September 11, 2023

U.S. Department of Health and Human Services
Office for Civil Rights
Attention: HHS Grants Rulemaking (RIN–0945–AA19)
200 Independence Avenue, SW
Washington, DC 20201

[SUBMITTED ELECTRONICALLY]

To Whom It May Concern,

We write to you today to address grave concerns regarding the newly released Proposed Rule, "Health and Human Services Grants Regulation," ("the Proposed Rule"), released by the U.S. Health and Human Services Department ("the Department") on July 13, 2023, and ask for a full recission. Family Policy Alliance is a network of hundreds of thousands of families from across the country—all of whom care deeply and genuinely about the safety of women and children—as well as a network of state and national organizations that seek to ensure that the rights of families are protected.

Serving the needs of families is a worthy goal, and we applaud the Department for considering ways in which it can do so. However, we are deeply concerned with the provision added here §75.300(e), which expands the scope of discrimination on the basis of sex to include sexual orientation and gender identity.[1] By doing so, the Department is endangering the safety of women and children, discriminating against organizations, specifically religious organizations that vehemently disagree with this broadened definition, and trampling contradictory state laws. Further, the decision to expand the definition of "sex" is based purely on the false premise that the 2020 Supreme Court decision *Bostock v. Clayton County* ("*Bostock*") mandates this change throughout law, including federal financial assistance under HHS' authority.[2] The Department misinterprets *Bostock* and violates both the Free Exercise and Equal Protection Clauses of the Constitution.

[1] Health and Human Services Grants Regulation, 88 Fed. Reg. 44753 (July 13, 2023) (to be codified at 45 CFR 75).
[2] Health and Human Services Grants Regulation, 88 Fed. Reg. 44754 (July 13, 2023) (to be codified at 45 CFR 75).

We appreciate that the Department has altered the 2016 Rule and did not revert back to all of the misguided policies from the 2016 version of this Rule, including rejecting the 2016 Rule's definition of §75.300(c) and §75.300(d).[3] We would ask that, barring full rescission, the final HHS Proposed Rule maintain its exclusion of the portions of the 2016 Rule as listed, specifically in the area of nondiscrimination policy.

Organizations that receive HHS grants provide invaluable services to countless American families in need. Those organizations that receive federal funding through HHS grants should not be forced to accept an expanded definition of "sex" that includes "sexual orientation" and "gender identity." The federal government should be looking for ways to award qualified and well-equipped organizations to serve the American people, not advance a false construct on human sexuality.

Ramifications for Altering the Definition of Sex

The Proposed Rule covers many programs in which the Department provides funding for states and organizations to be able to support American families. Specifically, it covers 13 far-reaching programs, such as the Family Violence Prevention and Services, Head Start and the Maternal and Child Health Block Grant.[4] Billions of federal taxpayer dollars go to these programs, and countless families are served each day. HHS itself notes it is the largest grantmaking federal body.[5] So, the implications of this Proposed Rule for organizations seeking federal grants are arguably greater than we can know. HHS' Proposed Rule states: "Discriminating against individuals in any of the programs, activities, projects, assistance, and services covered by the statutes in § 75.300(e) on the basis of sexual orientation or gender identity necessarily involves discriminating against them on the basis of sex."[6] There are certain concerning ramifications to expanding "sex" discrimination that we would like to point out for HHS to consider before finalizing this Proposed Rule.

Endangering the Safety of Women and Children

Expanding the definition of "sex" to include "sexual orientation" and "gender identity" does not increase protections for men and women; in fact, it only waters

[3] Health and Human Services Grants Regulation, 88 Fed. Reg. 44753 (July 13, 2023) (to be codified at 45 CFR 75).
[4] Health and Human Services Grants Regulation, 88 Fed. Reg. 44759 (July 13, 2023) (to be codified at 45 CFR 75).
[5] U.S. Department of Health and Human Services, *HHS Grants and Contracts,* HHS.GOV, https://www.hhs.gov/grants-contracts/index.html (last updated June 23, 2023).
[6] Health and Human Services Grants Regulation, 88 Fed. Reg. 44754 (July 13, 2023) (to be codified at 45 CFR 75).

down protections, specifically for women. Men and women have unique bodily differences that should not be replaced by an ideology that seeks to ignore these differences. In the instance of the administration's attempt to alter "sex" in the context of Title IX athletics, we argued that men are generally larger and stronger, have stronger lungs, and stronger muscle mass than women. So, when women compete against biological men self-identifying as women, this is unfair, unsafe and discriminatory to women in competitions specifically designed for women.[7]

Similarly, if HHS grants were to require grantees to recognize biological males as women, this would lead to extremely unfair and dangerous scenarios where women will be at risk of not receiving services, or worse being harmed by ill-intentioned males. Just as men have replaced women as leading sports competitors and women have lost out on gold medals, it is logical that women will be turned away if men seek those same services provided by HHS grantees. The Centers for Disease Control and Prevention has already promoted so-called "chestfeeding" as a solution for biological males seeking to nurse infants.[8] Will the Department then require organizations to enroll men in programs designed for maternal care? Organizations have limited resources and can only reach so many clients. This change in definition ultimately discriminates against women by ignoring biological realities and serving men in their stead.

