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December 19, 2019

Alex Azar, II
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Jennifer Moughalian
Acting Assistant Secretary for Financial Resources
U.S. Department of Health and Human Services
Office of the Assistant Secretary for Financial Resources
200 Independence Avenue, S.W.
Washington, D.C. 20201

Re: Notice of Proposed Rule Making (NPRM), RIN 0991-AC16

Dear Secretary Azar and Acting Assistant Secretary Moughalian,

Family Equality connects, supports, and represents the three million LGBTQ parents and their six million children in the United States. We are a community of parents and children, grandparents and grandchildren that reaches across this country. For forty years we have raised our voices in support of fairness for all families. Family Equality also supports LGBTQ youth, including foster youth, seeking family formation. Family Equality convenes and cochairs the Every Child Deserves a Family Campaign in partnership with the Child Welfare League of America, FosterClub, Lambda Legal, PFLAG National, and Voice for Adoption. This Campaign is composed of over 500 faith, child welfare, civil rights, LGBTQ and allied organizations and individuals who subscribe to the following beliefs and strive to improve the child welfare system by advocating for their implementation:

- (1) All child welfare decisions should be made in the best interests of the child.
- (2) All children and youth deserve a stable, loving, forever family.
- (3) Taxpayer-funded adoption and foster care service providers should not discriminate against youth, including LGBTQ youth in need of homes, or qualified LGBTQ potential parents or guardians.
- (4) Marginalized youth in the child welfare system, including LGBTQ youth and youth of color, deserve culturally competent, safe, and supportive care.
- (5) Discriminatory adoption and foster care bills must be stopped and repealed, at both the state and federal level.

Our comments are directed to the impact of the proposed re-promulgation of 45 CFR §75.300(c) and (d) (“the Final Rule”) particularly, but not exclusively, as it pertains to the administration of child welfare programs under Title IV, Part E, of the Social Security Act, 42 U.S.C. §670 et seq.¹

Family Equality strongly opposes the repeal and replacement of the Final Rule with the Proposed Rule for the following reasons:

- (1) the Proposed Rule ignores the facts demonstrating that discrimination limits the availability of foster and adoptive homes for neglected and abused children and thus harms children in foster care;
- (2) the Proposed Rule would increase the likelihood of inappropriate/unsuitable placement of children who do not belong to the agency’s approved religion or who identify as LGBTQ;
- (3) the Proposed Rule harms LGBTQ foster youth by allowing discrimination, service denials, and disparate treatment targeting them;
- (4) the Proposed Rule causes substantial harm to prospective foster and adoptive parents by removing prohibitions on discrimination against them;
- (5) The Proposed Rule causes substantial harm to LGBTQ parents and their children by removing prohibitions on discrimination against them;
- (6) the Proposed Rule conflicts with the compelling government interest in avoiding taxpayer funding of invidious discrimination;

¹ Family Equality also strenuously objects to the Notice of Nonenforcement of HHS Grant Regulation, 84 FR 63809, which is, in essence a peremptory repeal of the Final Rule, and thus flies in the face of HHS’s obligation to utilize 5 U.S.C. §553 rulemaking procedures, i.e., to make decisions only after an opportunity for public comment, except “when an agency for good cause finds that such procedures would be impracticable, unnecessary or contrary to the public interest...such exceptions should be used sparingly, as for example in emergencies and in instances where public participation would be useless or wasteful because proposed amendments to regulations cover minor technical matters.” 36 Fed. Reg. 2532. Specifically, with respect of 75 §300(c) and (d), there was no articulated justification for suspension of the rule beyond the alleged failure of HHS to adequately address whether the rule “may impose compliance costs on recipients by subjecting the recipients to conflicting statutory and non-statutory requirements.” There was no good cause shown; there certainly was no “emergency” nor a situation “where public participation would be useless.” *Id.* Moreover, an alleged failure of the Final Rule to comply with the technical requirements of the RFA would only support re-promulgation of the Rule, not its suspension.

- (7) the Proposed Rule, which allows child placing agencies to discriminate in providing HHS-funded services, violates the constitutionally protected equal protection rights of prospective foster and adoptive parents; and
- (8) the Proposed Rule serves no legitimate purpose because alleged “concerns” that the Final Rule violates RFRA are without basis in law or fact.

