To: Office for Civil Rights, U.S. Department of Health and Human Services - and -
Office of the Assistant Secretary for Financial Resources, U.S. Department of Health and Human Services

Docket ID number HHS-OCR-2023-0011
Regulation Identifier Number 0945-AA19

From: Thomas More Society, 309 W. Washington Street, Suite 1250, Chicago, IL 60606
Christian Legal Society, 8001 Braddock Road, Suite 302, Springfield, VA 22151
National Association of Evangelicals, Post Office Box 23269, Washington, DC 20026
Institutional Religious Freedom Alliance, a division of the Center for Public Justice, 1305 Leslie Avenue, Alexandria, VA 22301

Date: Tuesday, September 5, 2023

RE: **Health and Human Service Grants Regulation; Proposed Rule to Advance Nondiscrimination in Health and Human Service Programs for LGBTQI+ Community** (July 13, 2023)

[*]Submitted electronically via Federal Rulemaking Portal: https://regulations.gov
[*]Format: Microsoft Word

On behalf of the above-named organizations, we submit the following Comments to the Notice of Proposed Rulemaking ["NPRM"] concerning **Health and Human Service Grants Regulation**.

The NPRM was first published as part of a press release issued Tuesday, July 11, 2023, and appeared at 88 Fed. Reg. 44750 to 44760 on Thursday, July 13, 2023 [“2023 NPRM”].

The 2023 NPRM proposes to repromulgate provisions of the Uniform Administrative Requirements, 45 CFR part 75, set forth in the rule published at 81 Fed. Reg. 89393 (December 12, 2016) [“2016 Rule”]. The 2016 Rule went into effect on January 11, 2017, but then was subjected to an HHS Notice of Nonenforcement on November 19, 2019. 84 Fed. Reg. 63809. On the same day, HHS issued a NPRM proposing revisions to the 2016 Rule. 84 Fed. Reg. 63831. The final revised rule [“2021 Rule”] was published on January 12, 2021. 86 Fed. Reg. 2257. However, it never went into effect because it was almost immediately the subject of a lawsuit. *See* Facing Foster Care et al. v. HHS, 21-cv-00308 (D.D.C., filed February 2, 2021). On June 29, 2022, the district court in *Facing Foster Care* vacated and remanded to HHS those subsections of the 2021 Rule that would have amended 45 CFR 75.101(f), 75.300(c), and 75.300(d).

QUESTIONS ADDRESSED:

- The 2023 NPRM proposes to omit the provision of the 2016 and 2021 Rules that appeared at 45 CFR 75.101(f). HHS also proposes to retain paragraphs 45 CFR 75.300(a) and (b) as they appeared in the 2016 Rule. We have Comments below on omitting 45 CFR 75.101(f) and retaining 45 CFR 75.300(a).

- The 2023 NPRM proposes to amend and then repromulgate 45 CFR 75.300(c) and (d). We have Comments below on amending and retaining 45 CFR 75.300(c) and (d).

- The 2023 NPRM proposes to add new subsections 45 CFR 75.300(e), 75.300(f), and 75.300(g). We have Comments below on adding new subsections 45 CFR 75.300(e) and (f).

- In responding to requests for Religious Freedom Restoration Act [“RFRA”] exemptions, as well as in securing rights under the First Amendment, there arises the possibility of incidental harm to third parties. We respond below to HHS’s request for Comments on accounting for such incidental harm when accommodating the right to religious freedom.

POINT I: 45 CFR 75.101(f).

Title 45 CFR 75.101(f)[1] should be retained. Given the tortured history of 45 CFR part 75, subsection 75.101(f) is helpfully clarifying. It makes explicit that 45 CFR 75.300(c) does not subject the Temporary Assistance for Needy Families [“TANF”] Program, 42 USC 601 to 619, to a requirement of nondiscrimination against beneficiaries on the basis of sexual orientation or

[1] Existing 45 CFR 75.101(f) provides: “Section 75.300(c) does not apply to the Temporary Assistance for Needy Families Program (title IV-A of the Social Security Act. 42 U.S.C. 601-619).”

gender identity. This safe harbor from the effect of subsection 75.300(c) is implicit in the statutes governing TANF, in which Congress expressly applied four nondiscrimination statutes to TANF recipients, none of which identifies sex as a protected characteristic. *See* 42 USC 608(d) (listing four civil rights acts pertaining to the protected classes of age, disability, race, color, and national origin). Sex is therefore not a protected class within the TANF program, nor indeed is sexual orientation or gender identity.

Subsection 75.101(f) makes clear an interpretive principle that underlies our succeeding Comments: that Congress's express provision for certain protected classes (in this case, within TANF) means that other, unenumerated characteristics are *not* the subject of nondiscrimination policies.

