ALLIANCE DEFENDING FREEDOM
FOR FAITH. FOR JUSTICE.

August 30, 2023

Secretary Xavier Becerra
U.S. Department of Health and Human Services
Office for Civil Rights
Attention: HHS Grants Rulemaking
Washington, DC 20201
Via regulations.gov

RE: Comment on Notice of Proposed Rulemaking, Health and Human Services Grants Regulation, 88 Fed. Reg. 44750 (July 13, 2023) Docket ID HHS–OCR–2023–0011; RIN–0945–AA19

Dear Secretary Becerra,

Alliance Defending Freedom (ADF) opposes the Biden administration's effort to rewrite federal sex discrimination laws across federal human services grant programs. The U.S. Department of Health and Human Services (HHS) is correct to rescind its Obama-era grants rule that coerces religious foster care providers. But HHS should not replace one bad rule with another. HHS should respect the law, religious liberty, free speech, and parental rights—not redefine sex in federal law to harm women and children in healthcare, human services, and education programs.

I. HHS is correct to rescind the 2016 Grants rule, which unlawfully burdened religious foster care agencies.

Religious agencies who help children find loving homes should be supported and protected, not sidelined for their faith. That is why many foster care agencies receive reimbursement through Title IV-E of the Social Security Act, 42 U.S.C. §§ 670–679c, to help sustain their child-placement activities.

But the 2016 Grants Rule issued at the end of the Obama administration requires agencies receiving these funds to violate their religious beliefs by placing children in homes that do not align with their faith.[1] After the Biden administration rescinded religious exemptions to this rule,[2] ADF client Holston United Methodist

[1] HHS, Health and Human Services Grants Regulation, 81 Fed. Reg. 89,393 (Jan. 11, 2017).

[2] HHS, Health and Human Services Grants Regulation, 88 Fed. Reg. 44,750, 44,752 (July 13, 2023).

Home for Children had to sue HHS over this unwise—and unlawful—government coercion.[3]

The 2016 Grants Rule disregards foster care agencies' religious liberty and free speech—subjecting it to strict scrutiny that it cannot satisfy. *First*, the First Amendment's Free Exercise Clause subjects the rule to strict scrutiny because HHS can give exemptions from grant conditions in its discretion for any reason,[4] but no religious exemptions were made. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021). *Second*, the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb, subjects the rule to strict scrutiny because of its burden on religious exercise. *Third*, the concomitant burdens on speech and expressive association trigger strict scrutiny under the First Amendment's Free Speech Clause. *303 Creative, LLC v. Elenis*, 143 S. Ct. 2298, 2312–13, 2318 (2023)). But HHS cannot satisfy strict scrutiny under any of these laws. The past availability of discretionary exemptions undermines any interest in coercing religious foster care agencies. *Fulton*, 141 S. Ct. at 1881–82.

Notably, HHS's attempt at footnote 26 of the proposed rule to reinterpret § 75.102 as being inapplicable does not negate the effect of those exemptions. For several reasons, these exemptions negate HHS's ability under *Fulton* to satisfy strict scrutiny. *First*, HHS actually applied those exemptions to religious objections in the past. *Second*, nothing in the rule says the exemptions only apply for fiscal purposes. Nothing in the one external source HHS cites, OMB's FAQs, says so either. That notion is mere wishful thinking by HHS. *Third*, HHS implicitly concedes § 75.102 provides for exemptions beyond fiscal purposes by using qualifiers such as "primarily," "previously," "historically," and "best read to" to describe the section's purported narrow scope. If HHS wishes to limit § 75.102 to fiscal matters, HHS would need to amend § 75.102 by notice and comment rulemaking, which this rule did not propose.