1. The Proposed Rule Ignores the Facts Demonstrating that Discrimination Limits the Availability of Foster and Adoptive Homes for Neglected and Abused Children and Thus Harms Children in Foster Care

The Proposed Rule allows child welfare providers to discriminate against qualified prospective foster and adoptive parents on the basis of religion, sex, sexual orientation, gender identity, or other non-merit factors, unless expressly enumerated by statute. This will cause great harm to children in the child welfare system, which suffers from a shortage of foster homes (not from a shortage of child placing agencies). As illustrated through real life stories of discrimination in our *amicus curiae* brief in the U.S. Court of Appeals for the Third Circuit in *Fulton v. City of Philadelphia*,² discrimination against prospective foster and adoptive parents or couples prevents, deters, and delays them from providing a home to a child – whether a temporary foster home or a forever family. In the words of one former foster youth:

Children need families, not facilities. At the heart of the foster care crisis in this country is the simple fact that there are not enough foster and adoptive homes. So, why would anyone think it is acceptable to turn away qualified, willing foster parents? At best, allowing child welfare agencies to discriminate based on their religious beliefs creates an atmosphere of confusion and discouragement for families who want to foster or adopt in a state that desperately needs more families to do so. At worst, it robs children of their livelihood by unduly denying LGBT, single, or non-Christian parents opportunities to save children from the cycle of abuse and neglect they will almost certainly encounter growing up in the foster care system. No child should have the childhood that I had – especially when there are people who are willing to provide a safe and loving home.³

² Brief for Family Equality Council & COLAGE as Amicus Curiae, *Fulton v. City of Philadelphia*, No. 18-2572 (3rd. Cir. Oct. 4, 2018), available at: <https://www.aclu.org/legal-document/fulton-v-city-philadelphia-family-equality-council-amicus-brief>.

³ Kristopher Sharpe Statement to Family Equality (Aug. 28 & 29, 2018); *id.*

Being turned away by a state funded child welfare provider simply because of who they are or what they believe can have a chilling effect on applicants' willingness to move forward as a foster or adoptive parent. While some prospective parents abandon their efforts altogether, even those who persevere may be delayed for significant periods of time. The government's role should be to encourage families to adopt; the Proposed Rule fails to do so and, instead, creates the possibility and probability that more qualified parents will be turned away instead of being allowed to foster or adopt. In the face of such discrimination, some qualified same-sex couples will abandon their quest to start families and others will turn to other options to create their family, resulting in a loss of qualified, loving homes for youth in foster care.

When discussing the state's interest in non-discrimination laws and regulations, such as those incorporated in the Final Rule and eliminated from the Proposed Rule, seventeen states plus the District of Columbia had this to say:

These measures ensure that prospective foster parents are not invidiously excluded from the opportunity to open their homes to children in state custody; that such children have the best chance at finding safe and supportive foster parents; and that states fulfill their legal obligations to act in the best interests of children and in accordance with the Constitution.⁴

Child welfare standards and statutes call for maximizing the number of children placed in individual, loving homes; in 2018 Congress passed and the President signed into law the Family First Prevention Services Act, requiring that states prioritize placing children in family settings rather than

⁴ States' Amicus Brief, *Fulton v. City of Philadelphia*, No. 18-2572 (3rd. Cir. Oct. 4, 2018), available at: <https://www.aclu.org/legal-document/fulton-v-city-philadelphia-states-amicus-brief>.

residential facilities.⁵ If discrimination against prospective foster and adoptive parents is expanded as this Proposed Rule allows, it would further limit the pool of available homes and appropriate placements for children in care. This means more children growing up in group homes and “aging out” of foster care, only to face adulthood with the odds stacked against them. In a child welfare system that already is facing a nationwide shortage of foster and adoptive families,⁶ allowing more foster care providers to discriminate against qualified prospective parents on the basis of religion, sex, sexual orientation, gender identity, or other non-merit factors makes it less likely that young people in foster care will find the temporary or permanent family they wish for and deserve.

Laws and regulations prohibiting discrimination against qualified potential parents, such as those enumerated in the Final Rule, are essential to a state’s ability to make placements in the best interest of a child. Providing child welfare services are among a state’s most crucial duties. Caring for and supporting vulnerable children who have been removed from their homes – all too often because of abuse and trauma – necessitates prioritizing the health and safety of the children and limiting further trauma, above all other considerations. States are legally bound to place children in the most family-like setting available,⁷ yet there is a nationwide shortage of qualified potential parents able and willing to open their hearts and homes to these children in need. As a result, children languish in group care for too long⁸ or age out of care without a family to come home to during the holidays, to call for

⁵ Family First Prevention Services Act of 2018, passed as Title VII of the Bipartisan Budget Act, Pub. L. No. 115-123, H.R. 1892, 115th Cong. (2018), available at: <https://www.congress.gov/bill/115th-congress/house-bill/1892/text>.