Because other provisions of the 2023 NPRM propose to redefine and expand the scope of nondiscrimination policies on the basis of "sex," subsection 75.101(f)'s importance is compounded; it is now even more urgent that those administering TANF know that the novel nondiscrimination categories of sexual orientation and gender identity do not apply within that program.

POINT II: 45 CFR 75.300(a) and 75.300(c) (declaring "public policy").

We oppose retaining 45 CFR 75.300(a) from the 2016 Rule,[2] and we oppose amending and then repromulgating 45 CFR 75.300(c) from the 2021 Rule.

<u>45 CFR 75.300(a)</u>: To the extent that this subsection arrogates to HHS authority to declare and implement all "public policy," it should be stricken. HHS has no authority to declare the "public policy" of the United States of America, nor to implement every public policy articulated by the United States.

The declaration of public policy is the task of a deliberative body, herein Congress, that enacts legislation that is subject to bicameralism and veto, and whose members are from time-to-time accountable for such legislation by having to stand for popular election. Legislative declarations of public policy are subject to definitive interpretation by the judicial branch and implementation by the executive.

HHS is a mere executive agency; it is not populated with elected officials directly accountable to the people. HHS has only limited implementation authority properly delegated to it by Congress. When Congress exercises discretion to do so, it delegates authority to an executive

[2] Existing 45 CFR 75.300(a) provides: "The Federal awarding agency must manage and administer the Federal award in a manner so as to ensure 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. The Federal awarding agency must communicate to the non-Federal entity all relevant public policy requirements, including those in general appropriations provisions, and incorporate them either directly or by reference in the terms and conditions of the Federal award."

agency by a statute clearly setting forth any "public policy" to be implemented. HHS must act in accord with such an expressed and palpable congressional delegation to it specifically, not in accord with its own interpretation of something as amorphous and unbounded as "public policy." *See* Nat'l Ass'n for Advancement of Colored People v. Fed. Power Comm'n, 425 U.S. 662, 669 (1976) ("the use of the words 'public interest' in a regulatory statute is not a broad license to promote the general public welfare").

To have an executive branch agency pronouncing "public policy" unilaterally, then imposing its interpretation on private entities, as HHS purports to do in subsection 75.300(a), is both illegal and dangerous. That HHS does not recognize any constitutional limits on its mandate is suggested by subsection 75.300(a)'s public policy examples of "protecting the public welfare [and] the environment"—one category so nebulous as to exclude nothing, and the other a vast and technical area committed to the expertise of other government agencies.

The case of Bob Jones University v. United States, 461 U.S. 574 (1983), is not to the contrary. There, Congress endorsed the Internal Revenue Service's ["IRS"] interpretation of the word "charitable" as excluding organizations that engaged in racial discrimination in education, because such discrimination contravened "public policy." In order to uphold the IRS's interpretation of "public policy," the Court enumerated decades of legislative, judicial, and executive pronouncements that "add[ed] up to a firm public policy on racial discrimination," "declared" by "all three branches of Government." *Id.* at 598. In other words, the Court found that the IRS's interpretation of "public policy" was correct because it accurately reflected legislative enactments and related judicial precedents and executive practices, rather than stemming from the IRS's own understanding of what would serve the public. The IRS was not at liberty to unilaterally pronounce what was contrary to "public policy" and thus no longer "charitable" within the meaning of a tax-exempt organization.

Here, subsection 75.300(a) should be stricken because HHS claims therein the authority to declare and implement the entire universe of "public policy" without any authorization to do so.

45 CFR 75.300(c): Presumably 45 CFR 75.300(a) and (c) are meant to work together. However, where subsection 75.300(a) lacked legal grounding, subsection 75.300(c) has so much legal grounding it is nugatory. HHS does not need to declare something contrary to "public policy" if it contravenes federal statute.

This subsection should be stricken. If it is stricken, then subsection 75.101(f), which clarifies this subsection's inapplicability to TANF, can also be stricken. We additionally note that these two strikes would have the virtue of reducing the aggregate number of overall regulations—always a laudable goal.

POINT III: 45 CFR 75.300(d) (judicial precedent).
We oppose repromulgation of 45 CFR 75.300(d) from the 2021 Rule for similar reasons. The proposed rule states a simple truism: HHS must follow decisions of the Supreme Court of the United States. Stating such simplicities is unnecessary and can be pernicious. A reader, presuming regulations have something new and meaningful to contribute, might read into the rule something that is not there.

An interesting and more helpful question that could be resolved by rule making is how HHS will apply past court decisions to new disputes with grant recipients raising different but related questions. Additionally, because there are so few cases decided at the Supreme Court level, it would be helpful for recipients to know if HHS intends to comply with a decision by one federal circuit court in all the other federal circuits. But proposed subsection 75.300(d) is devoid of any such guidance. Rather, this proposed rule appears to be an artifact of the prior version of subsection 75.300(d) that spoke to *Windsor* and *Obergefell*.

