Via Electronic Submission

October 3, 2022

U.S. Department of Health and Human Services, Office for Civil Rights
Attention: 1557 NPRM (RIN 0945-AA17)
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue SW
Washington, DC 20201

Re: Charlotte Lozier Institute Public Comment Pursuant to Notice of Proposed Rulemaking on Docket ID number HHS-OS-2022-0012

To Whom It May Concern:

The Charlotte Lozier Institute (CLI) respectfully submits the following comment in opposition to several abortion-related aspects of HHS–OS–2022–0012, the Notice of Proposed Rulemaking (NPRM) "Nondiscrimination in Health Programs and Activities," published by the Department of Health and Human Services (Department) in the Federal Register on August 4, 2022. The proposed rule reinterprets Section 1557 of the Affordable Care Act (ACA), which prohibits discrimination on the basis of race, color, national origin, age, disability, and sex in covered health programs or activities. (*See* 42 U.S.C. § 18116.)

The mission of Charlotte Lozier Institute is to promote deeper public understanding of the value of human life, motherhood, and fatherhood, and to identify policies and practices that will protect life and serve both women's health and family well-being. CLI submits this comment because it opposes the proposed change to the interpretation of Title IX's prohibition of discrimination "on the basis of sex," and Section 1557's incorporation of that prohibition, to include "termination of pregnancy," which we are concerned will be used to force healthcare providers to participate in the brutal and abhorrent practice of abortion. We further oppose the interpretation of Section 1557's incorporation of Title IX to exclude that law's longstanding religious exemption (*See* 20 U.S.C. § 1681(a)(3)) and its abortion-neutrality provision (*See* 20 U.S.C. § 1688), which protect the rights of healthcare providers and entities like doctors, nurses, and hospitals to refrain from involvement in abortion. (*See* Doerflinger, R. (2021), "The

'Equality Act': Threatening Life and Equality," *available at* https://lozierinstitute.org/the-equality-act-threatening-life-and-equality/ detailing the history and purpose of Title IX's religious exception and abortion-neutrality provision.)

I.) A Final Rule Must Clarify Intended Department Interpretation, Application, And Enforcement Of Vague Terms, Such As "Termination Of Pregnancy" And "Pregnancy Or Related Conditions.

First, we express concern that the proposed rule would alter Title IX's longstanding definition of "on the basis of sex" (incorporated by reference into Section 1557) to specifically include discrimination on the basis of "pregnancy or related conditions," which includes the "termination of pregnancy." The Department specifically seeks comment on this proposal in light of the Supreme Court's recent decision in *Dobbs v. Jackson Women's Health Organization* and Executive Order 14076 (*See* E.O 14076 entitled, "Protecting Access to Reproductive Healthcare Services," *available at* https://www.federalregister.gov/documents/2022/07/13/2022-15138/protecting-access-to-reproductive-healthcare-services.)

We are concerned about this redefinition for multiple reasons. CLI seeks Department clarity on the following:

> 1.) what the Department's intended interpretation, application, and enforcement of the NPRM's use of the phrase "termination of pregnancy" specifically entails; and,
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> 2.) whether the Department's intended interpretation, application, and enforcement of "termination of pregnancy" includes spontaneous termination of pregnancy (*i.e.*, miscarriage) and the treatment of miscarriage once the unborn baby has already died; and,
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> 3.) whether the Department's intended interpretation, application, and enforcement of "termination of pregnancy" includes life-saving treatment of women experiencing an ectopic pregnancy or placental abruption (that might result in the death of the unborn child); and,
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> 4.) whether the Department intends to interpret, apply, and enforce the phrase "termination of pregnancy," as contemplated in the proposed language, as to mean *intentional* termination of pregnancies with the goal of producing a dead baby (*i.e.*, induced abortion.)

That the Department intends interpretation (4) is supported by its reference to *Dobbs* and E.O. 14076; however, including abortion in "pregnancy-related conditions" is very troublesome, as induced abortion is not health care. (*See* CNS News, 9/29/2022, "OB-GYN: 'Abortion Neither

Prevents, Treats or Palliates Any Disease … It Is Therefore Not Health Care for the Mother or Her Fetus,'" *available at* https://cnsnews.com/article/washington/melanie-arter/ob-gyn-abortion-neither-prevents-treats-or-palliates-any-disease.)

