To: Health and Human Services Department (HHS), Office for Global Affairs, Office of the Secretary
Document Number: 2023-28341 | RIN: 0955-AA03
From: Prof. William Wagner & Katherine Bussard
Date: January 21, 2024

Re: **Notice and Request for Comments on the Implications of Access and Benefit Sharing (ABS) Commitments/Regimes and Other Proposed Commitments Being Considered Under a WHO Convention, Agreement or Other International Instrument on Pandemic Prevention, Preparedness and Response**, 88 Fed. Reg. 88637 (December 22, 2023)

## INTRODUCTION

William Wagner holds the academic rank of Distinguished Professor Emeritus (Law). He served on the faculty at the University of Florida and Western Michigan University Cooley Law School, where he taught Constitutional Law and Ethics. He currently holds the Faith and Freedom Center Distinguished Chair at Spring Arbor University. Before joining academia, he served as a Senior Advisor in the United States Department of State; a federal judge in the United States Courts, Senior Assistant United States Attorney in the Department of Justice, and as a Legal Counsel in the United States Senate. He is also the Founder and President Emeritus of the Great Lakes Justice Center.

Katherine Bussard is the Chief Operating Officer of Salt and Light Global, an American faith-based nonprofit that works to uphold good governance around the world. Before entering the private sector, Katherine served as Mayor of her city and worked as a municipal economic development director.

We respectfully submit the following comments and concerns regarding the proposed World Health Organization (WHO) Convention, Agreement or Other International Instrument on Pandemic Prevention, with specific concern to the ABS Commitment proposal. While there are vital lessons to learn from the Covid-19 global pandemic and many areas where government can improve access and benefit sharing, we contend that entering into an international agreement is the wrong way for the United States to achieve the desired results. Key points of concern include the proposal's incompatibility with U.S. constitutional governance that could negatively impact healthcare delivery and patient outcomes.

## GOOD GOVERNANCE & CONSTITUTIONALITY CONCERNS

The World Health Organization's (WHO) *Proposal for Negotiating Text of the WHO Pandemic Agreement* violates principles of Good Governance.

The plain meaning of the words of the "proposal for negotiating text of the WHO Pandemic Agreement" establishes an international "Conference of the Parties" where unelected and politically unaccountable international authorities decide serious matters of healthcare in the place of elected representatives of the people.

Article VI, Clause 2, of the U.S. Constitution says:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and *all Treaties made*, or which shall be made, under the Authority of the United States, *shall be the supreme Law of the Land*; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Article II, Section 2, Clause 2 provides that

> [The President] shall have Power, by and *with the Advice and Consent of the Senate*, to make Treaties, provided two thirds of the Senators present concur

Nowhere in the Constitution is any power delegated to the Federal Government to regulate healthcare. The Tenth Amendment to the Constitution provides in such situation that

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, *are reserved to the States respectively, or to the people.*

Moreover, Article IV, Section 4 of the Constitution states, "The United States shall guarantee to every state in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence." In a republican form of government, laws are made by representatives chosen by the people and not by unelected bureaucrats or international bodies. That is why the power to regulate health care and the practice of medicine fall to the 50 state governments. This is why when you visit your physician, that the license to practice medicine hanging on the wall is issued by the state and not the federal government (or the WHO).

If the Parties ultimately negotiate a Treaty, it becomes the Supreme Law of the Land upon ratification by the U.S. Senate, thus usurping governance of healthcare policy by the 50 state governments. Perhaps that is the nefarious intent of the instant proposal seeking comment, given that it also expressly seeks alternatively to negotiate other means of binding the United States, which bypass the constitutional treaty requirements. To be sure, those proposing the new international instrument make clear they intend that it be legally binding,

> …It is a general principle of international law that once an international law instrument is in force, it would be binding on the parties to it, and would have to be performed by those parties in "good faith.[1]

Moreover, the negotiating text deems that the parties "*shall*" 183 times. Thus, international policy and its yet unspecified enforcement mechanisms will be determined by representatives from other nations. If the proponents mean what they say here, then under such a regime any disputes between member states would be adjudicated at the Hague.