This subsection should be stricken as both superfluous and likely pernicious.

POINT IV: 45 CFR 75.300(e) (errant addition of "sexual orientation" and "gender identity").
We oppose 45 CFR 75.300(e), which imposes on recipients of HHS funding, whether secular or religious, a duty to not discriminate against beneficiaries on the bases of sexual orientation and gender identity in (at least)[3] 13 listed programs.

(A) By its terms, Bostock *is expressly limited to Title VII.*

In Bostock v. Clayton County, 140 S. Ct. 1731 (2020), the Supreme Court of the United States resolved a discrete legal question: whether Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination "because of . . . sex," prohibits an employer from firing someone simply for being homosexual or transgender. *Id.* at 1738-39. The Court answered this question in the affirmative. The majority explained that Title VII's "because of . . . sex" text incorporates a "but for" causation standard. So long as "sex" was one "but for" cause of an employee's termination, that was sufficient to state a prima facie case under Title VII. *Id.* at 1739. The Court further explained that "sex" refers to the biological distinctions between males and females. *Id.* Taken together, the Court believed "[a]n employer violates Title VII when it intentionally fires an individual employee based in part on [biological] sex." *Id.* at 1741. The majority went on to reason that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Id.* "[H]omosexuality and transgender status are inextricably bound up with sex" because "to discriminate on these grounds requires an employer to intentionally treat individual employees

[3] The proposed rule reads: "Paragraph (e) applies to the following [congressional acts] that prohibit discrimination on the basis of sex . . . ." It thereby fails to clarify whether the 13 listed programs are the only such programs to which the interpretive rule in *Bostock* applies per 45 CFR 75.300(e), or if there might be additional programs that are not yet listed.

differently because of their [biological] sex." *Id.* at 1742. It follows that under Title VII, as a prima facie matter, "employers are prohibited from firing employees on the basis of homosexuality or transgender status." *Id.* at 1753.

The *Bostock* Court was careful to stress the narrowness of its opinion. *Id.* In particular, its holding did not "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination," nor did the high Court's decision "purport to address bathrooms, locker rooms, [dress codes,] or anything else of the kind." *Id.* The Court expressly declined to "prejudge" any laws or issues not before it, observing instead that "[w]hether policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases." *Id.* With respect to doctrines protecting religious liberty, their interaction with rules of nondiscrimination were "questions for future cases." *Id.* at 1754 n.24.

Justice Gorsuch wrote for the *Bostock* majority in the 5-4 decision. His textual literalism led him to a purely semantic construction of the word "sex." Because "sexual orientation" and "gender identity" cannot be defined without use of the word sex, he reasoned, and because Title VII had previously been held to employ a but-for rule of causation, Justice Gorsuch interpreted the word "sex" to necessarily include one's sexual orientation and gender identity. Moreover, the holding was reached without any regard for the universally agreed upon fact that Congress had no such meaning in mind for "sex" when Title VII was enacted in 1964.

At this writing, it is unknown if the Supreme Court will follow the bare textualism of *Bostock* in interpreting the protected classes in the 13 statutes listed in 45 CFR 75.300(e). If and when it rules on the meaning of sex discrimination in each of these 13 programs, the parties to these Comments do not expect a majority of the Justices to conclude that the sex nondiscrimination provisions in the 13 statutes to extend to the classes of sexual orientation and gender identity. Rather, given the *Bostock* dissents by Justices Alito and Kavanaugh, we expect the future Court will hold that Congress, when first enacting each of these 13 programs, meant only to prohibit discrimination on the basis of a binary understanding of sex (i.e., biologically male or female).

Whatever the future holds, *Bostock* itself instructs all of us to wait for further guidance from the Supreme Court before expanding the sex nondiscrimination provisions. It explicitly limited its holding to Title VII and made clear that it did not "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination." *Id.* at 1753. By purporting to "sweep" *Bostock* "beyond Title VII to other federal . . . laws that prohibit sex discrimination," *id.*, HHS is flouting, rather than applying, the Court's holding in *Bostock*.

Title 45 CFR 75.300(e) misinterprets *Bostock* and should be stricken.

(B) 45 CFR 75.300(e) incorrectly interprets discrimination based on "sex" in each of the 13 listed health or social service programs.

1. Five of the listed programs expressly incorporate sex discrimination protections under Title IX, to which the interpretive rule in *Bostock* does not extend.