In addition, it is the standard of care for any physician to intervene in a life-threatening pregnancy, and the medical indication for separating a mother from her unborn child should not be confused with an induced abortion. (*See* "Fact Sheet: Medical Indications for Separating a Mother and Her Unborn Child," *available at* https://lozierinstitute.org/fact-sheet-medical-indications-for-separating-a-mother-and-her-unborn-child/.) Life-saving care for pregnancy complications is already protected under every state pro-life law. (*See also* Skop, I. (2022). "Pro-Life Laws Protect Mom and Baby: Pregnant Women's Lives are Protected in All States," *available at* https://lozierinstitute.org/pro-life-laws-protect-mom-and-baby-pregnant-womens-lives-are-protected-in-all-states/.) The Department should clarify its intended interpretation and application of this vague, ambiguous, arbitrary, and capricious terminology in order to communicate exactly what the NPRM suggests constitutes discrimination "on the basis of sex."

CLI is concerned because the context of the NPRM suggests that the proposed rule is not intended merely to protect women who are experiencing miscarriage or ectopic pregnancies, but instead is intended to require expanded access to abortion services. This goal is evident in both the text of the President's recent E.O. and the text of the NPRM. President Biden signed E.O. 14076 in the wake of *Dobbs*, after which he signed an additional Executive Order, E.O. 14079, stating that "the continued advancement of restrictive abortion laws in States across the country has created legal uncertainty and disparate access to reproductive healthcare services depending on where a person lives, putting patients, providers, and third parties at risk and fueling confusion for hospitals and healthcare providers, including pharmacies" (*See* "Securing Access to Reproductive and Other Healthcare Services," *available at* https://www.federalregister.gov/documents/2022/08/11/2022-17420/securing-access-to-reproductive-and-other-healthcare-services.) Moreover, the NPRM states that this proposed definition is to ensure "nondiscriminatory access to care," which includes access to abortion services. (*See* NPRM *at* p. 47879.)

Such an interpretation of Section 1557's definition of discrimination "on the basis of sex" to include nondiscrimination in access to abortion services is *ultra vires*, going far beyond the statutory authority provided to the Secretary by Congressional charter. The antidiscrimination policies embodied in Title IX and Section 1557 are not mechanisms for providing a right to abortion disguised as "healthcare access." Indeed, in light of the Supreme Court's recent decision in *Dobbs v. Jackson Women's Health Org*. which held that the Constitution does not contain a "right to abortion," such an executive agency requirement is at odds with that decision's return of abortion law and policy to the people and their elected representatives. If

Congress intends to force health care providers to provide abortion, it should make clear its intent by specifically amending the Affordable Care Act or Title IX itself.

II.) The NPRM Incorrectly Interprets Section 1557 To Exclude Title IX's Religious Exemption And Abortion Neutrality Provision.

Second, the NPRM proposes to exclude Title IX's religious exemption and abortion neutrality provisions from incorporation into the Section 1557 regulation. The Department narrowly construes Section 1557's incorporation by reference of Title IX to include only what it claims is the prohibited basis for discrimination (i.e., sex) *but not* the exceptions set forth in Title IX.

A district court considering a previous version of the Section 1557 regulations, which interpreted Section 1557's scope of incorporation of Title IX similarly to the present NPRM, issued a nationwide injunction against it. In *Franciscan Alliance v. Burwell*, 227 F.Supp.3d 660 (2016), the court stated:

> Congress specifically included in the text of Section 1557 "20 U.S.C. 1681 et seq." That Congress included the signal "et seq.," which means "and the following," after the citation to Title IX can only mean Congress intended to incorporate the entire statutory structure, including the abortion and religious exemptions. Title IX prohibits discrimination on the basis of sex, but exempts from this prohibition entities controlled by a religious organization when the proscription would be inconsistent with its religious tenets. Title IX also categorically exempts any application that would require a covered entity to provide abortion or abortion-related services. Therefore, a religious organization refusing to act inconsistent with its religious tenets on the basis of sex does not discriminate on the ground prohibited by Title IX. Failure to incorporate Title IX's religious and abortion exemptions nullifies Congress's specific direction to prohibit only the ground proscribed by Title IX. That is not permitted.