What is more, the 2016 Grants Rule lacks statutory authority. Title IV-E addresses "race, color, or national origin." 42 U.S.C. § 671(a)(18)(A)–(B). Neither this statute—nor any other—addresses sex, sexual orientation, or gender identity in

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[3] This case's complaint and response brief lay out in detail the legal infirmities with the 2016 Grants Rule. Compl., *Holston United Methodist Home For Children, Inc v. Becerra*, No. 2:21-cv-185 (E.D. Tenn. Dec. 2, 2021), ECF No. 1; Pl.'s Opp'n to Def.s' Mot. to Dismiss, *Holston Home*, No. 2:21-cv-185 (E.D. Tenn. June 22, 2022), ECF No. 29; *see also Holston Home*, No. 2:21-cv-185, 2022 WL 17084226 (E.D. Tenn. Nov. 18, 2022) (finding the rule defunct).

[4] HHS may grant "[e]xceptions on a case-by-case basis for individual non-Federal entities," 45 C.F.R. § 75.102(b), as may the Office of Management and Budget on a program-wide basis, *id*. § 75.102(a).

Title IV-E grants. The *only* authority HHS ever relied on is the multi-agency housekeeping statute, 5 U.S.C. § 301, which lets an agency head regulate "the government of his department."[5] This statute only lets agencies "regulate [their] own affairs." *Chrysler Corp. v. Brown*, 441 U.S. 281, 309 (1979). It does not mention protected classes or allow HHS to regulate externally. *United States ex rel. O'Keefe v. McDonnell Douglas Corp.*, 132 F.3d 1252, 1254–56 (8th Cir. 1998).

HHS now proposes rescinding the 2016 Grants Rule and imposing different requirements. Activists will no doubt urge HHS to retain the 2016 Grants Rule or argue that the proposed rule has the same effect on religious foster care agencies. But the 2016 Grants Rule lacks any constitutional or statutory authority. HHS should not retain that rule, in whole or in part. And to ensure clarity on this issue, HHS should expressly state in the final rule's preamble that no foster care agency receiving funds under Title IV-E is subject to nondiscrimination requirements other than those listed in Title IV-E itself.[6] This approach respects the reliance interests of foster care agencies like Holston Home in continued funding.[7]

II. HHS should not rewrite federal sex discrimination laws to address matters not included by Congress.

But just because HHS should rescind the 2016 Grants Rule does not mean that HHS should replace it with the proposed rule. HHS's proposed rule would dramatically rewrite thirteen federal sex discrimination provisions in grants programs other than Title IV-E.[8] HHS should not redefine these or any other statutes to address sexual orientation and gender identity. Nor should HHS prejudge future laws by adding language or guidance redefining yet-to-be-passed statutes.

Abandoning the binary understanding of sex means abandoning reality. And when the government abandons reality, people get hurt. HHS's new rule thus will

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[5] 81 Fed. Reg. at 89,395.

[6] *See* 88 Fed. Reg. at 44,758 (Section "75.300(e) does not apply to the foster care programs at issue.").

[7] *See* ADF, *Holston United Methodist Home for Children v. Becerra*, https://adflegal.org/case/holston-united-methodist-home-children-v-becerra (video testimony).

[8] These arguments equally apply to the preamble's expansive language about sex characteristics, intersex traits, and sex stereotypes. 88 Fed. Reg. at 44,753 n.11. But, because the proposed rule's text does not mention these traits, the proposed rule does not include them. HHS cannot broaden a rule's scope through preamble language.

hurt women, children, patients, grantees, program participants, and parents. We know this for four reasons.

First, the rule threatens women and girls with the loss of equal opportunities, privacy, and safety. By seeking to redefine sex in Title IX and in other education programs, HHS jeopardizes females' sex-specific sports teams, educational programs, facilities, and housing, including in public universities with medical and nursing schools, and in children's residential homes. Likewise, by redefining sex in women's health-care programs like Maternal and Child grant programs, the rule threatens to allow any male who self-identifies as a mother to access female facilities and access benefits meant exclusively for mothers.

