



April 28, 2022

EO 12866 Meeting  
U.S. Office of Information and Regulatory Affairs (OIRA)  
Christine Pratt,  
Counsel, First Liberty Institute

**Re: Nondiscrimination in Health Programs and Activities—RIN: 945-AA17**

First Liberty Institute (“First Liberty”) appreciates this opportunity to provide comments on OIRA’s review of the U.S. Department of Health and Human Services’ (HHS’) rule entitled “Nondiscrimination in Health Programs and Activities” (“2022 Section 1557 Rule”).

We are a nonprofit, public interest law firm dedicated to defending religious liberty for all Americans through pro bono legal representation of individuals and institutions of diverse faiths—Catholic, Protestant, Islamic, Jewish, the Falun Gong, Native American religious practitioners, and others. For over thirty years, First Liberty attorneys have worked to defend religious freedom before the courts, including the Supreme Court.

Current and former First Liberty clients include health care professionals and organizations who seek to exercise their conscience or religious freedom rights in their important work.

First Liberty wishes to raise the following four points:

**1. Any supposed benefits of promulgating this rule will fail to outweigh the significant costs this rulemaking will impose on health care workers and organizations.**

- a. We anticipate HHS, in its 2022 Section 1557 Rule, will mandate that health care workers and organizations—including religious health care workers and organizations—perform “gender-affirming” medical care, as it did in the 2016 Rule. If this year’s Section 1557 rulemaking is similar to the 2016 rulemaking, it will substantially burden religious exercise.
- b. First, HHS’s 1557 rules apply broadly. The 2016 Rule said that it would apply to “all” operations of covered entities operating a health program or activity, any part of which receives Federal funding. 81 Fed. Reg. 31,467 (May 18, 2016). HHS estimated the rule would apply to “almost all practicing physicians in the United States,” as well as over 133,000 hospitals, clinics, and other health care facilities, and approximately 180 insurers. *Id.* at 31,445-46.
- c. The 2016 Section 1557 Rule refused to import Title IX’s religious and abortion-neutrality exemptions.
- d. In sum, this rulemaking will apply to nearly all health care workers and a large swath of health care organizations, while refusing to exempt the large amount of health care workers and organizations that adhere to religious beliefs.

- e. A 2005 University of Chicago study found that 76% of doctors believe in God and 90% of doctors in the United States attend religious services at least occasionally, compared to 81% of all adults in the United States.<sup>1</sup> Doctors in family practice and pediatrics were far more likely to carry their religious beliefs into “all ... other dealings.”<sup>2</sup> Among physicians in the study, 55% reported that their religious beliefs influence how they practice medicine.<sup>3</sup>
- f. Research on religious beliefs about biological sex shows that most Abrahamic religions, including Judaism, Protestantism, Church of Jesus Christ of Latter Day Saints, Roman Catholicism, Eastern Orthodoxy, Christian Science, Jehovah’s Witness, Seventh Day Adventist, and Shia and Sunni Muslims, teach that individuals are “entrenched” in a “binary” biological sex.<sup>4</sup>
  - i. “So God created mankind in his own image, in the image of God he created them; male and female he created them.” Gen. 1:27 (New International Version)
  - ii. “And made of him a pair, the male and female.” Quran 75:39
  - iii. “Sex is first and foremost a spiritual and ontological reality created by God. Being male or female cannot be changed by human hands; sex is a category of God’s handiwork, his original and intended design.”<sup>5</sup>
  - iv. “Over the years, I have walked with men and women who struggle with their body, their identity. It’s often a painful journey. They feel isolated, trapped and despairing. We need to do all we can to help these individuals. But we can’t tell them drugs or surgery will bring their body in line with what they experience and feel. We can’t say the human body doesn’t matter when it matters greatly. The male body and the female body are beautifully and wonderfully made. They have inestimable value and dignity. To experience full beauty, we must appreciate both male and female, see their complementarity and difference, and celebrate both. We should be awed by this rather than trying to deny it, even the body and mind conflict.”<sup>6</sup>
- g. Buddhists “affirm egolessness” and “most of them also expect men and women to be different and to have different life plans and expectations.”<sup>7</sup>

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<sup>1</sup> <https://www.uchicagomedicine.org/forefront/news/survey-shows-that-physicians-are-more-religious-than-expected#:~:text=The%20survey%2C%20performed%20by%20researchers,81%20percent%20of%20all%20adults.>

<sup>2</sup> *Id.*

<sup>3</sup> <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1490160/>

<sup>4</sup> Marianne Campbell, Jordan D. Hinton, Joel R. Anderson, *A Systematic Review of the Relationship Between Religion and Attitudes Toward Transgender and Gender-Variant People*, Vol. 20, 1 INT’L J. TRANSGENDERISM 21-38 (Feb. 2019), <https://www.tandfonline.com/doi/full/10.1080/15532739.2018.1545149>.