The 2023 NPRM states that "[t]he 13 statutes listed in proposed § 75.300(e) each contain prohibitions on sex discrimination. None of the 13 statutes contain any indicia—such as statute-specific definitions, or any other criteria—to suggest that these prohibitions on sex discrimination should be construed differently than Title VII's sex discrimination prohibition."[4] This is incorrect. First and foremost, five of the 13 statutes/programs expressly incorporate sex discrimination protections under Title IX of the Education Amendments of 1972:[5]

i. 42 U.S.C. 290cc–33, Projects for Assistance in Transition from Homelessness Program;
ii. 42 U.S.C. 300w–7, Preventive Health Services Block Grant Program;
iii. 42 U.S.C. 300x–57, Substance Abuse Treatment and Prevention Block Grant Program;
iv. 42 U.S.C. 708, Maternal and Child Health Block Grant Program; and
v. 42 U.S.C. 10406, Family Violence Prevention and Services Act.

The text of each of these five statutes already expressly and specifically prohibits discrimination "on the basis of sex under title IX . . . ."

The 2023 NPRM relies on *Bostock* to extend sex discrimination prohibitions specific to Title VII to the five above-listed programs. But, as stated above, the *Bostock* Court was careful to stress that its holding interpreted only the Title VII text. The holding did not "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination." *Bostock*, 140 S. Ct. at 1753.

Appellate courts have acknowledged that *Bostock* does not extend from Title VII to Title IX. *See* Adams ex rel. Kasper v. School Board of St. Johns County, 57 F.4th 791, 811-14 (11th Cir. 2022) (en banc) (holding that the meaning of "sex" set forth in *Bostock* does not apply to sex discrimination under Title IX); Pelcha v. MW Bancorp, Inc., 988 F.3d 318, 324 (6th Cir. 2021) (by its own terms *Bostock* is of limited reach); Meriwether v. Hartop, 992 F.3d 492, 510 n.4 (6th Cir. 2021) (the principles in *Bostock* do not automatically extend to Title IX). Here, HHS pretends that *Bostock* makes such an extension by force of its own reasoning. It does not. Any such expansion must be left to Congress. In these five acts, Congress chose a different path. It incorporated by reference Title IX, not Title VII. However, Congress has had countless opportunities over the years to add sexual orientation and gender identity to Title IX but has declined to do so.[6]

Title IX also comes with certain religious exemptions from its nondiscrimination mandate. For instance, the discrimination protections do not apply to the "operation of an entity which is

---

[4] 88 Fed. Reg. at 44754.

[5] 20 U.S.C. 1681 to 1688.

[6] Notwithstanding many opportunities, Congress has not enacted a bill that adds sexual orientation and gender identity to Title IX. And that was certainly not the original meaning when Congress first drafted, debated, and finally enacted Title IX fifty years ago. *See* 1972 U.S. Code, Cong. & Admin. News vol. 2, pp. 2462, 2559, and 2608 (congressional reports on legislative history of Title IX).

controlled by a religious organization if the application of [the sex discrimination prohibition] to such operation would not be consistent with the religious tenets of such organization." 20 U.S.C. 1687. *See also id*. at 1681(a)(3). Because the five statutes listed above incorporate Title IX's prohibitions, they also incorporate its religious protections. Yet HHS's proposed rules fail to account for those religious-tenets exemptions.[7]

2. The Children With Serious Emotional Disturbances program expressly allows decisions to be made on the basis of biological sex.

The 2023 NPRM interprets Children With Serious Emotional Disturbances, 42 U.S.C. 290ff *et seq*. ["CWSED"], to include sexual orientation and gender identity within its sex discrimination prohibition. CWSED, however, expressly allows for segregation based on male/female biological sex. 42 U.S.C. 290ff–1(e)(3)(A)(i) ("males and females [may] be segregated to the extent appropriate in the treatment of the children involved"). Such segregation is inconsistent with an expansion of *Bostock* to CWSED. It is consistent, however, with statutes like Title IX that recognize that segregation based on biological sex can serve important interests regarding adolescents.

3. The Family Violence Prevention and Services Act uses "sex" in the sense of biological male and female.

Title 42 USC 10406(a)(2) of the Family Violence Prevention and Services Act ["FVPSA"] in relevant part provides:

> Nothing in this chapter shall require any such program or activity to include any individual in any program or activity without taking into consideration that individual's sex in those certain instances where sex is a bona fide occupational qualification or programmatic factor reasonably necessary to the normal operation of that particular program or activity.

This is a use of "sex" in the sense of biological male or female. Consider, for example, where a FVPSA grantee is a shelter or home for female victims of domestic violence. The resident director of the shelter has to be a woman in the biological sense of that term. Given the clients, a man presenting as a female is per se unqualified. The trauma for these battered women is too high. The victims are highly vulnerable. So being a biological woman is a bona fide occupational qualification (BFOQ) for holding the position of director. Same with someone coming into the shelter to conduct counseling for the residents. The counselor must be a biological woman. The battered victims will not trust a man presenting as a woman or a woman presenting as a man. Finally, as to battered women admitted to the shelter, a resident cannot be a biological male

[7] The 2023 NPRM contains a religious accommodation process that requires administrative affirmation. 45 CFR 75.300(f). No such prior affirmation is required under Title IX. This creates another inconsistency regarding these statutes that expressly incorporate Title IX.

presenting as a woman. Again, the trust in men is too low and the trauma level for these women too high.