Second, by seeking to redefine sex in healthcare programs like the Community Mental Health grants and other block grants, the rule harms patients who struggle with their bodies, and censors providers who seek to help them. The rule threatens to require healthcare providers to endorse and refer patients—even children—for radical, life-altering gender interventions such as puberty blockers, cross-sex hormones, and surgeries to remove healthy reproductive organs. At the same time, the rule threatens to censor the views of healthcare providers who seek to help patients achieve their own goals of being at peace with their bodies.

Third, by seeking to redefine sex across human services programs, the rule threatens to coerce grantees, employees, and program participants to adopt a false view of sex and to use pronouns and titles that do not match a person's sex.

Fourth, by seeking to redefine sex in children's programs, the rule threatens to erode parental rights. In particular, by seeking to redefine sex in Head Start's universal preschool programs for low-income families, the rule threatens to require preschools to expose very young children to inappropriate material and to teach them to question their gender—regardless of parents' views or knowledge.

The statutes listed in the proposed Section 75.300(e) are sex discrimination provisions, not sexual orientation or gender identity provisions. Some statutes have standalone sex discrimination provisions that HHS seeks to redefine. *E.g.*, 8 U.S.C. § 1522(a)(5); 42 U.S.C. §§ 290cc-3(a)(2), 290ff-1(e)(2)(c), 295m, 296g, 300w-(a)(2), 300x-57(a)(2), 708(a)(2), 5151(a), 8625(a), 9849(a)–(b), 9918(c)(1), 10406(c)(2)(B)(i). Five of these statutes operate by incorporating Title IX's sex discrimination prohibition, either as the program's sole sex discrimination provision or in addition to freestanding program sex discrimination provisions. *E.g.*, 42 U.S.C. §§ 290cc-33(a)(1), 300w-7(a)(1), 300x-57(a)(1), 708(a)(1), 10406(c)(2)(A). In the proposed rule, HHS relies on *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), to redefine the term sex in each to mean sexual orientation and gender identity.

But these grant statutes contain no textual basis to redefine sex to mean gender identity or sexual orientation. The original understanding of the word sex in these statutes—as well as their purpose, structure, and context—points to a binary, biological understanding. For instance, the Children with Serious Emotional Disturbances program's sex discrimination provision "may not be construed . . . to prohibit a system of care . . . from requiring that, in housing provided by the grantee . . . males and females be segregated to the extent appropriate in the treatment of the children involved." 42 U.S.C. § 290ff-1(e)(3)(A)(i). The refugee assistance program likewise requires "that women have the same opportunities as men to participate in training and instruction." 8 U.S.C. § 1522(a)(1)(A). In the same way, the Title VII Health Workforce Programs refers to a medical school "changing its status as an institution which admits only female students to that of an institution which admits students without regard to their sex." 42 U.S.C. § 295m(i). So too the Maternal and Child Health Block Grant focuses on "maternal and prenatal health," 42 U.S.C. § 711(c)(1), defining an eligible family, in part, as "a woman who is pregnant, and the father of the child," 42 U.S.C. § 711(l)(2)(a). The Head Start program also repeatedly considers the needs of "pregnant women." 42 U.S.C. §§ 9840(a)(5)(A)(iii) & (d)(3), 9840a(c)(1) & (i)(2)(G), 9852b(d)(2)(C). And even though HHS seeks to redefine Title IX in this rule,[9] Title IX does not define sex to mean sexual orientation or gender identity either.[10]

It appears that at most only one program, about family violence, addresses sexual orientation or gender identity, and it does so only because of limited—separate—amendments. This program's sex discrimination provision, 42 U.S.C. § 10406, does not address sexual orientation or gender identity. Other, later

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[9] 88 Fed. Reg. at 44,752, 44,754, 44,756, 44,759 (invoking Title IX's authority and redefinition).

