March 27, 2018

U.S. Department of Health and Human Services
Office for Civil Rights
ATTN: Conscience NPRM, RIN 0945-ZA03
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue S.W.
Washington, D.C. 20201

**RE: Department of Health and Human Services, Office for Civil Rights RIN 0945-ZA03**

Muslim Advocates, a national legal advocacy and educational organization that works on the frontlines of civil rights to guarantee freedom and justice for people of all faiths, writes to express its profound concern regarding the U.S. Department of Health and Human Services' ("HHS") proposed rule, "Protecting Statutory Conscience Rights in Health Care; Delegations of Authority" (the "Proposed Rule"). The Proposed Rule, which was first introduced on January 26, 2018, empowers any individual whose work broadly relates to healthcare to wield their personal and/or religious beliefs to deny individuals medical care. While the Proposed Rule is promulgated under the guise of an antidiscrimination provision, it will instead foster discrimination against some of the most marginalized populations in our society. Accordingly, we urge HHS to rescind the Proposed Rule.

## I. The Proposed Rule Creates a Blanket Exemption for Religious or Moral Objections

The Proposed Rule stipulates that its purpose is to more effectively and comprehensively enforce "Federal health care conscience" and associated "anti-discrimination laws."[1] To that end, it creates a blanket exemption that would allow hospitals, insurance companies, health care providers, and other support staff to refuse patients care or even referrals for care.[2] The Proposed Rule deputizes HHS' Office for Civil Rights to police complaints of religious discrimination against recipients of Federal financial assistance.[3] While the Proposed Rule has been introduced under the guise of religious liberty, it will result in the denial of critical medical services to vulnerable populations and the propagation of discriminatory treatment and behavior within the healthcare industry.

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[1] *See* Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 83 Fed. Reg. 3880, 3881 (Jan. 26, 2018).
[2] *See id.* at 3891-92.
[3] *Id.* at 3881.

By easing the use of moral and religious objections to hamper access to critical medical care and services, the Proposed Rule will disproportionately burden women and LGBTQ individuals. Under the express terms of the Proposed Rule, individuals involved in medical care and services related to procedures such as abortions, sterilizations, and the provision of birth control will be able to opt-out of their duties if it violates their "conscience."[4] Even more disturbingly, the Proposed Rule offers this expansive carve-out broadly, applying to any who "assist in the performance" of conscience-piquing activities:

> [T]o participate in any activity with an articulable connection to a procedure, health service or health service program, or research activity, so long as the individual involved is a part of the workforce of a Department-funded entity. This includes counseling, referral, training, and other arrangements for the procedure, health service, or research activity.[5]

Thus, this Proposed Rule shelters anyone whose work is Federally funded and touches upon healthcare, allowing them to prioritize their own values and beliefs above the well-being and equality of their patients.

## II. The Proposed Rule Contravenes Longstanding Antidiscrimination Principles

The values of religious liberty and antidiscrimination are both bedrock principles of the U.S. Constitution. These values work not in opposition but in concert to support a pluralistic society in which religious freedom and diversity are honored. Federal courts have regularly balanced religious liberty and equality, ensuring that no right is subjugated by the other. In *Anderson v. U.S.F. Logistics (IMC), Inc.*, 274 F.3d 470, 476 (7th Cir. 2001), the Seventh Circuit found that there was no absolute right to say "Have a Blessed Day" to clients who voice an objection to the phrase. In *Wilson v. U.S. W. Commc'ns*, 58 F.3d 1337, 1342 (8th Cir. 1995), the Eighth Circuit determined that no absolute right to wear a graphic and religiously-motivated anti-abortion button in an office existed when it upset coworkers. And in *United States v. Lee*, 455 U.S. 252, 261 (1982), the Supreme Court held that "When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity." By undermining the antidiscrimination principles that courts routinely rely on to carefully harmonize religious liberty and antidiscrimination, this Proposed Rule weakens religious liberty protections, particularly for minority communities, who regularly rely on such safeguards to ensure equal treatment.

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[4] *Id.* at 3892.
[5] *See generally*, *id.*

History makes clear that arguments seeking to undermine antidiscrimination principles in the name of "religious liberty" often reflect bigotry and injustice. As recently as 1983, Bob Jones University, an Evangelical institution, effectuated a racially discriminatory policy based on their religious belief that the Bible forbade interracial dating and marriage.[6] In 1867, the Pennsylvania Supreme Court upheld segregated railway cars because "following the order of Divine Providence, human authority ought not to compel these widely separated races to intermix….it is not prejudice, nor caste, nor injustice of any kind, but simply to suffer men to follow the law of races established by the Creator himself."[7] In writing a 1959 lower court opinion for *Loving v. Virginia*, a federal judge upheld anti-miscegenation laws, drawing support for his decision from his faith, writing, "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix."[8] Politicians continued to rely on the Bible's Old Testament to oppose civil rights laws at the very height of the civil rights movement.[9] In light of this stark history, federal agencies should pay particular attention to policies like the Proposed Rule to ensure that "religious liberty" is not brandished as a bludgeon of oppression or as a shield for discrimination.

## III. Conclusion

As discussed above, this Proposed Rule conflicts with fundamental American values, and cannot be reconciled with longstanding antidiscrimination law and precedent. For these reasons, we ask that HHS rescind the Proposed Rule.

Please do not hesitate to let us know if we can provide any further information regarding our concerns. You may contact us directly at nimra@muslimadvocates.org or (202) 897-2564.

Sincerely,

Nimra H. Azmi
*Staff Attorney*
Muslim Advocates

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[6] *See Bob Jones Univ. v. United States*, 580, 103 S. Ct. 2017, 2022 (1983).
[7] *W. Chester & P. R. Co. v. Miles*, 55 Pa. 209, 213 (1867).
[8] *Loving v. Virginia*, 87 S. Ct. 1817, 1819 (1967) (quoting Circuit Court, Caroline County opinion of Leon M. Bazile, J.).
[9] *See, e.g.,* 110 Cong. Rec. 13,206-08 (1964).