⁶ John Kelly, D. Heimpel, J. Loudenback, C. Renick, K. Phagen-Hansel, E. Green, . . . M. Zarate, *Foster Care Housing Crisis*, THE CHRONICLE OF SOCIAL CHANGE (2017), available at: <https://chronicleofsocialchange.org/wp-content/uploads/2017/10/The-Foster-Care-Housing-Crisis-10-31.pdf>.

⁷ Family First Prevention Services Act of 2018, *supra* note 5.

⁸ US Department of Health and Human Services, *A National Look at the Use of Congregate Care in Child Welfare, Children’s Bureau* (2015), available at: https://www.acf.hhs.gov/sites/default/files/cb/cbcongregatecare_brief.pdf.

advice, or to celebrate accomplishments. For these children, the state has failed in fulfilling its duty of care. By ending the rule prohibiting discrimination against qualified prospective parents, the Proposed Rule makes this situation worse.

Turning away qualified prospective foster and adoptive parents decreases the overall pool of available homes, which harms *all* children in care. This is particularly concerning given that there are more than 437,000 children in the child welfare system throughout the United States, with over 125,000 of them waiting to be adopted.⁹ Far too many of these children grow up in group homes and other out-of-home settings and nearly 18,000 youth “age out” of care each year without a forever home and with limited support and resources.¹⁰ While the reasons why so many children are in the child welfare system are complicated, the reason so many grow up in group homes and ultimately “age out” of care without a forever home is quite simple – there are not enough qualified and willing foster and adoptive homes. The Proposed Rule exacerbates this problem.

It is difficult to understand why any responsible administrator in the child welfare system, much less a governmental body charged with the safety and welfare of the vulnerable youth in their care, would allow a child welfare provider to turn away qualified foster and adoptive families. Yet, that is exactly what the Proposed Rule would do – allow child welfare agencies to turn away qualified foster and adoptive parents on non-merit factors such as religion, or sex, sexual orientation, gender identity, or being in a same-sex marriage.

⁹ US Department of Health and Human Services, *Trends in Foster Care and Adoption*, THE AFCARS REPORT (2019), available at: <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport26.pdf>

¹⁰ See US Department of Health and Human Services, *Preliminary FY 2017 estimates as of June 2018*, THE AFCARS REPORT (2018), available at: <https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport26.pdf>.

Allowing, even inviting, discrimination as the Proposed Rule does, will not solve the shortage of foster and adoptive homes. In the ten states that protect discrimination by child placing agencies, in FY2017 there were over 84,000 children in the child welfare system, 36% of whom were eligible for adoption; less than half of the number of children eligible for adoption were adopted within a year. These policies and this Proposed Rule are contrary to accepted child welfare standards which require that the primary consideration must be the best interest of the child, not of the agency.

While some may argue that allowing discrimination such as that contemplated by the Proposed Rule, particularly by religiously affiliated child placing agencies, is necessary to keeping those agencies in the system so that the greatest number of children will be served, that argument runs counter to the experience of states who have implemented non-discrimination rules similar to the Final Rule. In some states, a few religiously affiliated agencies have chosen to stop serving children rather than to stop discriminating against qualified prospective families, without negative impact on the children being served. The states, themselves, expressed it best when they said:

In the Amici States, the vast majority of foster care and adoptive services providers, including faith-based organizations, have enthusiastically complied with inclusionary policies that disallow discrimination in these services. But in some Amici States, a few organizations have discontinued offering foster care or adoptive services because recruiting, certifying, or otherwise serving same-sex couples would violate their religious beliefs. In our experience, these decisions have not harmed either children in state custody or state and local governments' ability to administer child welfare systems. Moreover, we have found other ways of productively working with these faith-based organizations to support our children and families.¹¹

¹¹ States' Amicus Brief, *Fulton v. City of Philadelphia*, No. 18-2572 (3rd. Cir. Oct. 4, 2018), available at: <https://www.aclu.org/legal-document/fulton-v-city-philadelphia-states-amicus-brief>.

2. The Proposed Rule Would Increase the Likelihood of Inappropriate/Unsuitable Placements of Children Who Do Not Belong to the Agency’s Approved Religion Or Who Identify as LGBTQ

In addition to reducing the overall number of available homes, allowing child welfare providers to discriminate based on non-merit factors – as the Proposed Rule contemplates – risks allowing the agencies to turn away the best possible placement for a child. If an agency is allowed to turn away a foster or adoptive family based solely on religion or sex, sexual orientation or gender identity, then children will miss out not only on a loving home but also potentially miss out on the home best suited for their educational and health care needs. For example, these discriminatory laws and policies would allow an agency to turn away a physician or trauma nurse – simply because they are LGBTQ or belong to a minority religious faith – even where the agency has children to place who have significant medical needs. Or a teacher could be turned away, despite there being several children in care who have significant educational and developmental needs. Turning away qualified and needed families, even those with unique skill sets that could help children in care, does not serve the best interest of the child.