[10] Many reasons why Title IX and similar statutes must be interpreted narrowly and to protect liberty are set forth in ADF comments on other Title IX rulemakings and are incorporated by reference. *See ADF Title IX Rule Comment*, Docket ID ED-2021-OCR-0166; RIN 1870-AA16, Comment ID ED-2021-OCR-0166-200280, https://www.regulations.gov/comment/ED-2021-OCR-0166-200280 (explaining how redefining sex in Title IX lacks legal authority, hurts female athletes, undermines parental rights, harms unborn children and women, and violates freedoms of speech and religion); *ADF Section 1557 Rule Comment*, Docket ID HHS-OS-2022-0012, RIN 0945-AA17, Comment ID HHS-OS-2022-0012-68192, https://www.regulations.gov/comment/HHS-OS-2022-0012-68192 (comment on Title IX, Section 1557 of the Affordable Care Act, and the proposed religious liberty notification process); *ADF Title IX Sports Rule Comment*, Docket ID ED-2022-OCR-0143; RIN 1870-AA19, Comment IDs ED-2022-OCR-0143-141953, ED-2022-OCR-0143-141962, ED-2022-OCR-0143-141980, ED-2022-OCR-0143-141985, ED-2022-OCR-0143-141990, ED-2022-OCR-0143-142001, ED-2022-OCR-0143-142002, ED-2022-OCR-0143-142011, ED-2022-OCR-0143-142022, ED-2022-OCR-0143-142028, & ED-2022-OCR-0143-150698, https://www.regulations.gov/comment/ED-2022-OCR-0143-141953 & https://www.regulations.gov/comment/ED-2022-OCR-0143-150698 (explaining how Title IX cannot be changed administratively and how redefining sex harms female athletes).

amendments expanded the scope of the program to address sexual orientation or gender identity. 34 U.S.C. § 12291; 45 C.F.R. Pt. 1370. This shows that when Congress seeks to address sexual orientation or gender identity in grant statutes, it will do so expressly. *See also* 42 U.S.C. § 294e-1(b)(2).

For two reasons, the lack of clear statutory authority for HHS's new interpretation of these statutes should end the analysis. *First*, whether HHS may rewrite sex discrimination laws to add new protected classes is a major question, if there ever was one. Under the Supreme Court's major questions doctrine, HHS must have clear statutory authority to impose this mandate. *See, e.g.*, *Biden v. Nebraska*, 143 S. Ct. 2355, 2358 (2023); *West Virginia v. EPA*, 142 S. Ct. 2587 (2022). *Second*, the federalism clear-notice canon applies because each grants statute falls under the Spending Clause, *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 24 (1981), and displaces a traditional area of state authority. Congress thus must use "exceedingly clear language if it wishes to significantly alter the balance between federal and state power." *Sackett v. EPA*, 143 S. Ct. 1322, 1341 (2023) (cleaned up). HHS cannot add any grant conditions unless they were "unmistakably clear in the language of the statute," *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (cleaned up), at the time of enactment, *Carcieri v. Salazar*, 555 U.S. 379, 388 (2009). HHS may not surprise grantees "with post acceptance or 'retroactive' conditions." *Pennhurst*, 451 U.S. at 25.

But HHS concedes a lack of a clear prior authority here, saying that this rule seeks to make grant conditions more clear, certain, stable, predictable, and simple.[11] With no unmistakably clear prior statutory notice, there is no authority.[12]

Bostock v. Clayton County, 140 S. Ct. 1731 (2020) is not to the contrary. In *Bostock*, the Supreme Court rejected that its "decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination." 140 S. Ct. at 1753. The court warned that "none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question." *Id.* Even under Title VII, *Bostock* excluded intimate

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[11] 88 Fed. Reg. at 44,753–54, 44,756–58. For instance, HHS "proposes to add paragraph (e) to 45 CFR 75.300 to *clarify* the Department interprets preexisting prohibition against discrimination on the basis of sex to include discrimination on the basis of sexual orientation and gender identity." *Id.* at 44,757 (emphasis added).

