit to the Declaration of Principles...grounded in Article 18 of the Universal Declaration for Human Rights.”²⁴

Supreme Court Decisions. The Supreme Court has recognized the special status of the rights of conscience and religious exercise. In *Murdock v. Commonwealth of Pennsylvania*,²⁵ for example, several Jehovah’s Witnesses challenged a local ordinance that required a license to canvass, solicit “orders for...merchandise of any kind,” or to deliver such merchandise. Reversing the Jehovah’s Witnesses’ convictions under this ordinance, the Supreme Court held that First Amendment freedoms, including religious exercise, “are in a preferred position.”²⁶

Presidential Proclamations. In 1992, Congress unanimously enacted legislation to designate January 16, the anniversary of the Virginia Statute for Religious Freedom’s passage in 1786, as National Religious Freedom Day.²⁷ The statute requests the President to “issue a proclamation calling on the people of the United States to join together to celebrate their religious freedom.” Every President since then has done so.²⁸

- **President George H. W. Bush** recognized that religious freedom “has been integral to the preservation and development of the United States.”²⁹
- **President Bill Clinton** said that the “fundamental right of all people” to “follow our own personal beliefs” and “practice our faith freely and openly” is “essential to our well-being.”³⁰
- **President George W. Bush** called religious freedom “a cornerstone of our Republic, a core principle of our Constitution, and a fundamental human right.”³¹
- **President Barack Obama** said that religious freedom is “the natural right of all humanity—not a privilege for any government to give or take away.” It is, he said, a “critical foundation of our Nation’s liberty.”³²
- **President Donald Trump** recognized that religious freedom includes individuals’ “right not just to believe as they see fit, but to freely

exercise their religion.” Forcing people to “violate their core religious beliefs without sufficient justification ... can destroy the fundamental freedom underlying our democracy.”³³

- **President Joe Biden** said earlier this year that the effort to protect the “freedom to practice religion fully and freely...is as important now as it has ever been.”³⁴

Legislative and Regulatory Protections. Historically, culturally, and constitutionally, religious freedom is perhaps the single most significant defining feature of the United States as a nation. It takes precedence, it is a special case, and it occupies a preferred position. This status has, in the past several decades, become further established in legislative and regulatory protections.

- **The Church Amendments**, for example, prohibit requiring “any individual or entity” receiving grants, contracts, or loans under several federal statutes to perform or assist in abortion, or making facilities or personnel available to do so, if contrary to “religious beliefs or moral convictions.”³⁵
- **The Coats–Snowe Amendment** prohibits discrimination against health care entities that do not provide or require training in performing abortions.³⁶
- **The Balanced Budget Act** provides that neither Medicaid³⁷ nor Medicare Advantage health plans must provide, reimburse for, or cover counseling or referral services over objections based on moral or religious grounds.³⁸
- **The Weldon Amendment** provides that no funds appropriated for the Departments of Labor, HHS, or Education “may be made available to a Federal agency or program, or to a State or local government, if such agency, program, or government subjects any institutional or individual health care entity to discrimination on the basis that the health care entity does not provide, pay for, provide coverage of, or refer for abortions.”³⁹
- Under **the Affordable Care Act**, enacted in 2010, qualified health plans may not discriminate against health care providers or facilities that refuse to provide, pay for, cover, or refer for abortion.⁴⁰

The 2023 proposed rule includes a list of existing statutory conscience protections but glaringly omits the Religious Freedom Restoration Act (RFRA).⁴¹ The Senate Judiciary Committee report on the RFRA, which was enacted almost unanimously in 1993, states that the United States “was founded upon the conviction that the right to observe one’s faith, free from Government interference, is among the most treasured birthrights of every American.”⁴²

To protect that right, the RFRA allows the federal government to substantially burden “a person’s exercise of religion” only if doing so “is the least restrictive means of furthering [a] compelling governmental interest.” The Supreme Court has held that under this standard, often called *strict scrutiny*, “only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion.”⁴³

The RFRA not only imposes this standard, the toughest in American law, but applies it to “all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after” the RFRA’s enactment. As such, “RFRA operates as a kind of super statute, displacing the normal operation of other federal laws.”⁴⁴ The fact that the 2023 proposed rule must comply with the RFRA, yet fails even to mention it, suggests that the proposed rule does not take religious freedom as seriously as it should.

Court cases involving the RFRA typically arise when the government imposes specific prohibitions or requirements that substantially burden religious exercise. In *City of Boerne v. Flores*,⁴⁵ for example, the Catholic Archbishop of San Antonio challenged the denial of a building permit to enlarge a church. In *Burwell v. Hobby Lobby Stores, Inc.*,⁴⁶ a religious business owner challenged regulations issued under the Affordable Care Act that required employers to provide no-cost health insurance coverage for abortion-inducing drugs and devices. And in *Tanzin v. Tanvir*,⁴⁷ practicing Muslims challenged their placement by the FBI on the No-Fly List.

The 2023 proposed rule would impose a different kind of burden. As discussed below, the 2019 rule provided more robust protection for the right of conscience than its predecessor. As such, the 2019 rule moves that protection in a direction that comports with the profound, definitional role that religious freedom has played in American history and law. The 2023 proposed rule, in contrast, would reverse direction, dismantling much of the conscience protections provided by the 2019 rule. Doing so would increase the overall likelihood that health care workers will be forced to violate their religious or moral beliefs in situations where they had previously been protected.