Following the interpretive rule in *Bostock* makes no sense for FVPSA, and this is reflected in the statutory text using "sex" in the traditional sense. Accordingly, FVPSA should be removed from the list of 13 programs in subsection 75.300(e).

4. Applying gender identity and sexual orientation discrimination prohibitions to colleges and universities, many of which are religious, creates obvious religious freedom conflicts that need addressing explicitly and frontally in the regulations.

The 2023 NPRM proposes to extend gender identity and sexual orientation discrimination prohibitions to the current discrimination prohibitions found in title 7 of the Health Workforce Program (42 U.S.C. 295m) and the Nursing Workforce Development Program (42 U.S.C. 296g). These acts, among other things, state that medical, dental, and nursing schools cannot discriminate on the basis of sex. That ban makes sense if limited to a class based on biological sex. But many universities and other operators of medical schools are religious, and there is an obvious conflict between certain religions practices and a regulation that requires admission and treatment of students, as well as design of curriculum, without regard to gender identity or sexual orientation. This needs to be frontally addressed in the rule as was done, for example, by Title IX and its religious-tenets exemption. *See* Hunter v. United States Dep't of Educ., No. 6:21-CV-00474-AA, 2023 WL 172199 (D. Or., Jan. 12, 2023) (discrimination claims under Title IX by LGBTQ+ students against religious colleges and universities dismissed under religious-tenets exemption). Religious universities should not be forced to assert—for the first time—their religious freedom rights under the First Amendment or RFRA as a defense under this rule simply because HHS refuses to make obvious and necessary concessions at the outset in this 2023 NPRM.

5. The Maternal and Child Health Block Grant Program obviously protects biological women, to the exclusion of biological men or any other gender identity.

The 2023 NPRM proposes to extend gender identity and sexual orientation discrimination prohibitions to the Maternal and Child Health Block Grant Program ["MCHBGP"], 42 U.S.C. 708. MCHBGP concentrates its provisions on pregnant women and new mothers. 42 U.S.C. 701(a)(4) (stating that the program protects "pregnant women"); 42 U.S.C. 701(a) (stating that the objective is "to improve the health of all mothers and children").

When the manifest purpose of MCHBGP is to serve pregnant women and those who have recently borne children, subsection 75.300(e) makes gender-identity concerns nonsensical. For instance, "mother" is not defined under MCHBGP. A biological male parent with the gender identity of a woman cannot qualify for support because a biological male cannot get pregnant or bear a child. Applying these new discrimination prohibitions within a program that definitively focuses on biological females makes no sense and will lead to confusion.

MCHBGP should be removed from the list of 13 programs in subsection 75.300(e).

(C) Promulgation of 45 CFR 75.300(e) violates the major questions doctrine, which reflects the Constitution's separation of powers.

The major questions doctrine is a separate and independent ground for rejecting HHS's profound expansion of the nondiscrimination provisions in the 13 statutes listed in 45 CFR 75.300(e). In West Virginia v. Environmental Protection Agency, 142 S. Ct. 2587 (2022), the Court restored to administrative law a proper regard for separation of powers, requiring agencies to refrain from making momentous decisions without clear congressional authority. Specifically, the Court held that the Environmental Protection Agency [“EPA”] did not have authority to limit emissions at existing power plants through what is called “generation shifting” to renewable energy sources such as solar and wind. Because the EPA's proposed Clean Power Plan was significant enough to fall under the “major questions doctrine,” the Court held that it required specific congressional approval. Chief Justice Roberts, for the Court, wrote that “something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to ‘clear congressional authorization’ for the power it claims.” *Id.* at 2609. Justice Gorsuch, joined by Justice Alito, wrote a concurring opinion. Justice Gorsuch noted the broad importance of the major questions doctrine, stating that it “seeks to protect against ‘unintentional, oblique, or otherwise unlikely’ intrusions” on the areas of “self-government, equality, fair notice, federalism, and the separation of powers.” *Id.* at 2620.[8]

Even more recently in Biden v. Nebraska, 143 S. Ct. 2355 (2023), the Court found that the president's student loan forgiveness initiative violated the major questions doctrine. The proposal would have impacted 45 million former college students and cost an estimated $430 billion. Every indebted former student was to have ten thousand dollars of his or her loan forgiven, and certain low-income individuals were to be forgiven as much as twenty thousand dollars. Quoting from its prior cases, the Court said that, to determine whether Congress has granted authority for new and ambitious administrative actions, the major questions doctrine directs courts to examine the history and breadth of the authority that the agency [here the Department of Education] is asserting, and the economic and political significance of that assertion of power. *Id*. at 2372.