[12] Plus, because grantees are not already under these mandates and because these mandates displace state authority (including by imposing new mandates on state grantees), HHS must quantify these mandates' economic costs and analyze their federalism implications, rather than assuming the new rule lacks any additional economic impact or lacks federalism implications. 88 Fed. Reg. at 44,759.

spaces: the Court did "not purport to address bathrooms, locker rooms, or anything else of the kind." *Id.* Nor did *Bostock* consider the "particularly strict" effect of the clear-notice federalism canon. *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305 (1990). *Bostock* thus did not displace longstanding limits on grant conditions or on laws preempting traditional areas of state responsibility. HHS acknowledges that two courts have not accepted its expansive view of *Bostock*, but, rather than analyze these or other decisions against it, HHS simply dismisses one adverse judgment as "appealed."[13] This lack of reasoning is a far cry from clear authority (or reasoned agency decision-making).

III. HHS should provide robust free speech, religious liberty, and parental rights protections in the rule.

In seven ways, the proposed rule violates protections for religious liberty, free speech, and parental rights. The rule thus should recognize express exemptions.

First, at least five of the affected programs incorporate by reference Title IX, including Title IX's religious exemption. *E.g.*, 42 U.S.C. §§ 290cc-33(a)(1), 300w-7(a)(1), 300x-57(a)(1), 708(a)(1), 10406(c)(2)(A). Title IX does not apply to entities controlled by a religious organization if its application would be inconsistent with the organization's religious tenets. 20 U.S.C. § 1681(a)(3). When the 2016 Section 1557 rule adopted under Title IX omitted this exemption, it was held unlawful. "By not including these exemptions, HHS expanded the 'ground prohibited under' Title IX that Section 1557 explicitly incorporated." *Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660, 690 (N.D. Tex. 2016) (quoting 42 U.S.C. § 18116(a)). The proposed rule thus must incorporate Title IX's religious exemption as to these five statutes.

Second, HHS must avoid coercing or burdening religious grantees, parents, and program participants under the Free Speech Clause, the Free Exercise Clause, the Fourteenth Amendment, and RFRA. As discussed above, HHS's burdens on speech and religious exercise are subject to strict scrutiny. But HHS has not applied these statutes this way before, which undermines any claim that its policy "can brook no departures." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021). HHS also lacks any interest in regulating speech or impairing a group's expressive identity, such as by requiring an entity to affirm statements that are not true, requiring a speaker to use biologically incorrect pronouns, or "compel[ling] an

[13] 88 Fed. Reg. at 44,752–53 & n. 10 (citing *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 811–15 (11th Cir. 2022) (en banc); *Neese v. Becerra*, No. 2:21-CV-163-Z, 2022 WL 16902425 (N.D. Tex. Nov. 11, 2022)).

individual to create speech [he] does not believe." *303 Creative, LLC v. Elenis*, 143 S. Ct. 2298, 2308 (2023). HHS may not "coerce an individual to speak contrary to her beliefs on a significant issue of personal conviction." *Id*. at 2318. And HHS must respect parental rights. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (plurality opinion); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 535 (1925).

Third, in the past, HHS has acknowledged its duty to abide by a what it calls a First Amendment "nondiscrimination principle" and not to disqualify religious recipients from public benefits programs because of their religious character.[14] HHS should amend the proposed rule to respect that same nondiscrimination principle. Any discrimination by HHS on the basis of religion among program participants or service providers is unconstitutional. *See, e.g.*, *Carson v. Makin*, 142 S. Ct. 1987 (2022); *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246 (2020); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017).