While the proposed negotiating text of the WHO Pandemic Agreement gives lip-service to recognizing national sovereignty in an introductory General Principles section, the actual language of the rest of the document wholly undermines that principle as constitutionally understood in the context of healthcare policymaking in the United States of America.

James Madison expressed his wonder at the considerable extent to which the Philadelphia Convention reached agreement on the Constitution with these words: "It is impossible for the man of pious reflection not to perceive in it, a finger of that Almighty hand which has been so frequently and signally extended to our belief in the critical stages of the revolution."[2] Indeed, the Constitution's adoption was the people's acceptance of a moral view of government. The right and natural sovereign authority the Constitution provides for these United States, as a part of that moral view, ought not to be disturbed. It is apparent throughout *The Federalist* that the United States Constitution was written with a particular view in mind of ordinary principles of causality–that certain motives and opportunities of constituent interests ought (in view

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[1] "Pandemic prevention, preparedness and response accord Q &A" World Health Organization, June 28, 2023 https://www.who.int/news-room/questions-and-answers/item/pandemic-prevention--preparedness-and-response-accord

[2] *The Federalist* No. 37 at 236-238 (J.E. Cooke ed., 1961).

of the nature of man) to be treated by certain forms of government. The submission of the people of the United States to an international rule of decision to which the people's elected representatives have not on their own submitted them is no part of those Constitutional principles. This is especially so if the instrument is an executive agreement or some other international instrument that is not a treaty ratified by the United States Senate.

## INCOMPATIBILITY OF AMERICAN GOVERNMENTAL VALUES

While the form of the proposal presents constitutional problems, the policies of the proposal are equally troubling. The proposed agreement contains sweeping, egregious policy reforms to transparency and governmental information sharing, a "One Health" directive that values human life as though it had no more worth than plant or animal life, and would necessarily align our health policy *during and between* pandemics with WHO polices, including policies that contradict U.S. law. There are countless problems with this that merit further exploration:

REGARDING TRANSPARENCY, the supplementary information provided by HHS references key outcomes the United States is seeking as a participant in WHO's intergovernmental negotiating body (INB). These include creating an instrument that will, "Ensure that all countries share data and laboratory samples from emerging outbreaks quickly, safely, and *transparently* to facilitate response efforts and inform public health decision making..."[3] Governmental transparency is a core value for any self-governing people. All levels of American government operate under a wide variety of "Sunshine" laws, including, but not limited to, Freedom of Information Acts, open public meetings, and even First Amendment protections of free speech and the press. This level of public transparency is foundational in the U.S. system of government but remains a rather unique priority within the international community. In fact, this priority directly contrasts with the values of the WHO and their proposed pandemic agreement, in its current form. Article 1 (C) of the proposed agreement currently manufactures a new term, stating that an "infodemic" means too much information,"

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[3] "Notice and Request for Comments on the Implications of Access and Benefit Sharing (ABS) Commitments/Regimes and Other Proposed Commitments Being Considered Under a WHO Convention, Agreement or Other International Instrument on Pandemic Prevention, Preparedness and Response." Heath and Human Services Department; published on the Federal Register, December 22, 2023. https://www.federalregister.gov/documents/2023/12/22/2023-28341/notice-and-request-for-comments-on-the-implications-of-access-and-benefit-sharing-abs?utm_campaign=subscriptioncenter&utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=

which the WHO deems "can harm health. It also leads to mistrust in health authorities and undermines public health and social measures."[4] The proposal goes on to detail in Article 9, Section 2 (D), that all signatory parties shall promote…strategies… including infodemic management, at local, national, regional and international levels."[5] Does not this proposal fly in the face of fundamental protections of free speech and a free press, as well as the broader value of governmental transparency? If adopted as proposed, does not this agreement chill free speech and the free press while potentially withholding relevant medical information from U.S. citizens and healthcare providers? Medical arts and science flourish in environments where information and innovations in care can be freely shared. Especially during a pandemic, restricting that free exchange of information could severely harm patient outcomes or even extend the length of the pandemic. Censorship and regulation have immense potential to retard lifesaving innovations and medical progress. The government of a free, self-governing people must not censure speech or the free flow of information its citizens. Rather, empowering people with transparent, open communication allows them to make informed decisions and create innovations that benefit society as a whole.