Assessing Executive Agency Rules

The Administrative Procedure Act (APA)⁴⁸ governs the process by which federal governmental agencies like HHS develop and issue regulations. It includes requirements for publishing notices of proposed and final rulemaking in the *Federal Register* and provides opportunities for the public to comment on notices of proposed rulemaking. In promulgating rules, executive agencies are required to “engage in reasoned decision-making, and...to reasonably explain...the bases for the actions they take and the conclusions they reach.”⁴⁹

A rule is unlawful under the APA if it is “arbitrary and capricious.” This finding results when an agency “entirely fail[s] to consider an important aspect of the problem” or when the agency’s reasoning “runs counter to the evidence before the agency.”⁵⁰

Further, when an agency changes its previous regulatory positions, it must provide “good reasons” for the change and “a reasoned explanation...for disregarding facts and circumstances that underlay or were engendered by the prior policy.”⁵¹ Moreover, “[a]n agency cannot simply disregard contrary or inconvenient factual determinations that it made in the past, any more than it can ignore inconvenient facts when it writes on a blank slate.”⁵²

Comparing the 2011 and 2019 Rules. On August 26, 2008, HHS issued a rule titled “Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law.”⁵³ Addressing the statutory conscience protections in effect at that time, the rule stated that regulations were necessary to:

1. Educate the public and health care providers on the obligations imposed, and protections afforded, by federal law;
2. Work with state and local governments and other recipients of funds from the Department to ensure compliance with the nondiscrimination requirements embodied in the federal health care provider conscience protection statutes;
3. When such compliance efforts prove unsuccessful, enforce these nondiscrimination laws through various department mechanisms to ensure that department funds do not support coercive or discriminatory practices, or policies in violation of federal law; and

4. Otherwise take an active role in promoting open communication within the health care industry, and between providers and patients, fostering a more inclusive, tolerant environment in the health care industry than may currently exist.⁵⁴

Three years later, in the 2011 rule,⁵⁵ HHS rescinded much of the 2008 rule, including provisions defining certain terms used in one or more of the conscience provisions and various compliance certification requirements. The 2011 rule retained a provision designating the Office of Civil Rights (OCR) within HHS to receive and coordinate the handling of complaints of alleged violations of only three conscience provisions: the Church Amendments, the Weldon Amendment, and the Coats–Snowe Amendment.

In its 2019 rule, HHS concluded that withdrawal of the 2008 rule created confusion about conscience protections, noting a significant increase in complaints alleging conscience protection violations. The 2019 rule, therefore, applied enhanced conscience protections to all, rather than a few, of the laws that HHS is charged with enforcing. These protections include:

1. Additional statutory provisions to the rule’s enforcement scheme;
2. Definitions of various statutory terms;
3. Assurance and certification requirements;
4. Reaffirmation of the OCR’s enforcement authority;
5. Record-keeping and cooperation requirements;
6. Enforcement provisions and penalties (such as withdrawal of funding); and
7. A voluntary notice provision.⁵⁶

In the current proposed rule, HHS has proposed retaining three aspects of the 2019 final rule: application to all the federal conscience law provisions identified in the 2019 rule, several provisions related to complaint handling and investigations, and a voluntary notice provision. Retaining three aspects of the 2019 rule is certainly preferable to retaining none, but the 2023 proposed rule in many respects turns the clock back on the protection of the right of conscience.

The proposed rule's most significant changes to the 2019 rule, however, are what it eliminates:

- **Definition of terms**, including “assist in the performance,” “discriminate or discrimination,” “entity,” “federal financial assistance,” “health care entity,” “health service program,” “recipient,” “referral or refer,” “sub recipient,” and “workforce.”⁵⁷
- **Detailed explanation** of the applicability of and prohibitions or requirements under the different conscience protection laws.
- **Assurance and certification** of compliance requirements.
- **Compliance requirements**, including to maintain records, cooperate with OCR enforcement, and refrain from intimidation or retaliatory acts.
- **Detailed explanation** of enforcement authority, including resolution through withholding federal funds or referral to the Department of Justice (DOJ) for potential litigation.
- **Rule of construction** “in favor of a broad protection of the free exercise of religious beliefs and moral convictions.”⁵⁸

On its face, therefore, the proposed rule demonstrates HHS's weakened commitment to protecting the right of conscience. If implemented, it would *allow*, rather than require, the OCR to enforce the conscience protection laws. The OCR need only seek voluntary resolutions of complaints—with the aim of getting HHS funding recipients and complainants to work out their own solutions to claims of discrimination. The proposed rule makes clear that when negotiations fail, no discrimination claims will be referred to the DOJ for litigation.

The proposed rule also removes any mention of loss of funding or other remedies for violating conscience provisions or any compliance requirement indicating that duties imposed by the applicable statutes regarding conscience protections have been met. Under the 2023 proposed rule, there are no consequences for failure to respond to complaints, and there is no potential loss of federal funding for violation of obligations under the conscience provisions, either. In short, by removing the 2019 final rule's substantive enforcement provisions, the 2023 proposed rule virtually guarantees that conscience rights will rarely—if ever—be vindicated.

The authors think it should go without saying that protecting something as historically and legally important as the right of conscience requires a rule with teeth: concrete definitions, clear and robust policies, consistent enforcement, and serious penalties for noncompliance. The 2023 proposed rule backtracks on all of these. It lacks even a detailed explanation for its necessity, both in the statutory history and the analytical reasoning.

While the 2019 final rule contained a precise and thorough definition of discrimination⁵⁹ and clarified that accommodations granted to religious employees were not discriminatory, the 2023 proposed rule deletes all relevant definitions, including of key terms such as “discrimination” or “discriminate.” This places the right of conscience in an uncertain and precarious position. The proposed rule arbitrarily and capriciously asserts that these clarifying definitional provisions caused confusion when, in fact, it is their elimination in the proposed rule that will confuse the public.

HHS cannot possibly argue that it has satisfied the APA by providing “good reasons” for its change in regulatory position or “a reasoned explanation...for disregarding facts and circumstances that underlay or were engendered by the prior policy.”⁶⁰ By flying the false flag of “confusion,” and weakening and retreating from protection of the right of conscience, HHS attempts to “fix” the 2019 rule by smashing it altogether.