In the 2023 NPRM, HHS asserts the authority to expand the civil rights discrimination provisions applicable to these 13 programs to include sexual orientation and gender identity. This unilateral inflation of its power more than meets the criteria of the major questions doctrine, requiring specific congressional approval. Apart from race, national origin, sex, and disability, HHS has no history of enforcing nondiscrimination rules in federally funded programs. Moreover, Title VII, which HHS claims to interpret, is enforced by the EEOC. Expanding the reach of that statute's nondiscrimination provisions to the 13 statutes at issue here is an enormous

---

[8] Any move by a federal agency to evade a judicial holding striking down the agency's abuse of its delegated authority will be exposed and sanctioned. *See, e.g.,* Chris Horner, “The EPA Defies the Supreme Court: the agency imposes a ‘suite’ of climate policies and doesn't even try to hide its own lawlessness,” WALL STREET JOURNAL (Aug. 17, 2023).

arrogation of new authority to HHS. It will entail costly new regulation of grant recipients, especially burdensome to religious recipients. And the impact is highly political and divisive because sexuality and transgenderism are heatedly debated as prime subject of the so-called culture wars.

The subjects of the 13 statutes involve preschool programs, universities, mental health, child health, maternal health, dental care, family violence, substance abuse, and homelessness. The covered entities impacted are legion. Not only hospitals, but medical clinics and doctor's offices, along with their medical staff, are newly regulated. Also included are medical insurance companies, pharmacists and pharmacies, preschool teachers, curriculum, and counseling.

Much of HHS's new regulatory terrain involves the medical profession, which has its own longstanding codes of ethical conduct; HHS should not invite itself into the longstanding ethical codes of a profession.

The regulation implicates clinical education and curriculum in the medical and nursing colleges. It will reach into the nature of government-funded research at these colleges and elsewhere in the private nonprofit and for-profit sectors. It will implicate privacy in hospital rooms and restrooms, as well as the preferred pronouns of students and patients.

The operative parties or grantees here are often religious organizations and individuals of faith working at secular organizations. The First Amendment requires that their religious conscience be honored. However, the 2023 NPRM largely ignores these religious rights.

The regulation would impact and even preempt state laws, subverting federalism, which is another form of the Constitution's separation of powers.

The financial scope of the regulated subject areas, public and private, is monumental. Health care and childcare are expensive. The United States leads the world in per capita spending on health care. Health insurance companies are newly regulated, as are drugs dispensed by pharmacies and pharmacists.

The regulation creates issues with parental rights by regulating programs for students and minors. There has been a surge in gender dysphoria among American minors, especially girls, but the 2023 NPRM ignores parental rights and their constitutional grounding. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925). The wisdom of that is a congressional matter, not one for the unelected employees of HHS.

By conditioning eligibility for government grants, this rule's ideology will steer medical research and other innovations.

Even if straightforward consideration of the scope of the 2023 NPRM were not sufficient to demonstrate the need for specific congressional approval under the major questions doctrine, Congress's repeated failure to act in the way contemplated here by HHS should be sufficient to

demonstrate a positive lack of congressional guidance. For years, Congress has had pending legislation that would add sexual orientation and gender identity to nondiscrimination provisions, but the bills repeatedly have died in the House or Senate. The continued failure to pass legislation in an elected body regularly subject to voters is democracy in action—a saying "no" to this proposed aggrandizement of power. HHS clearly exceeds its authority in trying to expand its own power to do what Congress has repeatedly declined to do, either directly or by clear delegation to HHS or another agency.

In the absence of specific congressional approval concerning the addition of sexual orientation and gender identity as protected classes, HHS must refrain from promulgating 45 CFR 75.300(e).

POINT V: 45 CFR 75.300(e) and (f) (religious neutrality).

Title 45 CFR 75.102(b) authorizes a secular exemption from all provisions in 45 CFR pt. 75. The Free Exercise Clause of the First Amendment requires that secular exemptions be extended to religious objectors (e.g., religious recipients of federal financial assistance). *See* Fulton v. Philadelphia, 141 S. Ct. 1868 (2021); Tandon v. Newsom, 141 S. Ct. 1294 (2021) (per curiam). The *Fulton* Court reasoned that to extend a secular exemption but not a religious exemption elevates the secular over the religious. This devalues religious exercise, which the government cannot do unless its actions meet the high bar of strict scrutiny.[9]

It follows that the exemption in 45 CFR 75.102(b), excuses, *inter alia*, those with religious objections to the operation of subsection 75.300(e). The 2023 NPRM acknowledges the secular exemption in 75.102 but seeks to discourage its application based on historical use. 88 Fed. Reg. at 44755 n.26. However, the *Fulton* Court rejected a similar maneuver where the City of Philadelphia pointed out that it had made no prior use of a secular exemption. *Fulton*, 141 S Ct. at 1878-79. That made no difference to the operation of the Free Exercise Clause.

