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December 19, 2019

Department of Health and Human Services
Office of the Assistant Secretary for Financial Resources
Room 514-G, Hubert H. Humphrey Building
200 Independence Avenue, SW
Washington, DC 20201

Re: RIN 0991-AC16

On behalf of ADL (Anti-Defamation League), we are writing to offer our comments on proposed amendments to 45 CFR §75.300, “Statutory and National Policy requirements,” (“proposed rule”). If adopted, these dramatic changes would sanction wholesale discrimination against LGBTQ people throughout Department of Health and Human Services (“HHS”) grant-funded programs and services, which annually are supported by 500 billion dollars in taxpayer-funded grants and contracts. Furthermore, the amendments would permit discrimination against religious minorities and women within programs and services funded by multiple block grants – including foster and adoption programs, childcare, senior, mental health, legal, and substance abuse services, and other critical forms of assistance for millions of the most vulnerable Americans. We strongly oppose this proposed rule and urge its prompt withdrawal. In addition, we strongly object to HHS’s decision to stop enforcing the current anti-discrimination rules – which has caused widespread confusion and concern – even before the rulemaking process has been completed.

Founded in 1913 in response to an escalating climate of anti-Semitism and bigotry, ADL is a leading anti-hate organization with the mission to protect the Jewish people and to secure justice and fair treatment for all. Today, we continue to fight all forms of hate with vigor and passion. A global leader in exposing extremism, delivering anti-bias education, and fighting hate online, ADL ultimately works towards a world in which no group or individual suffers from bias, discrimination, or hate. To this end, ADL opposes efforts to employ our nation’s religious freedom safeguards as a sword to discriminate against or harm others, instead of the Founders’ notion of the First Amendment as a shield against majority religious tyranny.

The government’s compelling interest in eradicating discrimination cannot be overstated. Indeed, as Martin Luther King, Jr. famously said, “injustice anywhere is a threat to justice everywhere.” Yet, the proposed rule turns that national core value on its head. To the contrary, it seeks to revoke critical anti-discrimination protections for HHS-grant funded beneficiaries and employees, leaving them vulnerable to denial of services or employment by taxpayer-funded providers because of who they are or who they love. Taxpayer funds should not be used to deny care and services to millions of families, who are among the most vulnerable people in America.

The Proposed Rule Sanctions Widespread Discrimination Within HHS Grant-Funded Services

The current 45 CFR §75.300 provides clear, comprehensive anti-discrimination protections to millions of families across the United States in the administration of HHS grant-funded programs and services in two ways. First, §75.300(c) prohibits discrimination based on age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation. Second, §75.300(d) requires that marriages of same-sex couples be treated as valid in accordance with the U.S. Supreme Court's marriage equality decisions in *United States v. Windsor*, 133 S. Ct. 2675 (U.S. 2013) and *Obergefell v. Hodges*, 135 S. Ct. 2584 (U.S. 2015).

In a dramatic step backwards, the proposed rule repeals the explicit protections found in §75.300(c) and limits anti-discrimination safeguards only to those persons covered by federal statute. It also removes the §75.300(d) directive to abide by the *Windsor* and *Obergefell* decisions. In place of this directive, the proposed §75.300(d) merely requires compliance with all U.S. Supreme Court precedents. Taken together, the clear intent of the proposed sections is to sanction discrimination within all HHS grant-funded programs and services based on gender identity and sexual orientation, as well as discrimination on the basis of religion and sex within certain HHS grant-funded programs and services. That's wrong – and should be rejected.