The 2023 proposed rule states: “Patients also have autonomy, rights, and moral and religious convictions. And they have health needs, sometimes urgent ones. Our health care systems must effectively deliver services—including *safe legal abortions*—to all who need them in order to protect patients’ health and dignity.”⁶¹ That abortion is the Biden Administration’s political priority is widely known, but promoting it at the expense of the fundamental right of conscience is the wrong balance and an obvious violation of the RFRA, a law that the Supreme Court has dubbed a “super statute.”

By failing to define discrimination, removing all substantive enforcement provisions from the 2019 final rule, and stressing the importance of access to abortion (something the Supreme Court has recognized is not a constitutional right), the agency has tipped the scales against religious and moral objectors arbitrarily and capriciously—a violation of the APA. It has done so in a way that substantially burdens the free exercise rights of health care workers without employing the least restrictive means to protect its apparent interest in “patients’ health and dignity”—a violation of the RFRA.

The combination of these two probable violations renders the 2023 proposed rule questionable at best, and an *ultra vires* act at worst.

Flawed Decisions Enjoining the 2019 Rule

States, localities, and non-governmental parties challenged the 2019 final rule in three jurisdictions.⁶² The federal judges in each case granted summary judgment to the plaintiffs and enjoined the 2019 final rule from taking effect. The 2023 proposed rule states that it “is informed by” those three decisions, suggesting that they are relying on the effect or reasoning of these decisions in order to mandate significant changes to the 2019 final rule.

While the previous administration had appealed these decisions, those appeals were unjustifiably abandoned by the Biden Administration, and the agency is now issuing its own proposed rule.⁶³ Reliance on those decisions, however, is misplaced.

All three lawsuits challenged the 2019 final rule under the APA,⁶⁴ which governs how federal agencies develop and issue regulations, including publication of proposed and final rules in the *Federal Register*. The APA also outlines requirements for other agency actions, such as the issuance of policy statements, licenses, and permits. Agencies are required to “engage in reasoned decision-making, and...to reasonably explain ... the bases for the actions they take and the conclusions they reach.”⁶⁵

Although reviewing courts are not entitled to “substitute [their] own judgment for that of the agency,”⁶⁶ neither are courts permitted to “rubber stamp” agency actions. Instead, courts “must ensure that the agency considered all of the relevant factors.”⁶⁷

In each of the three challenges to the 2019 final rule, the district court failed to properly assess either HHS’s statutory authority to promulgate the 2019 final rule or HHS’s factual analysis in doing so, improperly concluding that the rule was “arbitrary and capricious.”

Washington v. Azar. In *Washington v. Azar*, the state of Washington challenged the 2019 final rule, claiming that it was not in accordance with HHS’s authority or certain federal statutes, and was, therefore, arbitrary and capricious under the APA. In granting summary judgment to the plaintiffs, however, the district court did exactly what the Supreme Court has said it may not do—that is, the court substituted its own judgment for that of the agency.⁶⁸

Despite evidence that religious discrimination claims had increased since 2011, the court simply disregarded the evidence justifying the 2019 final rule and adopted the ruling and reasoning of *New York v. U.S. Department of Health and Human Services* (discussed *infra*) with little independent analysis.

The court arbitrarily rejected the department's conclusion that access to health care is actually undermined by religious providers or entities exiting the medical field when forced to choose between their beliefs and their jobs. Instead, the court substituted its own view that "the Rule would severely and disproportionately harm certain vulnerable populations, including women; lesbian, gay, bisexual, and transgender people (LGBT individuals); individuals with disabilities; and people living in rural areas."⁶⁹

Under the court's logic, it would be better for a Catholic hospital in a rural community to shut down entirely than allow it to decline to remove a healthy uterus at the request of male-identifying biological woman. This disregards the plain fact that access to care for everyone, including LGBT persons for issues that do not involve abortion or sterilization, would decrease without the enforcement mechanisms set forth in the 2019 rule.

But even if the conscience protection statutes disproportionately affected LGBT individuals, nothing in the APA requires an agency to automatically defer to the views of a particular group. Moreover, any disparate impact would be a consequence of the *statutes themselves*, not the 2019 rule that merely enforces them. It would truly be arbitrary and contrary to law to change regulations to substantially diminish enforcement of valid laws simply because the agency or a court does not like some contemplated potential effects of those laws.

The 2019 final rule was not arbitrary or capricious merely because the court disagreed with HHS's predictive judgments or ultimate conclusion that the benefits of the 2019 final rule would outweigh the costs: Rather than give HHS's predictive judgments "particularly deferential review,"⁷⁰ the district court simply rejected it and substituted its own judgment.

Finally, the court held the 2019 rule to be arbitrary and capricious because HHS allegedly failed to conduct a reasoned analysis of the requirements of medical ethics. Specifically, the court asserted that the 2019 rule's statutory definitions "would allow an employee to refuse to participate in life-saving treatment without notice...withhold basic information from patients...and deprive patients of the ability to provide informed consent." The court leveled this serious charge without citing the text of the 2019 rule or *any* evidence in the record.

The conscience protection statutes have a narrow focus and center largely on questions of abortion, sterilization, and assisted suicide—none of which involves life-saving care. Comments submitted on the current rulemaking from groups such as the American Association of Pro-Life Obstetricians and Gynecologists substantiate the fact that abortion is never needed to save the lives of pregnant mothers with any medical complications ranging

from cancer to ectopic pregnancy. Therefore, the conscience protection statutes do not infringe on medical ethics or conflict in any way with laws governing the provision of life-saving care, like the Emergency Medical Treatment and Labor Act (EMTALA).⁷¹ As there is no conflict between the conscience statutes and the provision of life-saving care, there can be no conflict between the rule enforcing those conscience statutes and the provision of life-saving care.