Fourth, at least nine of these statutes include religious nondiscrimination provisions, which can be even broader than the First Amendment or RFRA. *E.g.*, 8 U.S.C. § 1522(a)(5); 42 U.S.C. §§ 290cc-33(a)(2), 290ff-1(e)(2)(C), 300w-7(a)(2), 300x-57(a)(2), 708(a)(2), 5151(a), 9849(a), 10406(c)(2)(B); *see also* 42 U.S.C. §§ 290kk–290kk-3, 300x-65; 42 C.F.R. pts. 54 & 54a; 44 C.F.R. § 206.11. It is arbitrary to add non-statutory gender identity or sexual orientation mandates, while ignoring statutory religious protections. HHS should add religious nondiscrimination provisions to protect religious grantees, parents, and participants.

Fifth, the Administrative Procedure Act requires HHS to consider in the preamble the effect of liberty-protecting laws like the First Amendment, RFRA, Title IX's religious exemption, and the Fourteenth Amendment's protection of parental rights. Even the *Bostock* Court was "deeply concerned with preserving" religious institutions' freedom. *Bostock*, 140 S. Ct. at 1754. HHS's failure thus far to "overtly consider" all of these interests—and tailor its regulation to provide exemptions—thus renders it fatally flawed. *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020).

Sixth, the process in proposed Section 75.300(f) for individual entities to notify HHS of religious liberty concerns will not avoid chilling the exercise of these protected rights. A notification process for religious liberty concerns is no substitute for up-front exemptions under the Constitution, RFRA, and other statutes. The

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[14] HHS et al., Partnerships With Faith-Based and Neighborhood Organizations, 88 Fed. Reg. 2395, 2401 (Jan. 13, 2023).

Constitution and RFRA govern in all instances, and Title IX's robust religious exemption likewise applies automatically by law. *Maxon v. Fuller Theological Seminary*, 549 F. Supp. 3d 1116, 1125 (C.D. Cal. 2020). Citizens need not obtain government permission to exercise their rights without fear of liability.

The proposed notification process allows for religious freedom concerns to be shared with HHS *after* enforcement proceedings begin, but that is not a sufficient way to protect free speech, free exercise, and parental rights—not when HHS knows of the proposed rule's conflicts with these freedoms. To the contrary, by omitting up-front exemptions, HHS seeks to chill speech and coerce as much compliance as possible by entities fearful of taking their chances on enforcement proceedings or litigation. Even in its notification process, HHS does not guarantee that upon notification of religious freedom concerns it *will* respect free speech or religious exercise, merely that HHS *may* consider these issues before continuing its enforcement proceedings. And make no mistake: even once notified of RFRA concerns, HHS has no intention of issuing religious waivers or self-enforcing RFRA because, in HHS's view, RFRA requires no affirmative agency compliance or enforcement beyond what a court orders.[15] As one commenter explained about the draft Section 1557 rule's parallel process for notifying the Office for Civil Rights (OCR) of religious freedom conflicts, "[t]his process is seen by many as a sham since HHS under Secretary Xavier Becerra has systematically targeted or ignored conscience and religious freedom protections."[16] Plus, as the proposed severability clause in § 75.300(g) makes clear, HHS will not only fail to voluntarily follow RFRA, but also will not apply any RFRA ruling beyond the parties protected in a case to similarly situated entities. The proposed rule thus seeks to force *each* religious provider to undergo years of enforcement proceedings followed by years of litigation. On top of this, HHS's process addresses religious freedom only, so it offers no hope for non-religious grantees, speakers, or parents.

In short, HHS seeks to be free to enforce the rule against every entity, leaving grantees to suffer enforcement proceedings and to engage in piecemeal litigation against HHS to protect their freedoms. Far from helping grantees avoid

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[15] HHS, Delegation of Authority, 86 Fed. Reg. 67,067 (Nov. 24, 2021); Sam Dorman, *HHS memo shows department moving to undo Trump-era action aimed at better protecting religious liberty* (Nov. 17, 2021), https://www.foxnews.com/politics/hhs-ocr-memo-rfra-trump-religious-liberty (" 'RFRA is meant to be a shield to protect the freedom of religion, not a sword to impose religious beliefs on others without regard for third party harms, including civil rights.' ").

