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Department of Health and Human Services
HHS-OS-2019-0014 (RIN-0991-AC16)
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Room 550-G.5, 200
Independence Avenue SW,
Washington, D.C. 20201

Re: Health and Human Services Grants Regulation (RIN 0991-AC16)

To Whom It May Concern:

Alliance Defending Freedom (ADF) submits the following comments on the Notice of Proposed Rulemaking (NPRM) regarding the Health and Human Services Grants Regulation. ADF enthusiastically supports the revision of this regulation as it would alleviate burdens on grant recipients and allow qualified agencies, both secular and faith-based, to compete for federal grants on an equal footing.¹

ADF is an alliance-building legal organization that advocates for the right of people to freely live out their faith. It pursues its mission through litigation, training, strategy, and funding. Since its launch in 1994, ADF has handled countless matters involving the religious freedom principles addressed by the Notice of Proposed Rulemaking. ADF routinely advises and represents non-profit organizations—including adoption and foster care providers—facing religious discrimination stemming from state and federal regulations. ADF was involved in several U.S. Supreme Court cases that provide the legal foundation on which the NPRM's analysis in part rests. ADF represented parties in *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017); and *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), and filed a friend of the court brief in *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171 (2012).

ADF believes that the proposed revisions to 45 C.F.R. 75.300 are necessary to ensure that our nation's adoption and foster care system continues to keep kids first. The revisions do so by protecting the providers of these vital services—some of whom have deeply held religious convictions regarding the best environment to raise a child—from government-backed discrimination. The proposed revision is necessary because: (1) the previous HHS regulation

¹ See 45 C.F.R. § 75.300(c)-(d) [hereinafter *the rule or the proposed rule*].

harms children by diminishing the supply of adoption and foster care providers, and (2) the previous HHS regulation enshrines religious discrimination against faith-based organizations.

A. The Proposed Revision is Necessary to Protect Children, Families, and Vulnerable Populations

America is currently experiencing a foster care crisis, leaving many children uncared for and without a home. The United States has over 437,000 children in foster care and over 125,000 children waiting to be adopted.² Last year, the rate of foster care rose in almost 60% of states.³ The opioid epidemic in particular has left a growing number of children without a home, and government group homes and private foster care and adoption providers are running out of places to put these children. While the number of children who need homes is rapidly increasing, the number of available foster care providers is diminishing.⁴ As the majority of Americans agree, one of the most effective ways of dealing with this epidemic of homeless children is by providing as many adoption and foster care agencies as possible.⁵

However, under the previous federal regulation, faith-based providers faced discrimination due to their sincerely-held beliefs about what family structure provides the best environment for a child. In the waning days of the Obama Administration, HHS inserted a list of “non-merit factors” that must be considered when distributing federal funds.⁶ These factors include “age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation.”⁷ The regulation required all private adoption and foster care providers to “comply with this public policy requirement in the administration of programs supported by HHS awards . . .”⁸ Furthermore, funding recipients must also comply with “the Supreme Court decisions in *United States v. Windsor* and in *Obergefell v. Hodges*” as interpreted by the Administration.⁹

As a result of these requirements, faith-based foster care and adoption providers who believe that children thrive best in a home with a married mother and father were forced to choose between placing children in homes with same-sex parents and parents that do not share the organizations’ religious beliefs or forfeiting critical funding necessary to keep their doors open to children and families in need. However, instead of abandoning their convictions, many faith-based

² U.S. Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children’s Bureau, *The AFCARS Report #26* (2019), <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport26.pdf>.

³ U.S. Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children’s Bureau, *Adoption and Foster Care Analysis and Reporting System FY2018 data* (2019), https://www.acf.hhs.gov/sites/default/files/cb/afcars_state_data_tables_09thru18.xlsx.

⁴ Ron Haskins, Jeremy Kohomban, and Jennifer Rodriguez, *Keeping up with the caseload: How to recruit and retain foster parents*, Brookings Institution, (April 24, 2019), <https://www.brookings.edu/blog/up-front/2019/04/24/keeping-up-with-the-caseload-how-to-recruit-and-retain-foster-parents/>.

⁵ Elizabeth Fender, *Poll: Ensure All Adoption Agencies Can Continue to Serve Families and Children*, Heritage Foundation, (July 9, 2018), <https://www.heritage.org/public-opinion/report/poll-ensure-all-adoption-agencies-can-continueserve-families-and-children>.

⁶ See 45 C.F.R. § 75.300(c).

⁷ *Id.*

⁸ *Id.*

⁹ 45 C.F.R. § 75.300(d).

adoption and foster care agencies may choose to close their doors, further exacerbating the foster care epidemic.

B. The Previous HHS Regulation Enshrined Discrimination Against Faith-Based Adoption and Foster Care Providers

The previous regulation codified discrimination against religious institutions by forcing adoption and foster care providers to act against their religious convictions as a condition of receiving federal funding. If a provider refuses to act against their beliefs regarding the best home environment for a child, the provider is left with only two choices: either violate their religious beliefs or be denied HHS grants. This discriminatory pressure presents numerous constitutional issues by conditioning participation in the federal adoption and foster care program on whether the organization will abandon their religious beliefs and identity.