The exemption in 45 CFR 75.102(b) should be explicitly cross referenced in subsection 75.300(f) so that it is not overlooked by religious grant applicants and recipients or by HHS.

POINT VI: 45 CFR 75.300(f) (religious rights and immunities).

There are features of subsection 75.300(f) that are not objectionable. However, as explained below, we predict this subsection will be little used by religious recipients. Because of an increasing lack of trust in HHS, there will be a tendency for faith-based recipients to initiate their religious freedom claims and defenses in more neutral venues, such as civil court.

---

[9] The RFRA exemption acknowledged in subsection 75.300(f) does not necessarily have the same coverage as the exemption in subsection 75.102(b). By way of example, some courts have held that RFRA does not apply when the federal government is not a named party to the lawsuit. In contrast, the Free Exercise Clause applies so long as there is "action under color of law" for purposes of the First Amendment. *See* City of Boerne v. Flores, 521 U.S. 507 (1997).

(A) The proposed rule reads as if it is optional[10] and thus can be invoked or ignored by faith-based recipients. Still, this rule should explicitly state that it is optional, as well as that there is no prejudice if a recipient does not seek a conflict resolution or preclearance under the rule. Further, this rule should explicitly state that there is no requirement that a recipient first exhaust the remedy under this subsection before raising claims or defenses under RFRA or the First Amendment in other venues.

(B) We note approvingly that this proposed subsection can be invoked even if there is no active complaint pending against the recipient. Prospective recipients should also be provided a procedure whereby they could seek preclearance even before they apply for a particular grant.[11] This could avoid a waste of time for all concerned.[12]

(C) The preamble correctly states that, to overcome RFRA's strict scrutiny requirement, the government must show that "application of the burden to the person is in furtherance of a compelling governmental interest." 88 Fed. Reg. at 44754.[13] Subsection 75.300(f) should be clarified by citing this standard in the text of the rule. That said, we point out that RFRA relief is sometimes case-by-case. That means that a victory for one faith-based recipient will sometimes not lay down a precedent for another recipient because the two operate in an altogether different context. This is reflected in the text of subsection 75.300(f)(4) (". . . that determination does not otherwise limit the application of any other provision of this part to the recipient or to other contexts, procedures, or services.") But not every RFRA determination is nonprecedential, and the rule is mistaken to read as if that is so. For example, while the claimant in Little Sisters of the Poor v. Pennsylvania, 140 S. Ct. 2367 (2020) has many unique features, the holding still has high precedential value in the ongoing controversy over the so-called "contraceptive mandate" and beyond.

(D) The operation of subsection 75.300(f) appears to not be a confidential proceeding. That will be a deterrent for many faith-based recipients. During the Obama Administration there was a preclearance process for the "religious tenets" exemption to Title IX. It resulted in religious college applicants suffering serious public harassment. That negative experience is not forgotten.

(E) In addition to RFRA, the proposed subsection mentions "Federal religious freedom law, including . . . the First Amendment." The rule should go on to expressly mention "church

[10] Subsection 75.300(f) reads "a recipient *may* notify" HHS, not *shall* notify HHS.

[11] By their terms, RFRA and the First Amendment apply without regard to whether a religious organization has applied for a grant and thereby acquired the status of a grant "recipient."

[12] In this regard, HHS should see to it that nothing in the electronic application process would require a religious applicant to affirm nondiscrimination conduct that would be at odds with RFRA or First Amendment rights.

[13] *See* Braidwood Management, Inc. v. EEOC, No. 22-10245, slip op. 34-39 (5th Cir., June 20, 2023) (holding, inter alia, that: (a) there is a substantial burden on the religion of the sole owner of a for-profit entity when forced to employ persons without regard to sexual orientation or gender identity contrary to the owner's faith; and (b) to overcome RFRA's burden of strict scrutiny the government must show more than an interest in enforcing civil rights laws eradicating discrimination).

autonomy doctrine" as an additional type of First Amendment defense. The doctrine of church autonomy confers immunity from suit with respect to matters of internal governance of a religious recipient. This doctrine offers more robust protection to faith-based recipients than RFRA's strict scrutiny standard. With immunity, if the church autonomy doctrine applies the case is over. There is no balancing of interests. No consideration of assertions of pretext. Rather, judgment is summarily entered for the recipient. *See* Hosanna-Tabor Evangelical Church & School v. EEOC, 565 U.S. 171, 189-90, 194-95, 196 (2012).

POINT VII: 45 CFR 75.300(f) (third-party harm).