Regarding safety, HHS grants are used to help prevent violence and are awarded to shelters that assist women in their greatest time of need. Men—no matter their identity—should not be allowed in places where women are seeking help away from their abuser, which is often a male. This Proposed Rule leaves no room for organizations to cater to their specific population, such as women in traumatic situations like these. Women should be protected and afforded every opportunity for full healing, not put back in dangerous or triggering situations.

In the instances of the HHS programs that serve young children, such as Head Start and Maternal and Child Health Block Grant, there is great concern that families will be met with suggestions and normalizing of gender transitions, even from a young age. Increasingly, children—who are incapable of contemplating the long-term consequences of their decisions—are being counseled that they are

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[7] Bailey, Kayla. "Female HS track athlete suing Connecticut over transgender policy: 'Disheartening.'" FOX NEWS (May 31, 2023, 3:52 PM), https://www.foxbusiness.com/sports/female-hs-track-athlete-suing-connecticut-transgender-policy-disheartening.

[8] Centers for Disease Control and Prevention, *Health Equity Considerations,* CDC.GOV, https://www.cdc.gov/nutrition/emergencies-infant-feeding/health-equity.html (last updated July 9, 2023).

"born in the wrong body" and provided with life-altering, irreversible medications and surgeries. Recent reports have shown a rise in minors undergoing gender transition procedures and using medication.[9] Despite the trend to push children toward these drastic physical interventions, 85 to 90 percent of children who experience thoughts of gender dysphoria grow out of those concerns in adulthood when not pushed toward transgender interventions.[10] Minors should be provided real help and care to resolve body dysmorphia, not exposed to the irreversible harm of puberty blockers or other methods of so-called "gender transitioning," especially at taxpayer expense.

Religious Liberty and Conscience Concerns

By forcing an alternate definition of "sex," this will ultimately lead to a harmful reduction in quality services to American families as organizations will no longer seek grants either for believing they will not qualify due to their sincerely held convictions or are concerned that they will be opening themselves up to a legal battle. Following the role out of the 2016 Rule, several states sought legal protection and waivers from enforcement of the 2016 Rule's non-discrimination requirements, which similarly expanded "sex" to include "sexual orientation" and "gender identity." Texas, for instance, filed a lawsuit against HHS on March 5, 2020, on behalf of the Archdiocese of Galveston-Houseton, which provides services to families that support children in the foster care.[11] Both South Carolina and Michigan applied for similar waivers and were granted these under the prior administration.

Although we recognize the 2016 Rule had far worse implications for faith-based organizations, this Rule does little to advance religious freedom protections and offers no solutions for those that have core conscience concerns, often specific to the sensitive areas of the community that they serve. We also welcome the fact that, because this Proposed Rule is specific to HHS-specific programs only, it will also have a more limited scope than the 2016 Rule.[12]

Already, concerns are being expressed from faith-based organizations that serve these populations affected, such as the United States Conference of Catholic

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[9] Jason D. Wright, MD; Ling Chen, MD, MPH; Yukio Suzuki, MD, PhD; et al, *National Estimates of Gender-Affirming Surgery in the US,* JAMA NETWORK (August 23, 2023), *https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2808707#:~:text=Within%20the%20cohort%2C%2031%20668,to%2038%20470%20in%202020.*

[10] Ryan Anderson, *Understanding Responding to Our Transgender Moment*, GET PRINCIPLES, https://www.getprinciples.com/understanding-and-responding-to-our-transgender-moment, (last visited on September 11, 2023).

[11] *Texas* v. *Azar,* 3:19–cv–00365 (S.D. Tex. Oct. 31, 2019).

[12] Health and Human Services Grants Regulation, 88 Fed. Reg. 44753 (July 13, 2023) (to be codified at 45 CFR 75).