Allowing child welfare providers to turn prospective parents away based on their failure to subscribe to a particular agency’s religious tenets means that the pool of available families will be limited to the agency’s religion and faith tradition. As a result, if a child in care does not subscribe to those beliefs, the agency would not be able to place that child with an individual or couple who reflects and affirms the child’s beliefs. For example, when a Christian foster care agency such as Miracle Hill Ministries in South Carolina turns away people of other faiths (including other Christians who do not subscribe to the agency’s particular doctrine) who wish to be foster or adoptive parents,¹² then the

¹² Miracle Hill Ministries, *Foster Care Inquiry Form: Agreement with Doctrinal Statement*, MIRACLE HILL (2019), available at <https://miraclehill.org/foster-care-inquiry-form/>.

agency eliminates the possibility of a Jewish, Muslim, or other type of Christian or non-Christian child being placed with a family of her own faith tradition.

Thus, rejecting qualified foster parents based on their religion, as the Proposed Rule would allow, limits opportunities for placement of children in homes which affirm the religious beliefs of the child and the child's family of origin. This is problematic for multiple reasons. First, a foster family that does not share the child's religious beliefs and faith traditions may not support the child in his religious practices and traditions. HHS guidance specifies that foster children have the right to "[p]lacement in a setting ... where their religious customs can be maintained;"¹³ and the Child Welfare League of America's Standards of Excellence for Family Foster Care Services specify that "[p]arents of children in family foster care have the right to...[m]ake certain decisions regarding their child which include...designation of the child's religion."¹⁴ Secondly, three in five foster children return to their families of origin,¹⁵ so support for the faith traditions (as well as other aspects of the culture of) a child's family of origin helps ensure a smooth reintegration of a foster child with her family. Finally, turning away foster parents of a child's faith may lead an agency to reject placement with a child's extended family member of the same faith. A summary of research on kinship care by Child Focus shows that "children experience better outcomes with kin across three major domains: improved

¹³ Child Welfare Information Gateway, *Reunification: Bringing Your Children Home From Foster Care*, U.S. D.H.H.S. CHILDREN'S BUREAU, (2016), available at <https://www.childwelfare.gov/pubPDFs/reunification.pdf>.

¹⁴ Child Welfare League of America, *Standards of Excellence for Family Foster Care Services*, CWLA (1995).

¹⁵ See US Department of Health and Human Services, *Preliminary FY 2017 estimates as of June 2018*, THE AFCARS REPORT (2018), *supra* note 10.

placement stability, higher levels of permanency, and decreased behavior problems.”¹⁶ Thus, refusing placements with kin based on their religious beliefs (or any other non-merit related reason), as the Proposed Rule would allow, goes against the requirement of an agency to act in the best interest of the child.

Similarly, when qualified prospective foster and adoptive families are turned away because they are LGBTQ or a same-sex couple, the diversity of the pool of available families is significantly diminished. Not only is the agency eliminating an entire group of prospective parents who are seven times more likely to foster or adopt,¹⁷ they are decreasing the likelihood that LGBTQ children in the child welfare system will be placed with an affirming family.

The requirement for children to be placed in accordance with their best interests requires considering all attributes of a child – including their sexual orientation, gender identity, and religion. LGBTQ youth are overrepresented in the child welfare system by at least a factor of two¹⁸ and, unfortunately, too often enter the system because their birth or original family has abused, neglected, or abandoned them due to their LGBTQ identity.¹⁹ Once in the child welfare system, LGBTQ youth

¹⁶ Child Focus, *Children in Kinship Care Experience Improved Placement Stability, Higher Levels of Permanency, and Decreased Behavioral Problems: Findings from the Literature*, CHILD FOCUS, available at: http://grandfamilies.org/Portals/0/4-%20Kinship%20Outcomes%20Review%20Handout_1.pdf.

¹⁷ Shoshana K. Goldberg & Kerith J. Conron, *How Many Same-Sex Couples in the US are Raising Children?*, WILLIAMS INSTITUTE UCLA SCHOOL OF LAW (2018), available at: <https://williamsinstitute.law.ucla.edu/research/parenting/how-many-same-sex-parents-in-us/>.

¹⁸ Bianca D.M. Wilson, Khush Cooper, Angeliki Kastanis & Sheila Nezhad, *Sexual and Gender Minority Youth in Foster Care: Assessing Disproportionality and Disparities in Los Angeles*, The Williams Institute: UCLA School of Law (2014), available at https://williamsinstitute.law.ucla.edu/wp-content/uploads/LAFYS_ExecutiveSummary_Aug_2014.pdf.