REGARDING THE VALUE OF HUMAN LIFE, it is clear that the WHO promotes values diametrically opposed to the value of human life held by western culture for millennia and the U.S. government since its inception. Article 5 of the proposed agreement implements a "One Health" policy that regards the health of human beings as equal to mere animals and plants, and requires that all member states "commit to promote and implement" the same approach.[6] Section 2 of Article 5 national and international cooperation "in order to identify and conduct risk assessments at the interface between human, animal and environment ecosystems, while recognizing their interdependence, and with applicable sharing of the benefits"[7] in keeping with the "equity" practices of Article 9 and 12. Does this mean that governments would be required to divert equitable efforts to sustain plant and animal life, even at the expenses of providing care to human beings? Article 5 further calls for "harmonization of surveillance", "community surveillance", "whole-of-government and whole-of-society approaches" to inter-species equity, and "produce[ing] science-based evidence, including that which is related to social and behavioural sciences, and risk communication and community engagement." Rather than prioritizing human health, safety, and care, this policy provides for redistribution of health care assists among nations and species in a way

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[4] *Proposal for Negotiating Text of the WHO Pandemic Agreement*, World Health Organization, October 30, 2023. https://apps.who.int/gb/inb/pdf_files/inb7/A_INB7_3-en.pdf. Page 5.
[5] Ibid. Pages 12-13.
[6] *Proposal for Negotiating Text of the WHO Pandemic Agreement*, World Health Organization, October 30, 2023. https://apps.who.int/gb/inb/pdf_files/inb7/A_INB7_3-en.pdf. Page 9
[7] Ibid.

that devalues human life and tramples limited government, patient privacy, and individual liberty.

Another concern is that the WHO deems ending human life to be a "human right" in some circumstances, while our laws regard human life as worthy of governmental protection. This is especially evident concerning reproduction and abortion policies. The WHO specifies, "Quality abortion care must be both accessible (timely, affordable, geographically reachable, and provided in a setting where skills and resources are appropriate to medical need) and acceptable (incorporating the preferences and values of individual service users and the cultures of their communities)."[8] However, in *Dobbs V. Jackson Women's Health Organization*, the U.S. Supreme Court held that: "The Constitution does not confer a right to abortion;…the authority to regulate abortion is returned to the people and their elected representatives."[9] Currently, 21 states prohibit or restrict abortion during the early weeks of a pregnancy.[10] Those states have a constitutionally protected right to pass such regulations protecting human life, but the proposed agreement would give WHO health policy equal or superior standing, creating an inherent legal conflict. There are numerous other examples where WHO policies and procedures do not compliment or support our laws or medical best practices. One size fits all solutions rarely work, and when instituted on a global level, such solutions could prove nothing short of catastrophic.

## CONCLUSION

In conclusion, freedom and voluntary cooperation is the best method for facilitating response efforts, including the rapid creation and equitable deployment of safe and effective vaccines, diagnostic tests, and treatments. The policies of the current negotiating text are rife with issues of constitutionality, good governance and transparency that will harm patient outcomes in America and around the world. Rather than becoming a signatory party, the U.S. government should promote voluntary international participation, including optimizing opportunities for non-profits who already have global infrastructure, like the Red Cross, Samaritan's Purse, etc. They could focus on improving domestic intergovernmental emergency communication and information sharing, integrating federal, state, county, township, and municipal datapoints and items requiring emergency service attention to more effectively manage resources while reporting and addressing shortfalls. They should further optimize transparent information sharing to empower citizens and medical scientists to make

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[8] *Abortion Care Guideline*. Geneva: World Health Organization; 2022. Licence: CC BY-NC-SA 3.0 IGO.
[9] *Dobbs* v. *Jackson Women's Health Organization,* 597 U. S. ___ (2022) Pp. 8—79.
[10] "Tracking Abortion Bans Across the Country." *The New York Times*, January 8, 2024. https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html

their own fact-based decisions, when upholding public policy that preserves constitutional protections for personal liberty.

Thank you for your consideration on this important matter.

Respectfully,

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