[16] Rachel Morrison, *HHS's Proposed Nondiscrimination Regulations Impose Transgender Mandate in Health Care*, https://fedsoc.org/commentary/fedsoc-blog/hhs-s-proposed-nondiscrimination-regulations-impose-transgender-mandate-in-health-care-1.

coercion, this notification process gives HHS a new tool to coerce compliance. By creating a burdensome and illusory religious liberty notification process, HHS seeks to be able to argue to a court that any clash with religious freedom is speculative—so HHS can evade or postpone judicial review. This is religious targeting, and it is unlawful. *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719 (2018). It would never fly in the context of any other protected right.

Seventh, the notification process raises several procedural concerns.

- Despite the withdrawal of RFRA delegation from OCR, OCR would be doing some religious liberty work—including as applied to laws enforced by other HHS components. Does OCR have, or will it receive, delegated authority to do this?
- Who will evaluate claims and make final decisions? The career professionals from the now-disbanded Conscience and Religious Freedom Division of OCR should be involved, and their involvement should be stated expressly in regulations.
- OCR has no set deadline or duty to respond to notices. What will ensure prompt responses?
- There is no appeal process. Will appeals be allowed? If so, HHS should say how.
- The agency views non-discrimination as a compelling interest. Can this process result in *any* exemptions, under the agency's view? If so, it should explain how.
- This process involves the loss of anonymity and privacy, much like the process for an assurance of exemption under Title IX, where, under the Freedom of Information Act, activists obtain information about exempt entities to conduct harassment campaigns. How is the process not at risk of First Amendment problems under *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373 (2021)?
- This process is not required for an exemption, but the existence of this process will suggest that notification is required. So creating this process likely will chill religious exercise by those not participating in it. How will HHS address this chilling effect? Will HHS respect religious liberty if this process is not followed? How? And will HHS abide by court orders against its proposed rule?

In addition, HHS should abide by other procedural requirements in the final rule. HHS should perform a family policy assessment under Treasury & General

Government Appropriations Act of 1999, Pub. L. 105-277. HHS also should certify compliance with tribal consultation with affected tribal grantees. Exec. Orders 13,132, 64 Fed. Reg. 43,255 (Aug. 4, 1999) & 13,175, 65 Fed. Reg. 57,879 (Nov. 6, 2000). In addition, given HHS's self-confessed failure to disclose irregularities in the 2020 Grants Rule,[17] HHS should identify its process of reading and responding to comments, including by disclosing in the preamble of the final rule any methods of sampling or other anomalies.[18]

In conclusion, ADF supports rescinding the 2016 Grants Rule. But ADF strongly opposes the harms imposed by redefining sex discrimination laws.

Respectfully Submitted,

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[17] HHS, Health and Human Services Grants Regulation, 84 Fed. Reg. 63,831 (Nov. 19, 2019); HHS, Health and Human Services Grants Regulation, 86 Fed. Reg. 2,257, 2,261 (Jan. 12, 2021).

[18] HHS should say if it read every comment and, if HHS did not, HHS should explain how it addressed the full range of significant issues. HHS should identify and explain in the final rule's notice the size of any samples collected, each methodology used to select a sample, its de-duplication process, any self-imposed deadline or caps on hours, and the percentage of the sample actually reviewed. HHS should further identify whether the sample or its methodology rested on an estimate of what HHS or its contractor could accomplish under time and budget constraints that HHS had imposed on itself or its contractor. HHS should also explain how any sample of unique and "pivot" comments is representative of the broader pool. In addition, any report from a contractor, including proposals on sampling, should be specifically disclosed in the docket for comment. *See* Def.s' Mot. for Remand with Vacatur at 3–4, 6–9, *Facing Foster Care in Alaska v. HHS*, No. 1:21-cv-00308 (D.D.C. June 17, 2022), ECF No. 41; Cooper Decl., Ex. 1 – "HSAG Final Report", ECF No. 41-1.