City & County of San Francisco v. Azar. In *City & County of San Francisco v. Azar*, the plaintiffs argued that HHS exceeded its rulemaking authority in violation of the APA. In granting summary judgment to the plaintiffs, the court concluded that HHS did not possess the authority to promulgate a rule interpreting and implementing statutory provisions recognizing a right of funding recipients with conscientious objections to certain medical services.

Nor, the court held, did HHS have the “housekeeping authority” to promulgate a rule that could lead to termination of an entity’s financial assistance. In this respect, Judge William Alsup determined that the 2019 rule substantively changed the rights and responsibilities of health care providers and threatened federal funding for noncompliance. HHS, he wrote, misconstrued the underlying statutes by a “redefinition of statutory terms” that allegedly expanded the scope of protected conscience objections and upset the balance between the “uninterrupted flow” of abortions and sterilizations and conscience rights that Congress had struck.

First, as the court recognized, whatever balance Congress struck was in reaction to a regime in which abortion was required to be legal in federal law and across all 50 states because of *Roe v. Wade*.⁷² The *Dobbs v. Jackson Women’s Health Organization*⁷³ decision of 2022, however, explicitly overruled that regime in its entirety. The burden, therefore, is on the agency to demonstrate why the conscience protection statutes, which were passed to limit the harms of a nationwide abortion-on-demand regime, should not be enforced with the tools made available by the 2019 rule post-*Dobbs*. It would be arbitrary and capricious for the agency to *not* consider the fundamental shift in the legal and policy landscape now that states and the federal government can protect unborn life at all stages and in an environment in which many states strictly limit abortion—and some have outlawed abortion entirely. In several such states, any alleged “balance” struck between conscience protection and abortion access is entirely gone, as no lawful interest remains on the other side. The agency must contend with this new reality.

Additionally, the federal conscience statutes themselves⁷⁴ implicitly granted HHS the authority to condition its funds on compliance with those

statutes and to ensure that recipients comply with their requirements.⁷⁵ The authority to ensure compliance with grant conditions is consistent with the well-established power of the United States “to fix the terms and conditions upon which its money allotments to state and other governmental entities should be disbursed.”⁷⁶

Likewise, certain federal statutes⁷⁷ grant HHS the very “housekeeping authority” that the district court declined to recognize.⁷⁸ Both 5 U.S.C. § 301⁷⁹ and 40 U.S.C. § 121(c) authorize HHS to promulgate regulations to administer its funding instruments. HHS did so through its Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS awards (UAR) and its Acquisition and Regulation guidelines (HHSAR). The UAR requires “that Federal funding is expended and associated programs are implemented *in full accordance with U.S. statutory and public policy requirements* including, but not limited to, those protecting public welfare, the environment, and *prohibiting discrimination*.”⁸⁰ Similarly, the HHSAR permits HHS to include “requirements of law” and “HHS-wide policies” in its contracts.⁸¹ Naturally, the prohibition against religious discrimination for federal funding recipients comes from, among others, the very federal conscience statutes at issue in the 2023 proposed rule and 2019 rule.

In using this “housekeeping authority,” the 2019 Rule did not alter or amend the obligations of the respective underlying conscience statutes,⁸² but simply ensured that recipients of federal funds did not violate them. If HHS retreats from the view that substantive funding and housekeeping statutes grant it sufficient authority to promulgate interpretive rules and enforcement-based regulations, it must be consistent and repeal every regulation relying on such authorities, not just those related to conscience protection.⁸³

In *Chevron, USA v. National Resources Defense Council, Inc.*,⁸⁴ the Supreme Court counseled deference to an agency’s interpretation and application of its underlying statutory authority. A court must first ask “whether Congress has directly spoken to the precise question at issue.”⁸⁵ If the answer is yes, the court is required to give effect to Congress’s intent. If the answer is no because the statute is ambiguous, “the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”⁸⁶ While the court may have preferred other definitions that fit certain policy objectives, that is not a legitimate basis for finding the 2019 final rule arbitrary and capricious. Instead, assuming the court believed that these terms were ambiguous, the court was required to accept HHS’s definitions “so long as that reading is reasonable, *even if the agency’s reading differs from what the court believes is the best statutory interpretation.*”⁸⁷

New York v. U.S. Department of Health and Human Services. A challenge to the 2019 final rule was mounted by 19 states including the State of New York, the District of Columbia, three local governments, and various health care provider associations the same year. As had the plaintiffs in the other two challenges discussed above, they alleged a violation of the APA, among others. Plaintiffs argued that HHS’s systematic interpretation and implementation of over 30 statutory “conscience provisions” recognizing the right of individuals or entities to abstain, as conscience-based objectors, from participating in medical procedures, programs, services, or research activities on account of religious or moral objection to health care services provided by recipients of federal funds was outside the scope of its authority.

The court began by delving into the nature and number of complaints received regarding potential conscience violations ahead of the 2019 proposed rule. The 2019 rule relied in part on the fact that HHS OCR had received only 34 conscience complaints between November 2016 and January 2018 and had a “significant increase” to 343 complaints during fiscal year 2018. The court questioned these numbers and inappropriately took on the role of OCR adjudicator in order to judge that only a small fraction of the 343 self-identified conscience complaints were relevant to the conscience protection statutes.⁸⁸ The potential for a majority of the complaints to not ultimately result in a violation finding is typical for civil rights complaints and should not have caused the court any concern.⁸⁹ The court’s assessment of the complaints, though invalid, would still prove another independent basis for the 2019 rulemaking, namely, a general lack of knowledge of the conscience statutes and widespread “confusion” as to the scope of conscience protection among those who were aware of those statutes.

Regardless, HHS *today* contends that a full 7 percent of its complaints are conscience related (compared to 27 percent for all other protected classes).⁹⁰ As HHS OCR received over 51,000 complaints in 2022, the conscience docket now accounts for nearly 3,600 complaints. This demonstrates that the goal of increasing attention to the rights of conscience specifically intended by the 2019 rule has been robustly met.