Under the previous HHS regulation, federal agencies and states that receive federal funds can refuse to fund faith-based adoption agencies. State leadership from various parts of the country have asked for relief from this regulation. For example, shortly after South Carolina Governor Henry McMaster issued an executive order that protected faith-based providers from religious discrimination by state administrative agencies,¹⁰ he also requested an exemption from the federal HHS regulation for South Carolina's faith-based agencies in general, and more specifically an exemption for Miracle Hill Ministries, a Christian charity that offered foster care services.¹¹ HHS granted an exemption for Miracle Hill in January 2019.

However, Governor McMaster's success was short-lived as Americans United for Separation of Church and State filed a lawsuit against McMaster and HHS to stop federal agencies from granting an exemption to charities like Miracle Hill or allowing them to participate in any federally funded programs.¹² The outcome of this ongoing litigation has national implications for the ability of faith-based providers to continue participating in federally funded programs on equal terms with organizations and helping displaced children around the country.

a. *Discrimination in State and Local Laws*

Faith-based adoption and foster care providers also face religious discrimination at the state and local levels. Often motivated by religious animosity, a handful of states enacted regulations similar to the previous HHS regulation, and the effects of these regulations are wreaking havoc on the number of displaced children in those states. These states illustrate the impact a facially

¹⁰ Exec. Order No. 2018-12, *South Carolina State Register Vol. 42, Issue 4*, (March 13, 2018), <https://governor.sc.gov/sites/default/files/Documents/Executive-Orders/2018-03-13-FILED-Executive-Order-No-2018-12.pdf>.

¹¹ United States Department of Health and Human Services, Administration for Children and Families, *Re: Request for Deviation or Exception from HHS Regulation 45 CFR § 75.300(c)*, by Steve Wagner, Washington, DC: Jan. 23, 2019.

¹² Complaint at 2, *Maddonna v. U.S. Department of Health and Human Services, et al.*, No. 6:19-cv-00448-TMC (D.S.C. Feb. 15, 2019).

discriminatory grant regulation can have on the number of children around the country left without a loving home to call their own.

For example, Catholic Charities of Boston was one of the oldest adoption providers in the nation.¹³ It found homes for tens of thousands of children during its long tenure within the state. Following the legalization of same-sex marriage, Massachusetts sought to force faith-based providers to place children with same-sex couples or stop providing adoption and foster care services altogether.¹⁴ Catholic Charities asked for an exemption to the new regulation but was denied.¹⁵ The longstanding charity was forced to close its doors and over the next two years Massachusetts saw an 18% drop in adoption.¹⁶ Currently, social workers express the need for 600 more foster homes immediately¹⁷ – homes that Catholic Charities could have helped provide.

Washington D.C. experienced a similar situation with Catholic Charities of the Archdiocese of Washington. In 2010, D.C. changed the laws to require faith-based agencies to place children in same-sex homes or cease operations. Like their counterpart in Boston, Catholic Charities sought a religious exemption to allow them to continue to place children in a manner consistent with their beliefs. But they were also denied, and then forced to close their organization.¹⁸ Since Catholic Charities closed, the number of children adopted in D.C. has decreased by 22%.¹⁹ There are more homes needed, but the system is severely overwhelmed and there are not enough providers to deal with the surplus of children.

This demonstrates what we can expect to happen throughout the country if faith-based providers are universally prohibited from operating according to their religious beliefs and attending to the foster care epidemic throughout the country.

¹³ United States Conference of Catholic Bishops, *Discrimination Against Catholic Adoption Services*, (2018), <http://www.usccb.org/issues-and-action/religious-liberty/discrimination-against-catholic-adoption-services.cfm>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ In 2006, 874 children were adopted in Massachusetts. See U.S. Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau, *Gender of Public Agency Children Adopted: October 1, 2005 to September 30, 2006*, (2008), https://www.acf.hhs.gov/sites/default/files/cb/gender_2006.pdf; in 2008, 712 children were adopted in Massachusetts. See U.S. Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau, *Sex of Public Agency Children Adopted: October 1, 2007 to September 30, 2008 (FY 2008)*, (2011), https://www.acf.hhs.gov/sites/default/files/cb/gender_2008.pdf.

¹⁷ Kay Lazar, "In a broken foster system, some kids can't find a bed for the night," *Boston Globe* (April 6, 2019), <https://www.bostonglobe.com/metro/2019/04/06/state-broken-foster-system-some-kids-can-find-bed-for-night/40xAjxIIT0errJZVjSiY5H/story.html>.

¹⁸ Ryan Anderson and Sarah Torre, *Adoption, Foster Care, and Conscience Protection*, Heritage Foundation (January 15, 2014), <https://www.heritage.org/marriage-and-family/report/adoption-foster-care-and-conscience-protection>.