In meeting requests for RFRA accommodations, as well as the securing of rights under the Free Exercise Clause, there arises the possibility of incidental harm to third parties. These harms may be embarrassment, mental distress, or inconvenience in securing services elsewhere when a religious recipient denies services to beneficiaries because of their sexual orientation or gender identity. These can occur as a natural consequence of the strict-scrutiny balancing test that is weighted in favor of religious freedom. HHS seeks comments on the matter of the potential for incidental burdens on third parties. *Id.* at 44756 ("The Department seeks comment on . . . whether [proposed subsection 75.300(f)] should include additional procedures, the potential burdens of such a provision on recipients and potential third parties, and additional factors that the Department should take into account . . . .").

RFRA, as well as the Free Exercise Clause, require that a religious recipient be accommodated unless the government can meet strict scrutiny (compelling governmental interest in enforcing the rule of equal treatment without exception for the religious recipient, all while achieved by the means least restrictive to the recipient's religion). Strict scrutiny is a heavy standard to satisfy. Absorbing dignitary affronts are a modern feature of the tolerance we fellow citizens concede to one another, secular and religious, living as we do in a pluralistic society that is necessarily one of "live, and let live." To carry matters beyond tolerance to demand legitimation—even agreement on controverted ideas—is to give way to raw-power politics. This calculus is reflected in cases involving LGBTQ+ equality where the Supreme Court has never found that LGBTQ+ interests have satisfied strict scrutiny to overcome the free exercise of religion, freedom of speech, or freedom of association. *See* 303 Creative LLC v. Elenis, 143 S. Ct. 2298 (2023); Fulton v. Philadelphia, 141 S. Ct. 1868 (2021); Masterpiece Cakeshop v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719 (2018); Boy Scouts of America v. Dale, 530 U.S. 640 (2000); and Hurley v. Irish American Gay, Lesbian, and Bisexual Group of Boston, 515 U.S. 557 (1995).

The only case HHS cites for the proposition that third-party harms might surmount the high hurdle of strict scrutiny – Cutter v Wilkinson, 544 U.S.709 (2005)—involved an Establishment Clause challenge to a prisoner accommodation under the Religious Land Use and Institutionalized Persons Act of 2000. In *Cutter*, the Supreme Court upheld the constitutionality of RLUIPA, including its strict scrutiny standard of review. The sole case (i.e., *Estate of Thornton v. Caldor*) the Court mentioned in *Cutter* for the proposition that third-party harm is probative

evidence was in weighing an Establishment Clause claim, not a Free Exercise Clause or RFRA claim.[14]

In a government grant to a faith-based organization similar to the 13 programs listed in subsection 75.300(e), the Executive Branch's chief lawyer—the Office of Legal Counsel ["OLC"] in the U.S. Department of Justice—addressed RFRA's interplay with an employment nondiscrimination requirement embedded in the underlying statute that authorized the grant.[15] In its 29-page analysis, wherein OLC concluded that RFRA allowed the federal government to exempt a faith-based grantee from a nondiscrimination provision, nowhere did OLC even consider third-party harm.

Moreover, religious exemptions and other statutory accommodations (such as RFRA) have never been found by the Supreme Court to violate the Establishment Clause. The leading cases are Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 335 (1987) (upholding the constitutionality of the religious employer exemption to Title VII of the Civil Rights Act of 1964) and Walz v. Tax Commission of New York, 397 U.S. 664, 680 (1970) (upholding the constitutionality of a municipal property tax exemption for houses of worship). *See generally* Carl H. Esbeck, *Do Discretionary Religious Exemptions Violate the Establishment Clause?* 106 KTY. L. J. 603 (2017 - 2018); *id.* at 609-11 (in seven plenary opinions and three summary dismissals the Supreme Court has held that statutory religious exemptions do not violate the Establishment Clause; there are no cases to the contrary).

While perhaps admissible into evidence with respect to the government's burden to show strict scrutiny, such incidental harms to third parties cannot result in a curtailment of a demand to be exempt from a generally applicable law that is a burden on the claimant's religion. Subsection 75.300(e) should be altered to explicitly state the foregoing principle of law.

* * *

Thank you for your attention to the foregoing Comments.

Respectfully submitted,

Thomas More Society, Christian Legal Society, National Association of Evangelicals, and Institutional Religious Freedom Alliance, a division of the Center for Public Justice

[14] Estate of Thornton v. Caldor, 472 U.S. 703 (1985), is also cited in the 2023 NPRM, 88 Fed. Reg. at 44756 n.28. *Caldor* was an Establishment Clause case involving an unyielding religious preference, not a religious exemption.

[15] *Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act* (June 29, 2007), https://www.justice.gov/d9/olc/opinions/attachments/2015/06/01/op-olc-v031-p0162.pdf.

J. Matthew Belz
Clayton Plaza Law Group, L.C.
112 South Hanley, Suite 200
St. Louis, Missouri 63105
Special Counsel to Thomas More Society

Carl H. Esbeck
R.B. Price Professor Emeritus and Isabella Wade & Paul C. Lyda Professor of Law Emeritus
209 Hulston Hall
Ninth & Conley Streets
Columbia, Missouri 65211