<sup>5</sup> As described by one major Protestant church organization, this passage, and others in the Bible, explains that being created in the image of God, and being male or female, is essential to being human. See <https://www.thegospelcoalition.org/essay/gender-identity-and-sexual-orientation/>

<sup>6</sup> A Catholic priest and the President of a Catholic university, Father Dave Pivonka, who reportedly has helped men and women who struggle with their bodies and identities, expressed his religious beliefs about biological sex by stating, first, that everyone should do all they can do help individuals struggling with their bodies and identities, and second, that a person’s God-given sex cannot be wiped away with medical intervention. See <https://www.usatoday.com/story/opinion/voices/2022/04/28/transgender-athletes-conversations-university-president/7217994001/>

<sup>7</sup> [https://www.inquiringmind.com/article/2701\\_w\\_gross-how-clinging-to-gender-subverts-enlightenment/](https://www.inquiringmind.com/article/2701_w_gross-how-clinging-to-gender-subverts-enlightenment/)

- i. “A *pandaka* should not be given the full ordination. If it has been given, he should be expelled.” First Khandhaka, Mahkkhandhaka.
- ii. “*Pandaka* refers to male tranvestites and [effeminate] homosexuals... The scriptures describe the Buddha as expressing a compassionate attitude towards people who began to show cross-gender characteristics after ordination and to those who, while attracted to members of the same sex, were regarded as being physiologically and behaviourally true to the then prevailing cultural notions of masculinity. However, the Buddha opposed accepting into the *sangha* those who openly expressed cross-gender features at the time they presented for ordination. Volume Four of the *Vinaya* recounts a story of a *pandaka* who violated the clerical vow of celibacy and whose bad example led to a comprehensive ban on the ordination of *pandaka*.”<sup>8</sup>
- iii. “Clinging to gender identity and letting conventional ideas about gender dictate one’s life thus contradicts all central Buddhist teachings. One would then also have to contend that egolessness is gendered, which would be a self-contradictory, illogical proposition.”<sup>9</sup>
- h. The Baha’i religion prohibits sterilization procedures “unless needed for the preservation of the mother.”<sup>10</sup>
- i. Thus, for HHS to force all covered entities to provide “gender-affirming” care, HHS would be forcing tens of thousands of sincere, religious health care workers and organizations to choose between their faith and their medical career, which could decimate the healthcare industry.
- j. Religious and/or conscience beliefs about biological sex do not mean that religious health care workers and organizations cannot generally treat transgendered individuals.<sup>11</sup>
- k. If HHS discriminates against religious persons and organizations, HHS will impose psychological, emotional, and spiritual harm to health care workers and health care organizations who suffer the loss of their conscience and religious freedom rights.
- l. Religious people, including health care workers and organizations, must have the right to exercise their professional judgment about how to advise, speak about sex and gender, and perform medical interventions.
- m. By substantially burdening the religious exercise of health care workers and organizations, HHS will harm the availability of care for patients, which is already in crisis due to the government and hospital policies regarding the COVID-19 pandemic.

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<sup>8</sup> <http://buddhism.lib.ntu.edu.tw/museum/TAIWAN/md/md08-52.htm>.

<sup>9</sup> <https://www.shambhala.com/go-beyond-gender-excerpt-buddhism-beyond-gender/>

<sup>10</sup> <https://www.ncbi.nlm.nih.gov/books/NBK493216/>

<sup>11</sup> “We’re happy to provide compassionate and quality care for anybody that walks in the door as long as we don’t become morally complicit in something that violates our conscience,” said Dr. David Stevens, CEO of the Christian Medical & Dental Associations, which represents about 19,000 health care workers  
<https://www.npr.org/sections/health-shots/2019/05/09/721532255/whats-behind-a-rise-in-conscience-complaints-for-health-care-workers>

- n. A 2019 study found that 91% of health care workers surveyed would rather stop practicing medicine altogether than be forced to violate their conscience.<sup>12</sup>
- o. At the same time, religious beliefs help patients and health care workers alike find meaning in the experiences of illness and provide resources for coping with suffering.