Franciscan Alliance at 690-91 (internal citations and footnotes omitted.)

The Department disagrees with the conclusion of *Franciscan Alliance* and says that it is not bound by the decision. The NPRM does not explain why the reasoning of *Franciscan Alliance* is wrong; however, despite the NPRM's omitted explanation, a final rule should contemplate the Department's divergence from established jurisprudence. CLI queries how the Department's proposed interpretation can be reconciled with *Franciscan Alliance*'s clear rejection of the similar 2016 regulation.

Despite refusing to recognize Title IX's religious exemption, the Department seeks to reassure that it "is fully committed to respecting conscience and religious freedom laws when applying this rule, including an organization's assertion that the provisions of this rule conflict with their rights under federal conscience and religious freedom laws." (*See* NPRM *at* p. 47841.) Similarly, with respect to its exclusion of the abortion neutrality provision, the Department notes that "there are several other statutory and regulatory provisions related to the provision of abortions that may apply to an entity covered by Section 1557" and states that the OCR will apply these provisions consistent with the law. (*Id. at* p. 47879.) The Department specifically mentions the Weldon Amendment, the Coats-Snowe Amendment, and the Church Amendment.

The Department seeks comment on this approach (*i.e.*, relying on other federal religious and conscience protections rather than specifically incorporating Title IX's religious exception and abortion neutrality provision.) CLI expresses grave concern that expressions of generalized reliance are not sufficient to protect the religious and conscience rights of those who oppose the practice of abortion. First, Title IX clearly forbids use of its sex discrimination standard to force objecting entities to violate their religious beliefs *ab initio*. In contrast, the Religious Freedom Restoration Act (RFRA) is more general and provides a mechanism for a party who believes its religious beliefs have been violated to seek recourse. While protective in some respects, this latter approach requires litigation, which can be costly and time-consuming for the person or entity protecting its rights, and places a strain on judicial resources. In contrast, the Title IX religious exemption puts the burden on the Department not to burden those rights in the first place. CLI requests further explanation as to whether the Department's promised reliance on these other protections is a secure guard, given the Administration's commitment to passing the Women's Health Protection Act and the Equality Act, both of which would nullify RFRA as a defense against abortion mandates.

Moreover, the Department has signaled that it believes it has a compelling state interest and no alternate way to serve that interest that would better accommodate religious freedom, the standard which would satisfy a RFRA action. Tellingly, the NPRM states in contrast to Title IX and the educational context:

> [S]tudents and families typically make a choice to attend religious educational institutions, patients seeking health care are much more likely to be driven by considerations of availability, convenience, urgency, geography, cost, insurance network restrictions, and other factors unrelated to the question of whether the health care provider is controlled by or affiliated with a religious organization. There are an increasing number of communities in the United States with limited options to access health care from non-religiously affiliated health care providers. As a practical matter, then, many patients and their families may have little or no choice about where to seek care, particularly in exigent circumstances, or in cases

> where the quality or range of care may vary dramatically among providers. Moreover, health care consumers are not always aware that the health care entities from which they seek care may be limited in the care they provide. Incorporation of Title IX's religious exception would therefore seriously compromise Congress's principal objective in the ACA of increasing access to health care.

NPRM *at* p. 47840-1.

This alleged disjunction between educational and health care institutions is unconvincing. Under the Common Rule of 2000, Title IX (including its abortion exclusion) already applies to agencies which provide health care such as the Department of Veterans Affairs. In fact, the situation that led Congress to realize the need for an abortion-neutral amendment was one involving students at the University of California who objected to paying student health fees for a student health care service elective abortions – only to be told, among other things, that the university was required to provide abortions by Title IX.

In any case, the Department's argument on this point suggests that it believes there is a compelling state interest to force healthcare providers to provide abortion services in order to prevent "discrimination." It also suggests that the Department's position is that the religious and conscience rights of providers ought not be respected if patients happen to be unaware of the provider's religious or ethical commitments. In short, it seems that any claim under RFRA will be opposed in court by the Department. CLI requests clarification of the Department's view of the extent of protection existing federal religious and conscience protections would provide and an explanation of why Title IX's explicit religious exemption is not also required to provide robust protection to healthcare providers.