Bishops. In their comment letter for the Proposed Rule, they state: "[The Proposed Rule's] religious exemption scheme offers no assurance to religious charities that they will be able to participate in HHS-funded programs without being made to violate their beliefs. And it fails to consider the impact that **chilling religious charities' participation in those programs** would have on those whom the programs serve."[13]

In other instances, other individuals and organizations will have serious conscience concerns with using their services intended for a woman for biological men. It is completely logical that an organization helping women overcome violence would wish to continue to deter men from using women's restrooms for the safety and mental well-being of those women often suffering from trauma. Under any of these programs that HHS serves, HHS does not address the concerns of those organizations that might recognize that men and women should use separate restrooms and changing rooms for the safety and well-being of women. Additionally, in regard to the organizations that serve children, there is an increasing number of young people who consider themselves to be of the opposite gender (as stated above). We have serious concerns that organizations that wish to protect children from the harms of gender transitioning will be incorrectly labeled as discriminating against, rather than protecting, children.

We request that, barring full rescission of the Proposed Rule, conscience protections and clear and overt religious freedom protections for faith-based organizations be included in the finalized version of this Proposed Rule.

State's Rights Concerns

State legislatures are also working hard to protect young Americans from being cornered into believing they should undergo gender "transition" procedures. Many states have already adopted legislation prohibiting the harmful practices of so-called "gender affirming care," including mastectomies on healthy, young women and puberty blockers for otherwise healthy children. This Proposed Rule oversteps those state legislatures and state laws by either forcing states to embrace this new definition of "sex" when accepting block grant funding or forcing grant recipients to choose between following state laws or federal regulations. This is an impractical and impossible situation to be caught in for organizations seeking HHS Grant funding.

[13] William J Quinn, Michael Moses, Daniel E. Balserak, UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, (September 5, 2023), 23-0905_COMMENTS_HHSGrantsRule_FINAL.pdf.

We are deeply concerned that state block grant funding will be suspended when their laws conflict with proposed nondiscrimination regulations in §75.300(e). We have witnessed the administration pull federal funds when states do not fall in line with the specifics of grant nondiscrimination clauses in other areas. For example, Tennessee has had billions of federal Title X grant funding suspended for its state laws on referring women to have an abortion.[14] Tennessee is now forced to fill in the gap for federal funds they were anticipating in order to provide basic services such as cancer screenings and maternal care; all due to its differing views from the administration on abortion.

It is of great concern that this action will be similarly replicated across all states that pass legislation that advance the rights of biological women and protect children from the harms of gender transitions. Again, this only leads to fewer organizations serving the population that needs it most and ultimately punishes the families seeking these services.

Misinterpreting *Bostock*

Finding no textual or historical basis to expand the definition of "sex" to encompass gender identity, the Department erroneously turns to the Supreme Court's ruling in *Bostock v. Clayton County*[15] to support the Proposed Rule. However, the Proposed Rule misapplies *Bostock*, which dealt only with the interpretation of Title VII and explicitly excluded other laws from consideration, stating:

> The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. **But 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 today. Under Title VII, too, we do not purport to address bathrooms, locker rooms, or anything else of the kind.**[16]

[14] Jeff Keeling. *Tennessee to backfill Title X family planning funding that feds pulled over abortion,* WJHL (April 12, 2023), https://www.wjhl.com/news/local/tennessee-to-backfill-title-x-family-planning-funding-that-feds-pulled-over-abortion.
[15] 140 S. Ct. 1731 (2020).
[16] *Bostock*, 140 S. Ct. at 1753 (emphasis added).

Here, the Court clearly asserted that this decision cannot serve as a basis to expand the definition of sex to encompass sexual orientation and gender identity in other laws. Further, the Court did not establish a standard requiring all definitions of "sex" to be based on gender identity–rather than biological sex–for any law. The Court itself in *Bostock* did not uphold this standard, and "proceed[ed] on the assumption that 'sex' . . . refer[s] only to biological distinctions between male and female."[17] We urge the Department to adhere to statutory authority rather than misapply this case.

Violating The Free Exercise Clause

If the Proposed Rule were to be finalized as is, it would have devastating effects on the freedom of religion in this country. Although the Proposed Rule purports to comply with the Religious Freedom Restoration Act of 1993 ("RFRA"),[18] its "case-by-case" application is problematic. It is impossible to apply RFRA on a case-by-case basis at the sole discretion of a government entity. To do so, would jeopardize the very rights it was enacted to protect. RFRA was enacted to protect the government from placing substantial burdens on the free exercise of religion without a compelling interest.[19] In other words, RFRA subjects federal laws to a strict scrutiny analysis when the laws burden religious exercise, not when government entities decide they would like to apply it. Therefore, the Proposed Rule, in requiring the abilities of organizations to adhere to certain moral and religious principles about sex and sexuality, must be subjected to strict scrutiny upon its enactment.