To put this in perspective, this represents an over 100 times increase in conscience complaints received in 2022 compared to November 2016 and January 2018, and an over 10 times increase in complaints compared to around the time the 2019 rule was promulgated. It would be the height of arbitrariness and capriciousness to withdraw clarifying definitions and remove enforcement mechanisms from a rule that has worked exactly as planned and explained in 2019.

The court made other legal errors besides its assessment of the complaints, however. It determined, among other things, that the 2019 rule was substantive (rather than a “housekeeping measure”); that the promulgation of the rule exceeded HHS’s rulemaking and enforcement authority; that the rule was arbitrary and capricious; and that the rule’s definition of “discrimination” was not a “logical outgrowth” of its notice of proposed rulemaking. The judge in the case, Paul Engelmayer, agreed that the 2019 final rule’s definition of “discrimination,” and “entity,” as well as the rule’s enforcement mechanism (the withdrawal of federal funding) were significant enough to change the responsibilities of federal funding recipients, and therefore made the rule, as plaintiffs argued, a “watershed.”⁹¹

HHS countered that the rule was merely “housekeeping,” and therefore interpretive in nature. It argued the rule was only related to how HHS is governed and how it administers federal statutes, and that providing guidance on key terms was essential to the enforcement of conditions imposed on federal funding under the conscience statutes.

HHS was right. The 2019 final rule was the very type of interpretive rule determined by federal courts to be one that simply offers clarity to federal funding recipients of their existing obligations.⁹² Rules of this sort allow agencies “to explain ambiguous terms in legislative enactments without having to undertake cumbersome proceedings.”⁹³ Interpretive rules do not “effect[] a substantive change in the regulations,”⁹⁴ contrary to how this federal court ruled.

Even the challenged assurance and certification requirements of the 2019 rule simply implemented other requirements in the contracts and grant regulations that require federal funding recipients to comply “with U.S. statutory and public policy requirements.”⁹⁵ Any of the substantive requirements of the rule did nothing more than repeat the text of the underlying federal conscience statutes themselves and specify which entities the statutes affect. This is a clear example of the court’s judgment displacing that of an agency’s.

Instead of following fundamental administrative law principles, this and other federal trial court judges achieved a particular outcome that aligned with their policy preferences. This is not an appropriate justification for striking down an agency’s rule.

Short Shrift for Religious Objectors Under the Proposed Rule

Among its justifications for partial rescission of the 2019 rule, HHS argues⁹⁶ that conscience rights must be balanced against the need for health care, stating:

- “The Federal health conscience protection and nondiscrimination statutes represent Congress’ attempt to strike a careful balance. Some doctors, nurses, and hospitals, for example, object for religious or moral reasons to providing or referring for abortions or assisted suicide, among other procedures. Respecting such objections honors liberty and human dignity. It also redounds to the benefit of the medical profession.”⁹⁷
- “Patients also have autonomy, rights, and moral and religious convictions. And they have health needs, sometime [sic] urgent ones. Our health care systems must effectively deliver services—including safe legal abortions—to all who need them in order to protect patients’ health and dignity.”⁹⁸
- “Congress sought to balance these considerations through a variety of statutes. The Department will respect that balance.”⁹⁹

Unfortunately, HHS’s desire to strike a “balance” between access to care and nondiscrimination in the provision of health care is not in any way supported by the text or historical application of the conscience protection laws HHS is tasked with enforcing. As stated earlier, if there is any wiggle room with respect to “balance,” the agency must recalibrate because the Supreme Court has now explicitly held that abortion is not a right found in the Constitution.

To ignore this change in legal circumstances on such a fundamental question with respect to the balancing of “rights” regarding abortion would be arbitrary and capricious. In fact, if the agency is truly concerned with balancing conscience rights against the interests of those individuals seeking access to controversial medical services, it would protect religious organizations and medical providers that object to providing such controversial procedures under the conscience statutes and leave any “gaps” to be filled by the private sector or government actors where not contrary to law. Forcing all organizations and personnel to perform procedures that are contrary to their religious or moral beliefs is clearly contrary to the letter of the law of the conscience provisions HHS is tasked with enforcing.

The Biden Administration has paid lip service to the several provisions of federal law that prohibit recipients of federal funding from coercing individuals and entities in the health care field into performing actions they find religiously or morally objectionable despite a centuries-long tradition of recognizing religious liberty as the first among our freedoms.

The weakening of the 2019 rule and the return to the structure of the 2011 rule would be a further and dangerous expansion of the Administration’s attacks on conscience and HHS’s well-known resistance to the *Dobbs* decision.¹⁰⁰

In addition, because the government, rather than private parties, has the central role in enforcing federal conscience and anti-discrimination laws, the agency’s proposal to limit its enforcement efforts is particularly pernicious.¹⁰¹ This Administration’s proposed removal of enforcement provisions for violating the foregoing conscience protections is raw politicking, not reasoned rulemaking. It sets up an inevitable conflict between religious objectors and recipients of federal funding eager to maintain their funding.

The most controversial medical interventions, including services related to abortion; sterilization; assisted suicide/end-of-life; vaccines; and those related to “gender-affirming” or “gender-transition” medical services (including, but not limited, to cross-sex hormones, puberty blockers, and surgery—whether for minor children or adults) will prove unnavigable under this proposed rule. Advancements in medical technology—for example, procedures governing *in vitro* fertilization, the evolving state of “gender affirming” care, and new or altered abortion modalities—will only expand the worries of conscientious objectors. For religious or moral objectors to these interventions, the proposed rule will not adequately protect them from having to participate in, cover, or pay for such interventions. The proposed rule does not strike the correct balance in favor of religious liberty, and the lack of robust enforcement mechanisms renders the proposed rule toothless.