III. The NPRM Relies On An Erroneous Interpretation Of EMTALA To Justify Excluding Title IX's Abortion Neutrality Provision From Section 1557.

The Department's claim that the abortion-neutral amendment is not part of the "basis" for interpreting the meaning of "discrimination on the basis of sex" is arbitrary and unconvincing. That amendment reads: "***Nothing in this chapter shall be construed*** *to* require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion" (emphasis added). The statute could not be clearer. Nothing, whether its definitions or operative provisions, can be construed to require involvement in abortion. This amendment straightforwardly clarified and effectively narrowed *on what basis* a legal action can be brought.

The Department further signals that it believes individuals have a right to abortion, regardless of a healthcare provider's objection, because in explaining why Section 1557 should not be

interpreted to incorporate the abortion neutrality provision, the Department invokes the Emergency Medical Treatment and Active Labor Act (EMTALA) to require hospitals to provide abortions. The Department states that if a person has an "'emergency medical condition', the hospital must provide available stabilizing treatment, *including abortion*, or an appropriate transfer to another hospital that has the capabilities to provide available stabilizing treatment, notwithstanding any directly conflicting state laws or mandate that might otherwise prohibit or prevent such treatment." (*See* NPRM *at* p. 47879, *emphasis added.*)

There is a significant legal question as to whether this is a correct interpretation of EMTALA. It is the position of CLI that this is a grievously erroneous interpretation of EMTALA and contrary to the statute's plain language, which requires healthcare providers to protect *both* the mother and the unborn child. (*See* 42 U.S.C. § 1395dd(e)(1)(i); s*ee also* "Pro-Life Laws Protect Mom and Baby: Pregnant Women's Lives are Protected in All States," *available at* https://lozierinstitute.org/pro-life-laws-protect-mom-and-baby-pregnant-womens-lives-are-protected-in-all-states/.) The Department's interpretation has been rejected by at least one district court. (*See State of Texas v. Becerra et al, No. 5:2022cv00185 - Document 73 (N.D. Tex. 2022).)* CLI asks the Department to explain its intended interpretation of EMTALA in light of ongoing litigation, and to clarify whether healthcare providers that provide life-saving care to mothers, but not direct abortions, will be subject to enforcement actions under Section 1557.

In conclusion, it is true that Americans need and want access to quality healthcare providers, and Section 1557 is meant to ensure that access is provided in a fair, nondiscriminatory manner. But by failing to protect the religious and conscience beliefs that motivate many healthcare providers, especially related to protection of mothers and unborn children, the Department risks jeopardizing its own goal of patient access to care. At a time when our nation needs more, not fewer, healthcare professionals and facilities to provide treatment and preventative, palliative and rehabilitative care for life-threatening health complications forcing providers to participate in abortion and other services in violation of their conscience will drive providers out of the medical field, resulting in less care for patients. Indeed, the Department acknowledges this, by noting that in many areas a religious health care entity is the only one willing and able to serve the population's need for lifesaving care. If the Department intends to drive these providers from the health care field, its action will reduce access to needed health care, not enhance it.

Additionally, many Americans prefer to receive care from a provider who shares their religious views or their life-affirming perspective on the dignity of unborn life. Although the proposed regulation seeks to assure faith-based or pro-life health care providers that the Department will follow existing laws, those assurances ring hollow. The Department's proposal to explicitly exclude Title IX's religious exemption and abortion neutrality provisions from the scope of Section 1557 clearly communicates that its finger is on the scale of unfettered access to abortion - at the expense of those healthcare providers that have genuine religious or moral objections.

The Department's effort to redefine health care and, in particular, protections for pregnant women, to include abortion is of the utmost concern. Abortion is not health care, but the taking of innocent and vulnerable human life. We must ensure that healthcare providers are allowed to continue providing life-affirming care to all Americans, and that they are not forced to perform abortions under the guise of "health care" or "nondiscrimination." Therefore, the Charlotte Lozier Institute opposes the provisions of the proposed rule including "termination of pregnancy" in the definition of discrimination "on the basis of sex," as well as the exclusion of longstanding protections for healthcare providers and entities that refuse to participate in abortion.

Respectfully submitted,

Charlotte Lozier Institute