To survive strict scrutiny, the government must show that a law furthers a compelling state interest by the least restrictive means. The Proposed Rule fails in both these regards. First, preventing discrimination based on sexual orientation and gender identity is not a compelling state interest, as neither is a protected class. Even if this were a compelling state interest, the Proposed Rule is not the least restrictive means of accomplishing this goal. This can be seen by the Proposed Rule's exemption process. The Proposed Rule allows exemptions at the sole discretion of the Office for Civil Rights or the Office of the Assistant Secretary for Financial Resources, risking anti-religious governmental bias in the exemption granting process.[20] Additionally, by allowing exemptions, the Proposed Rule shows that their purpose may still be achieved even though some exemptions are granted. Despite the fact that exemptions would not undermine

[17] *Bostock*, 140 S. Ct. at 1739.
[18] 42 U.S.C. 2000bb.
[19] 42 U.S.C. 2000bb.
[20] Health and Human Services Grants Regulation, 88 Fed. Reg. 44754 (July 13, 2023) (to be codified at 45 CFR 75).

the Proposed Rule's purpose, the Rule still fails to provide a reliable religious exemption. Similarly, the Supreme Court in *Fulton v. City of Philadelphia* found a similar exemption process as evidence of anti-religious discrimination, rather than the least restrictive means of achieving a governmental interest.[21]

Americans have the God-given and constitutional right to freely exercise their faith at home and in public, such as in schools. Many students and educational employees hold sincere religious beliefs about marriage and sexual morality. No student or school should have to choose between their sincerely held religious beliefs and compliance with the law. Accordingly, we urge the Department to uphold this country's fundamental commitment to the free exercise of religion by withdrawing the Proposed Rule.

Violating The Equal Protection Clause

The Proposed Rule's disparate impact on religious grant recipients violates the Equal Protection Clause of the Constitution. The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[22] This ensures that the government does not discriminate against certain individuals in the application of its laws. For example, laws may not discriminate against religious practice.[23] The Proposed Rule discriminates against religious groups by penalizing them for adhering to their sincerely held religious beliefs on sexual morality, violating the Equal Protection Clause.[24] Religious groups are targeted for discriminatory treatment, as compliance with the Proposed Rule would necessitate violating sincerely held religious beliefs for a religious individual, but not for an individual professing no religious faith. Laws that violate the Equal Protection Clause are subject to a heightened level of judicial scrutiny.

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[21] *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1879 (2021).

[22] U.S. CONST. amend. XIV. The Fourteenth Amendment guarantees equal protection with respect to state laws, but this provision was incorporated against the federal government via the Fifth Amendment. U.S. CONST. amend. X; *see Bolling v. Sharpe,* 347 U.S. 497, 500 (1954).

[23] *See Board of Education v. Grumet*, 512 U.S. 687 (1994) (explaining that Religion Clauses and the Equal Protection Clause work together to ensure that "the government generally may not treat people differently based on the God or gods they worship, or do not worship" and that the "emphasis on equal treatment is . . . an eminently sound approach" because "one's religion ought not affect one's legal rights or duties or benefits"); *Allegheny County v. ACLU*, 492 U.S. 573, 589-90 (1989) (explaining that the constitution "guarantee[s] religious liberty and equality and that the "government may not … discriminate among persons on the basis of their religious beliefs and practices).

[24] *Sherbert v. Verner,* 374 U.S. 398, 402, 410 (1963) (holding a state unemployment compensation law unconstitutional because it discriminated against religious individuals by disqualifying those who did not work on Saturdays); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534, 556 (1993) (holding a city ordinance invalid because it targeted the religious practice of animal sacrifice by a local religious group).

As discussed above, the Proposed Rule would fail heightened scrutiny. Therefore, to uphold this country's commitment to upholding the equal protection of citizens under the law, we urge the Department to withdraw the Proposed Rule.

Conclusion

In conclusion, we request the Department withdraw this Proposed Rule and specifically its proposal to add the provision expanding the scope of sex discrimination in the HHS Grants Rule under §75.300(e) to include "sexual orientation" and "gender identity." This Proposed Rule alienates HHS grantees seeking to serve families without fear of discrimination, endangers women and children, jeopardizes the rights guaranteed under the Free Exercise Clause, and discriminates against religious individuals in violation of the Equal Protection Clause. States, non-profits, and organizations seeking to serve the public and protect our nation's young people should not be excluded from federal funding for their beliefs about human sexuality. Thank you for your consideration of this comment.

Sincerely,
Ruth Ward
Director, Government Affairs
Family Policy Alliance