These concerns are not the stuff of fantasy. This Administration has demonstrated an extensive history of limiting the rights of conscience within the health care context. The 2023 proposed rule claims “[t]he Department remains committed to educating patients, providers, and other covered entities about their rights and obligations under the conscience statutes and remains committed to ensuring compliance.”¹⁰²

Yet under the Biden Administration and HHS Secretary Xavier Becerra, HHS has taken unprecedented actions¹⁰³ to ignore the very conscience rights it is tasked with enforcing. In July 2021, in coordination with the DOJ’s dismissal of an enforcement lawsuit, the OCR withdrew¹⁰⁴ a notice of violation against the University of Vermont Medical Center for violating the Church Amendments. While the previous Administration had found a violation after the medical center forced a nurse to participate in an abortion despite her known religious

objection, Becerra and the OCR withdrew the violation notice on the grounds that certain federal cases—those discussed above—had called such an “unqualified right” to object to a medical procedure on religious grounds into question. Under Becerra, the OCR has also rescinded violation notices against the State of California for forcing nuns and other religious objectors to provide insurance coverage of abortion services in violation of the Weldon Amendment.¹⁰⁵

The foregoing actions were all taken despite Secretary Becerra’s public commitment¹⁰⁶ to Congress that “the work [of the Conscience and Religious Freedom Division] will not change.” As such, conscientious objectors are justifiably concerned about HHS’s politicization of the OCR¹⁰⁷ and its unwillingness to ensure compliance with laws designed to protect people of faith from having to violate their deepest-held beliefs about the nature of the human person.

Conclusion

In enacting and implementing statutes, Congress and executive branch agencies have significant latitude in prioritizing some political or policy objectives over others. When it comes to impacting fundamental rights such as the right of conscience, however, that latitude is more circumscribed.

The historical, cultural, and legal tradition of protecting the right of conscience began more than 350 years ago and has deep constitutional, statutory, and even regulatory roots. The right of conscience, in general, and the free exercise of religion, in particular, have what the Supreme Court has described as a “preferred position” and, therefore, are not simply on a long list of interchangeable policy preferences.

As that Court has noted:

[B]oth morals and sound policy require that the State should not violate the conscience of the individual. All our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep in its significance and vital, indeed, is it to the integrity of man’s moral and spiritual nature that nothing short of the self-preservation of the state should warrant its violation; and it may well be questioned whether the state which preserves its life by a settled policy of violation of the conscience of the individual will not in fact ultimately lose it by the process.¹⁰⁸

The 2019 final rule more clearly and thoroughly comported with the importance and priority of religious freedom, while the 2023 proposed rule, by compromising religious freedom in favor of certain political priorities, does not. It relies instead on flawed precedents to promote political objectives at the expense of religious freedom.

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Endnotes

1. Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws, 76 Fed. Reg. 9968 (Feb. 23, 2011) (to be codified at 45 C.F.R. pt. 88).
2. Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23, 170 (May 21, 2019) (to be codified at 45 C.F.R. pt. 88).
3. Safeguarding the Rights of Conscience as Protected by Federal Statutes, 88 Fed. Reg. 3, 820, 45 C.F.R. 88 (Jan. 5, 2023).
4. Michael McConnell, *Freedom from Persecution or Protection of the Rights of Conscience? A Critique of Justice Scalia's Historical Arguments in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 819, 823 (1997).
5. *Id.*
6. 22 U.S.C. § 6401(a)(1).
7. 161 CONG. REC., S7080 (daily ed. Oct. 1, 2015) (statement of Sen. Orrin Hatch).
8. *Id.* at 7081.
9. See Wei Zhu, *The Forgotten Story of the Flushing Remonstrance, The Immanent Frame* (Jan. 15, 2014), <https://tif.ssrc.org/2014/01/15/the-forgotten-story-of-the-flushing-remonstrance/>.
10. Branton J. Nestor, *The Original Meaning and Significance of Early State Provisos to the Free Exercise of Religion*, 42 HARV. J. L. & PUB. POL'Y 971, 973 (2019).
11. *Id.* at 974.
12. *Id.* at 976.
13. The Virginia Declaration of Rights has been part of the Virginia constitution since 1830. See VA. CONST. art. I.
14. James Madison, *Memorial and Remonstrance Against Religious Assessments* (June 20, 1785), <https://founders.archives.gov/documents/Madison/01-08-02-0163>.
15. Act for Establishing Religious Freedom (Jan. 16, 1786), Record of the General Assembly, State of Virginia, <https://www.virginiamemory.com/docs/ReligiousFree.pdf>.
16. 22 U.S.C. § 6401(a)(2).
17. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).
18. *Id.*
19. Comm'n on Sec. and Coop. in Europe, The Helsinki Final Act (1975), <https://www.csce.gov/sites/helsinki/helsinki.house.gov/files/Helsinki%20Final%20Act.pdf>.
20. G.A. Res. 36/55, Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (Nov. 25, 1981).
21. *Id.*
22. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966).
23. U.S. Dep't of State, Press Statement, International Religious Freedom Day (Oct. 27, 2022), <https://www.state.gov/international-religious-freedom-day-2/>.
24. U.S. Dep't of State, International Religious Freedom or Belief Alliance, <https://www.state.gov/international-religious-freedom-or-belief-alliance/>.
25. 319 U.S. 105 (1943).
26. *Id.* at 115.
27. Pub. L. 102-464, 106 Stat. 2277 (Oct. 23, 1992).
28. Presidential proclamations are published in the Federal Register and may be found at <https://www.federalregister.gov/presidential-documents> (last accessed March 21, 2023).
29. 107 Stat. 2588 (1992).
30. 63 Fed. Reg. 13, 3243 (Jan. 21, 1998).
31. 67 Fed. Reg. 13, 2787 (Jan. 18, 2002).
32. 75 Fed. Reg. 14, 3843 (Jan. 22, 2010).
33. 83 Fed. Reg. 14, 3057 (Jan. 16, 2018).
34. 88 Fed. Reg. 12, 3285 (Jan. 19, 2023).
35. 42 U.S.C. § 300a-7(b)(1).