**2. HHS should pause any regulatory actions regarding nondiscrimination requirements for the performance or assistance of abortions until the Supreme Court issues its decision in *Dobbs v. Women’s Health Organization* (U.S. No. 19-1392).**

- a. The 2016 Section 1557 Rule included “termination of pregnancy” within its definition of discrimination on the basis of sex.
- b. The first question presented in *Dobbs* is whether all pre-viability prohibitions on elective abortions are unconstitutional.
- c. The outcome in the *Dobbs* case will have a major impact on conscience and religious freedom rights in health care, since the requirements of at least one of the conscience statutes depends on the definition of what is a “lawful abortion.”
  - i. See, e.g., the Church Amendments, 42 U.S.C. § 300a-7(c), discussing discrimination against a person for performing or assisting in the performance of “lawful ... abortions.”
- d. HHS should pause any regulatory actions that affects the issue of abortion until the Court adjudicates this crucial matter.
- e. It would be a waste of resources for HHS to publish a regulation before knowing whether that regulation’s definitions conflict with a binding and imminent U.S. Supreme Court decision.
- f. Failing to wait on the U.S. Supreme Court’s *Dobbs* decision exposes HHS’s rule to legal challenges and subsequent invalidation by courts.

**3. HHS should pause regulatory action regarding nondiscrimination requirements affecting the use of pronouns before the U.S. Supreme Court decides *303 Creative v. Elenis* (U.S. No. 21-476).**

- a. The 2016 Section 1557 Rule required entities that receive Federal funding to “treat individuals consistent with their gender identity,” 81 Fed. Reg. 31,470 (May 18, 2016), which would require health care workers and organizations to speak only advice that affirms a person’s “internal sense of gender, which may be male, female, neither, or a combination of male and female, and which may be different from an individual’s sex assigned at birth.” *Id.* at 31,467. In *303 Creative*, the Supreme Court will decide the constitutionality of the government compelling speech on marriage and sexuality under the First Amendment.
- b. It would be a waste of resources for HHS to publish a regulation before knowing whether that regulation’s requirement that health care workers speak advice that must affirm a person’s gender identity in all situations conflicts with a binding and imminent U.S. Supreme Court decision.

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<sup>12</sup> [https://www.faithsteps.net/\\_files/ugd/b28fb3\\_0bbec87718e440e7ae8922ac35081241.pdf](https://www.faithsteps.net/_files/ugd/b28fb3_0bbec87718e440e7ae8922ac35081241.pdf)

- c. Failing to wait on the U.S. Supreme Court's *303 Creative* decision exposes HHS's rule to legal challenges and subsequent invalidation by courts.

**4. HHS should state in any Section 1557 Rule that it will apply Title IX's religious and abortion-neutrality exemptions.**

- a. HHS conspicuously omitted Title IX's religious and abortion-neutrality exemptions in its 2016 Section 1557 Rule. HHS should not repeat that omission in its 2022 Section 1557 Rule.
- b. To prohibit discrimination in federally funded or administered health programs or activities, Section 1557 of the ACA imports four preexisting civil rights statutes, including Title IX, which prohibits discrimination on the basis of sex. See 20 U.S.C. § 1681(a).
- c. Title IX provides two notable exemptions that protect the religious rights of both individuals and institutions:
  - i. Title IX is inapplicable "to an educational institution which is controlled by a religious organization" if the application of Title IX "would not be consistent with the religious tenets of such organization," 20 U.S.C. § 1681(a)(3), and
  - ii. Title IX cannot "require or prohibit any person, public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion." 20 U.S.C. § 1688.
- d. Previous versions of Section 1557 Rules imported applicable statutory exceptions for discrimination based on protected classes such as race, color, national origin, age, and disability, but HHS unjustifiably omitted Title IX's religious and abortion-neutrality exemptions in its 2016 Section 1557 Rule.
- e. If HHS imports Title IX's definitions and requirements, it must necessarily import Title IX's religious and abortion-neutrality exemptions. Failing to do so is arbitrary and capricious, and HHS lacks the authority to cherry-pick portions of Title IX that it prefers to enforce, while ignoring other portions it does not prefer to enforce.

**Conclusion**

We ask OIRA to assess the relevant costs that this regulation will impose on the American public. We also recommend that HHS pause any regulatory action until it receives the U.S. Supreme Court's decisions in *Dobbs* and *303 Creative*. We also ask that OIRA ensure that HHS fully complies with Federal law by stating explicitly in any Section 1557 rulemaking that HHS will follow Title IX's requirements, including its religious and abortion-neutrality exemptions. Thank you for considering these important matters.