Federal law specifically provides no anti-discrimination protections to HHS grant-funded beneficiaries based on gender identity or sexual orientation. Thus, any HHS grant-funded provider could deny services to some of the most vulnerable in society simply because a person is transgender or gay. Similarly, multiple authorizing statutes for HHS block grants do not contain prohibitions against religious or sex discrimination. For example, the Small Business Job Protection Act, Federally Assisted Health Training Programs, Low Income Home Energy Assistance Program (LIHEAP), and Community Services Block Grant Act do not contain prohibitions on religious discrimination, and the Community Mental Health Services Block Grant and Substance Abuse Prevention and Treatment Block Grants, Small Business Job Protection Act, Federally Assisted Health Training Programs and LIHEAP do not prohibit sex discrimination. So a provider funded by such a block grant also could discriminate against religious minorities or women.¹

Moreover, the only conclusion that can be drawn from the proposed rule's elimination of the directive on marriage equality is that HHS does not intend to treat same-sex marriages as valid. Therefore, it appears that HHS seeks to ignore the Supreme Court's clear recognition of equal treatment for same-sex marriages and to open the door for legal challenges that will assuredly follow to ensure equal treatment of same-sex spouses in the receipt of benefits or services.

As to employment for taxpayer-funded jobs within HHS grant-funded services and programs, the proposed section leaves LGBTQ people in a precarious situation. Federal circuit courts and numerous federal district court decisions, as well as U.S. Equal Employment Opportunity Commission guidance, have determined that Title VII's prohibition on employment

¹ Given the omnibus nature of the proposed rule limiting anti-discrimination protections to those covered by federal law, it could supersede religious discrimination protections found in HHS regulations relating to the faith-based and community initiative.

discrimination “because of sex” covers sexual orientation and gender identity.^{2 3} ADL firmly believes that these decisions and this guidance are a correct reading of the law. However, the question of whether Title VII covers these categories is currently before the U.S. Supreme Court. Should the Court overturn this case law and guidance, it could mean that any grant-funded provider of HHS services or programs could deny employment to a person simply because they are transgender or gay.

The Proposed Rule is Without Legitimate Justification and Raises Serious Constitutional Issues

The detrimental impact of the proposed rule would be staggering. Yet it cites to merely a handful of generally described complaints and concerns to justify a massive change in how HHS administers its grant-funded programs and services. Indeed, the proposed rule cites no statistics or specifics other than one pending lawsuit in a federal district court concerning one subgrantee to support the change in the rule. It states:

The Department is modifying §75.300 ... because the Department has faced several complaints, requests for exceptions and several lawsuits concerning §75.300(c) and (d). The Department also is currently preliminarily enjoined from enforcing §75.300(c) in the State of Michigan as to a subgrantee’s protected religious exercise. ...

Some non-Federal entities have expressed concerns that requiring compliance with certain non-statutory requirements of these paragraphs violates the Religious Freedom Restoration Act (RFRA) 42 U.S.C. 2000bb, et seq., or the U.S. Constitution, exceeds the Department’s statutory authority, or reduces the effectiveness of programs, for example, by reducing foster care placements in Title VI-E programs of HHS’s Administration for Children and Families. The existence of these complaints and legal actions indicates that §75.300(c) and (d) imposed regulatory burden and created a lack of predictability and stability for the Department and stakeholders with respect to those provisions’ viability and enforcement.

The entire rationale for the proposed Rule appears to be grounded in religious objections. Thus, the proposed rule is devoid of any basis for rescinding the anti-discrimination protections of §75.300(c) and (d) as applied to secular providers of HHS grant-funded services and programs.

With respect to faith-based providers, the proposed rule’s reliance on RFRA and/or the Free Exercise Clause is misplaced. The U.S. Supreme Court “has long recognized that government may (and sometimes must) accommodate religious practices.” See *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 334. (1987) (citations omitted). However, it cautioned that “[a]t some point, accommodation may devolve into “an unlawful fostering of religion.” *Id* at 334-35.

Religious accommodations that unduly burden third parties violate the Establishment Clause. See *Sherbert v. Verner*, 374 U.S. 398 (1963); see also *Estate of Thornton v. Caldor*, 472 U.S.

² Regina L. Hillman, *Title VII Discrimination Protections & LGBTQ Employees: The Need for Consistency, Certainty & Equality Post-Obergefell*, 6 Belmont L. Rev. 1 (2019).

³ See U.S. Equal Employment Opportunity Commission, “What You Should Know About EEOC and the Enforcement Protections for LGBT Workers,” https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm (web-page last visited Dec. 6, 2019).