36. 42 U.S.C. § 238n(a)(1).
37. 42 U.S.C. § 1396u-2(b)(3)(B).
38. 42 U.S.C. § 1395w-22(j)(3)(B).
39. Consolidated Appropriations Act, Pub. L. 108-447, 118 Stat. 3163 (Dec. 8, 2004).
40. 42 U.S.C. § 18113(c)(3).
41. 42 U.S.C. § 2000bb.
42. Religious Freedom Restoration Act of 1993, Rep. 103-111, 103rd Congress, 1st Sess., July 27, 1993, at 4.
43. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).
44. *Bostock v. Clayton County*, 140 S.Ct. 1731, 1754, (2020). See also Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 211 (RFRA is “an exercise of general legislative supervision over federal agencies”); Michael S. Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 253 (1995) (RFRA “operates as a sweeping ‘super-statute,’ cutting across all other federal statutes...and modifying their reach.”).
45. 521 U.S. 507 (1997).
46. 573 U.S. 682 (2014).
47. 141 S. Ct. 486 (2020).
48. 5 U.S.C. § 551 *et seq.* (1946). See discussion of the APA *infra*, p. 12.
49. *Bhd. of Locomotive Eng’rs & Trainmen v. Fed. R. R. Admin.*, 972 F.3d 83, 115 (D.C. Cir. 2020) (quoting *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, ___ U.S. ___, 140 S. Ct. 1891 (2020)).
50. *Am. Bankers Ass’n v. Nat’l Credit Union Admin.*, 934 F.3d 649, 663 (D.C. Cir. 2019) (quoting *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm*, 463 U.S. 29, 43 (1983)).
51. *Organized Village of Kake v. U.S. Dep’t of Agriculture*, 795 F.3d 956, 966 (9th Cir. 2015) (quoting *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 515 (2009)).
52. *Id.* at 537.
53. Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, 73 Fed. Reg. 50274 (Aug. 26, 2008) (to be codified at 45 C.F.R. pt. 88).
54. Ensuring That Department of Health and Human Services Funds Do Not Support Coercive or Discriminatory Policies or Practices in Violation of Federal Law, 73 Fed. Reg. 78072, 78074 (Dec. 19, 2008) (to be codified at 45 C.F.R. pt. 88).
55. Dep’t of Health and Hum. Svcs., Regulation for the Enforcement of Federal Health Care Provider Conscience Protection Laws, 76 Fed. Reg. 9968 (Feb. 23, 2011) (to be codified at 45 C.F.R. pt. 88).
56. The 2019 rule encouraged recipients of HHS funds to provide notice to individuals and entities about their right be free from coercion or discrimination, but did not require the provision of such notice, as the 2011 rule had. This change was a result of increasing litigation over state and local government laws requiring crisis pregnancy centers to post notices related to abortion services. That litigation culminated in *National Institute of Family and Life Advocates v. Becerra*, 585 U.S. ___, 138 S. Ct. 2361 (2018), in which the Supreme Court held that California’s version of such a law likely violated the First Amendment free speech rights of centers that object to abortion.
57. Eliminating definitions of description.
58. 88 Fed. Reg. 3, 820, 45 C.F.R. 88.
59. Dep’t of Health and Hum. Svcs., Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 84 Fed. Reg. 23170, 23263 (May 21, 2018) (to be codified at 45 C.F.R. pt. 88), § 88.2 Definitions.
60. See discussion of the Administrative Procedure Act, *supra* p. 7.
61. 88 Fed. Reg. 3, 820, 45 C.F.R. 88 (emphasis added).
62. See *Washington v. Azar*, 426 F. Supp. 3d 704 (E.D. Wash. 2019), appeal pending, No. 20-35044 (9th Cir.); *City & Cnty. of San Francisco v. Azar*, 411 F. Supp. 3d 1001 (N.D. Cal. 2019), appeal dismissed, 2020 WL 3053625, 9th Cir., June 01, 2020; *New York v. HHS*, 414 F. Supp. 3d 475 (S.D.N.Y. 2019), appeal withdrawn, 2022 WL 17974424, 2nd Cir., Dec. 8, 2022.
63. To the extent HHS is still able to defend the 2019 rule in court, it should do so. In the alternative, it must adopt as much of the 2019 rule’s definitions and enforcement mechanisms as legally permissible. For the reasons stated *supra*, it would be arbitrary and capricious for it not to.
64. 5 U.S.C. §§ 551-559.
65. *Bhd. of Locomotive Eng’rs & Trainmen*, 972 F. 3d at 115 (quoting *Dep’t of Homeland Sec. v. Regents*, 140 S. Ct. at 1905).
66. *Am. Bankers Ass’n*, 934 F.3d at 663 (internal quotation marks omitted).
67. *Oceana, Inc. v. Ross*, 920 F.3d 855, 863 (D.C. Cir. 2019).