¹⁹ U.S. Department of Health and Human Services, Administration for Children and Families, Administration on Children, Youth and Families, Children's Bureau, *Adoption and Foster Care Analysis and Reporting System FY2018 data* (2019), https://www.acf.hhs.gov/sites/default/files/cb/afcars_state_data_tables_09thru18.xlsx.

b. *Ongoing Litigation Leaves Faith-Based Agencies' Existence in Jeopardy*

Faith-based providers are currently fighting for their lives in several religious discrimination cases being litigated throughout the country. These cases that will shape the ability of faith-based providers to continue their work of placing children in loving, lasting homes without fear of government-endorsed discrimination.

ADF is currently representing Catholic Charities West Michigan, a faith-based adoption and foster care provider, in a federal lawsuit against state officials. In 2015, Michigan passed a law to protect the rights of faith-based providers to operate consistent with their religiously held beliefs.²⁰ However, in 2017, the ACLU sued Michigan to force the state to end these protections for faith-based providers.²¹ The Attorney General of Michigan, Dana Nessel, signed a settlement agreement with the ACLU that would prohibit the faith-based providers from operating according to their religious beliefs.²² ADF represents Catholic Charities West Michigan in their attempt to secure their religious freedom and reverse the religious discrimination settlement in Michigan.

Following the settlement between Michigan and the ACLU, St. Vincent Catholic Charities also filed suit to protect their religious freedoms and operate according to their beliefs.²³ In September 2019, St. Vincent prevailed on a preliminary injunction allowing the charity to continue placing children in homes until the case is officially resolved.²⁴ In the opinion granting the preliminary injunction, the court said that, “the State’s real goal is not to promote non-discriminatory child placements, but to stamp out St. Vincent’s religious belief and replace it with the State’s own.”²⁵ Due to the State’s targeting of St. Vincent’s religious beliefs, the court found that the case called for a higher standard of review and supported the preliminary injunction that enabled the agency to continue according to their previous status quo while the case remains in litigation.²⁶

Similarly, ADF is also representing New Hope Family Services in a suit against New York state officials. The state of New York reinterpreted its child welfare laws to require all New York adoption providers to place children with same-sex couples. Facing a grave threat to its existence, New Hope filed suit, contending that the law violates the agency’s First Amendment right to operate according to its religious beliefs. The Second Circuit Court of Appeals granted an

²⁰ Mich. Comp. Laws 722.124e.

²¹ Complaint, *Dumont v. Lyon*, No. 17-cv-13080 (E.D. Mich. Sept. 20, 2017).

²² Kelsey Dallas, “Michigan settlement in favor of LGBTQ couples leaves faith-based adoption agencies wondering what’s next,” *Deseret News* (March 22, 2019), <https://www.deseret.com/2019/3/23/20669116/michigan-settlement-in-favor-of-lgbtq-couples-leaves-faith-based-adoption-agencies-wondering-what-s-married-couple-dana-and-kristy-dumont-with-pixie->.

²³ Complaint, *Buck v. Gordon*, No. 1:19-cv-00286-RJJ-PJG (W.D. Mich. April 15, 2019).

²⁴ *Buck v. Gordon*, No. 1:19-cv-00286-RJJ-PJG, 2019 WL 4686425, (W.D. Mich. Sept. 26, 2019).

²⁵ *Id.* at *11.

²⁶ *Id.* at *16.

emergency order allowing them to continue operating during the entirety of the case, on the condition that New Hope does not accept any new prospective adoptive parents.²⁷

The outcome of these cases will determine whether faith-based adoption and foster care providers will be permitted to operate according to their religious beliefs in Michigan and New York. These cases show the vast impact these regulations can have on children and their ability to be placed in a home.

Protecting faith-based providers will result in positive outcomes for birth mothers, children, and families. The choice of a birth mother to place her child for adoption can be heart-wrenching but a provider that shares her faith can help ease that pain and provide spiritual support and holistic care that state-based agencies cannot offer. Likewise, a child being removed from a home can be traumatic, but placing a child in a familiar religious environment, where the child's faith is embraced, can comfort the child.²⁸ Prospective parents and birth mothers should have the freedom to choose a provider that shares their values.

In sum, HHS's proposed rule to end discrimination offers hope for children, more options for birth mothers, support for families, and increased flexibility for states seeking to alleviate real human need. We commend HHS for protecting a diversity of providers to ensure the greatest number of children find a permanent, loving family.

ADF applauds and supports HHS's proposed regulations.

Respectfully submitted,



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²⁷ Order granting Mot. for Prelim. Inj., *New Hope Family Services v. Poole*, Case No. 19-1715, (2d Cir. Nov. 4, 2019).

²⁸ Jewish Adoption, "Preserving our Jewish Heritage" <https://www.jafco.org/who-we-are/preserving-our-jewish-heritage/> (last visited December 18, 2019); New Star Kafala, "At New Star Kafala, we believe it is the right of every child to have a family," <http://www.newstarkafala.org/what-we-believe/> (last visited December 18, 2019).