703, 710 (1985). Indeed, the Supreme Court found that to comport with the Establishment Clause in applying the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc et seq (“RLUIPA”) which applies the same standard as RFRA, courts “must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.” See *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005). Furthermore, in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), every member of the Court authored or joined an opinion recognizing that detrimental effects on nonbeneficiaries must be considered when evaluating requests for accommodations under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb et seq.⁴

Ignoring this longstanding U.S. Supreme Court precedent, as noted above the proposed rule cites only to one federal district court case – a case in which the court issued a preliminary injunction against the State of Michigan limited to one Catholic child placing agency. That case, *Buck v. Gordon*, 2019 U.S. Dist. LEXIS 165196 (W.D. Mich. September 26, 2019), currently pending appeal before the Sixth Circuit, is distinguishable from application of current §75.300. The preliminary injunction was based in part on evidence of animus directed at the provider by the State. *Id.* LEXIS 165196 *31. There is no evidence that religious animus or bias was a motivation for §75.300. Although ADL does not agree with the ruling by the Michigan court, critical to its analysis was that the agency does not engage in wholesale discrimination, which the proposed rule sanctions. The court relied on the fact that while the agency refers LGBTQ people and unmarried couples to other agencies for certification as adoptive or foster parents, it places children with them. *Id.* at *36.

In *Burwell*, the Court found that the federal government has a “compelling interest in providing an equal opportunity to participate in the workforce. . .” 573 U.S. 682, 733 (2014). It is axiomatic that the government’s interest in eradicating discrimination is at its apex in the administration of taxpayer-funded services and employment. Despite this interest, the proposed rule does not take into account the significant harm that it will undoubtedly cause to beneficiaries, employees, and job applicants to HHS grant-funded programs. That harm undoubtedly raises serious issues under the Establishment Clause, which countervails the concerns and legal objections raised by the proposed rule.

We also note that while ADL staunchly believes the Establishment Clause does not permit faith-providers to discriminate on the basis of religion within taxpayer-funded programs, HHS has — pursuant to its flawed interpretation of RFRA — been granting waivers to the current §75.300(c) and (d) requirements on a case-by-case basis. Thus, the legitimacy of the proposed rule is undermined by HHS’s existing policy, which could grant waivers for the handful of complaints referenced by the proposed §75.300(c) and (d). However, instead of granting such waivers in select cases, the proposed rule would strip away essential anti-discrimination protections from

⁴ See *Hobby Lobby*, 134 S. Ct. at 2760 (“Nor do we hold * * * that * * * corporations have free rein to take steps that impose ‘disadvantages . . . on others’ or that require ‘the general public to pick up the tab.’” (brackets omitted)); *id.* at 2781 n.37 (“It is certainly true that in applying RFRA ‘courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries.’”); *id.* at 2787 (Kennedy, J., concurring) (religious exercise must not “unduly restrict other persons * * * in protecting their own interests”); *id.* at 2790 (Ginsburg, J., joined by Breyer, Kagan, and Sotomayor, JJ., dissenting) (“Accommodations to religious beliefs or observances * * * must not significantly impinge on the interests of third parties.”); see also *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., joined by Sotomayor, J., concurring) (Court’s recognition of right to accommodation under RLUIPA was constitutionally permissible because “accommodating petitioner’s religious belief in this case would not detrimentally affect others who do not share petitioner’s belief”).

the hundreds of thousands who receive benefits from or are employed through HHS-grant funded services. The blanket removal of these critical safeguards invites discrimination and is analogous to doing surgery with a chainsaw instead of a scalpel.

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The vital services HHS and its grantees and contractors provide must be available to any eligible person in need. The proposed rule is antithetical to the fundamental American principle of equality and would be a giant leap backwards for civil rights in our nation. We therefore urge its recall and the withdrawal of its accompanying notice of nonenforcement.

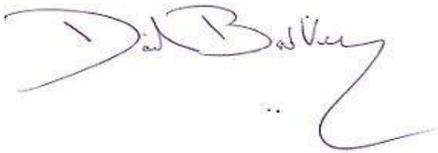
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