68. *F.C.C. v. Fox*, 556 U.S. at 513.
69. *Washington v. Azar*, 426 F. Supp. 3d at 721.
70. *Trout Unlimited v. Lohn*, 559 F.3d 946, 959 (9th Cir. 2009).
71. The EMTALA requires hospitals to treat patients that need emergency care regardless of their ability to pay for such care. If a hospital cannot provide appropriate medical care, the patient must be transferred to another facility. 42 U.S.C. §§ 1395dd *et seq.*
72. *Roe v. Wade*, 410 U.S. 413 (1973).
73. *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ____ (2022).
74. See extensive explanation of agency statutory authority as laid out in the 2019 final rule. 84 Fed. Reg. at 23,183–86.
75. See *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001) (observing that delegated authority may be explicit or implicit).
76. See *United States v. Marion Cty. Sch. Dist.*, 625 F.2d 607, 609 (5th Cir. 1980) (collecting Supreme Court cases).
77. See 5 U.S.C. § 301 (federal funding is in “full accordance with U.S. statutory and public policy requirements including...prohibiting discrimination”); 40 U.S.C. § 121(c) (HHS may include “requirements of law” and policies in its contracts).
78. 45 C.F.R. § 75.300(a) (emphasis added).
79. For example, the UAR, 5 U.S.C. § 301 provides this “housekeeping authority,” stating: “The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.”
80. 45 C.F.R. § 75.300(a) (emphasis added).
81. See 48 C.F.R. § 301.101(b)(1).
82. 84 Fed. Reg. at 23,185.
83. “Unexplained inconsistency” between agency actions is “a reason for holding an interpretation to be an arbitrary and capricious change.” *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Services*, 545 U.S. 967, 981 (2005).
84. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).
85. *Id.* at 842.
86. *Id.* at 843.
87. *Perez-Guzman v. Lynch*, 835 F.3d 1066, 1079 (9th Cir. 2016) (quoting *Nat'l Cable and Telecomms. Ass'n*, 545 U.S. at 980 (emphasis added)).
88. OCR investigators typically contact and interview complainants before making such a determination. See, Dep't. of Health and Hum. Svcs., *How OCR Enforces Civil Rights Discrimination Laws and Regulations*, <https://www.hhs.gov/civil-rights/for-providers/compliance-enforcement/enforcement-process/index.html>.
89. See Equal Employment Opportunity Commission, Title VII of the Civil Rights Act of 1964 Charges (Showing “reasonable cause” findings in only 2.4 percent of all employment discrimination complaints filed with the EEOC in FY 2021).
90. Dep't of Health and Hum. Svcs., *HHS Announces New Divisions Within the Office for Civil Rights to Better Address Growing Need of Enforcement in Recent Years*, <https://www.hhs.gov/about/news/2023/02/27/hhs-announces-new-divisions-within-office-civil-rights-better-address-growing-need-enforcement-recent-years.html>.
91. *New York v. HHS*, 414 F. Supp. 3d at 512.
92. *Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc); The *Attorney General's Manual on the Administrative Procedure Act* defined an interpretive rule as one “issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers.” Tom C. Clark, Attorney General, *Attorney General's Manual on the Administrative Procedure Act*, at 30 (1947).
93. *Am. Hosp. Ass'n. v. Bowen*, 834 F.2d 1037, 1045 (D.C. Cir. 1987).
94. *Warder v. Shalala*, 149 F.3d 73, 80 (1st Cir. 1998) (quoting *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 100 (1995)).
95. See 45 C.F.R. § 75.300(a).
96. Dep't of Health and Hum. Svcs., *Safeguarding the Rights of Conscience as Protected by Federal Statutes*, Fed. Reg. Vol. 88, No. 3, 820 (Jan. 5, 2023) (to be codified at 45 C.F.R. pt. 88).
97. *Id.*, at 826.
98. *Id.*
99. *Id.*
100. See e.g., Dep't of Health and Hum. Svcs., *Secretary's Rep., Health Care Under Attack: An Action Plan to Protect and Strengthen Reproductive Care*, Aug. 2022, <https://www.hhs.gov/sites/default/files/hhs-report-reproductive-health.pdf>.

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101. In lawsuits filed by health care providers for alleged violations of certain conscience protection laws, including those discussed *supra*, courts have generally held that such laws do not contain, or imply, a private right of action sufficient to provide relief from such violations by covered entities. See, e.g., *Cenzon-DeCarlo v. Mount Sinai Hospital*, 626 F.3d 695 (2d Cir. 2010); *Hellwege v. Tampa Family Health Centers*, 103 F. Supp. 3d 1303 (M.D. Fla. 2015); *Nat'l Instit. of Family and Life Advocates v. Rauner*, 2017 WL 11570803, (N.D. Ill. July 19, 2017).
 102. 88 Fed. Reg. 3, 820, 45 C.F.R. 88.
 103. Rachel Morrison, *In Its First Year, Biden's HHS Has Relentlessly Attacked Christians and Unborn Babies*, THE FEDERALIST (Mar. 18, 2022), <https://thefederalist.com/2022/03/18/in-its-first-year-bidens-hhs-relentlessly-attacked-christians-and-unborn-babies/>.
 104. Dep't of Health and Hum. Svcs., Letter to University of Vermont Medical Center Letter, OCR Transaction No. 18-306427, July 20, 2021, <https://www.hhs.gov/conscience/conscience-protections/uvmmc-letter/index.html>.
 105. Dep't of Health and Hum. Svcs., Letter to State of California, OCR Transaction Nos. 17-274771 and 17-283890, Aug. 13, 2021, <https://www.hhs.gov/conscience/conscience-protections/ca-letter/index.html>.
 106. See questioning from Senator James Lankford (R-OK) to Xavier Becerra during a Senate Finance Committee hearing entitled "The President's FY 2022 HHS Budget." James Lankford, *Lankford Slams HHS Secretary on Changing "Mother" to "Birthing Person" in President's Budget Request*, YOUTUBE (June 10, 2021), <https://www.youtube.com/watch?v=BsYcj1hQKgQ>.
 107. Roger Severino, *Who Has Been Politicizing the HHS Office for Civil Rights?* NAT'L REVIEW ONLINE (Sept. 17, 2021), <https://www.nationalreview.com/corner/who-has-been-politicizing-the-hhs-office-for-civil-rights/>.
 108. *United States v. Seeger*, 380 U.S. 163, 170 (1965), quoting Harlan Fiske Stone, *The Conscientious Objector*, 21 Col. Univ. Q. 253, 269 (1919).