¹⁹ Child Welfare Information Gateway, *Supporting Your LGBTQ Youth: A Guide for Foster Parents*, U.S. D.H.H.S. Children’s Bureau (2013), available at: <https://www.childwelfare.gov/pubPDFs/LGBTQyouth.pdf>.

suffer higher rates of discrimination and abuse than their non-LGBTQ peers.²⁰ Thus, a pool of LGBTQ-affirming placements, including families headed by LGBTQ individuals and same-sex couples, is essential to ensuring a placement that is in the best interests of many of these youth. Non-discrimination laws and regulations, such as the Final Rule, encourage this diverse pool of parents by encouraging LGBTQ parents to participate – parents who are uniquely suited to affirm and advocate on behalf of LGBTQ youth – whereas the Proposed Rule fails to provide this important governmental guidepost. But LGBTQ-headed families as placements do not just benefit LGBTQ foster youth. LGBTQ parents are also more likely to foster and adopt children with historically lower placement rates, including older children of color, large sibling sets, and children with special needs.²¹

If an LGBTQ person or same-sex couple is turned away, it is highly likely that the foster and adoptive families who do meet the agency’s criteria will not be affirming of an LGBTQ foster youth’s sexual orientation or gender identity and may even denounce or try to change it. Sexual orientation and gender identity, like religion, are core to one’s identity and being placed in a temporary or permanent home where it will be questioned or denounced risks additional traumatization of the more than one in five foster children who identify as LGBTQ.²²

²⁰ Megan Martin, Leann Down, & Rosalynd Erney, *Out of the Shadows: Supporting LGBTQ Youth in Child Welfare Through Cross-System Collaboration*, Center For The Study of Social Policy (2016), available at: <https://cssp.org/resource/out-of-the-shadows/>.

²¹ D.M. Brodzinski & Evan B. Donaldson Adoption Institute, *Expanding Resources for Children III: Research-Based Best Practices in Adoption by Gays and Lesbians*, EVAN B. DONALDSON ADOPTION INSTITUTE (2011), available at: https://www.adoptioninstitute.org/wp-content/uploads/2013/12/2011_10_Expanding_Resources_BestPractices.pdf.

²² See Laura Baams, Bianca D.M. Wilson & Stephen T. Russell, *LGBTQ Youth in Unstable Housing and Foster Care*, 143(3): e20174211 *Pediatrics* (2019), available at: <https://pediatrics.aappublications.org/content/pediatrics/early/2019/02/07/peds.2017-4211.full.pdf>; Megan Martin, Leann Down, & Rosalynd Erney, *Out of the Shadows: Supporting LGBTQ youth in Child Welfare Through Cross-System Collaboration*, Center for the Study of Social Policy (2016), available at: <https://cssp.org/resource/out-of-the-shadows/>.

Given the freedom to discriminate, as granted by the Proposed Rule, child placing agencies (even if they are not religiously affiliated) would even be free to refuse to place a child with a family member or close family friend simply because they are LGBTQ. A provider could turn away a lesbian grandparent, bisexual uncle, or transgender cousin who are qualified and wish to provide the child with a temporary or permanent home. This refusal of “kinship” placements runs directly contrary to one of the main goals of the child welfare system: to preserve family bonds.

There is no legitimate policy served by allowing agencies to discriminate against prospective foster or adoptive parents on the basis of sexual orientation or gender identity. Where allowed to fully participate, the LGBTQ community is an important and valuable resource for child welfare placements. As previously indicated, LGBTQ parents are seven times more likely to foster and adopt than non-LGBTQ parents,²³ and children with same-sex parents have the same advantages and expectations for health, social, and psychological expectations as children with parents whose parents are different-sex.²⁴ Further, a 2018 Family Equality study shows that there will be a dramatic increase in the number of LGBTQ-headed families in coming years.²⁵ Non-discrimination laws and regulations, such as the Final Rule, prevent exclusion of this potential pool of qualified parents and instead cultivate an inclusive and welcoming environment for LGBTQ parents to submit their applications to serve as foster and adoptive parents.

²³ Goldberg, *supra* n.17.

²⁴ Timothy J. Biblarz & Judith Stacey, *How Does the Gender of Parents Matter?*, 72 JOURNAL OF MARRIAGE AND FAMILY 3, 22 (2010), available at: <https://www.apa.org/pi/lgbt/resources/biblarz-stacey.pdf>; Stephanie Pappas, *Why Gay Parents May Be the Best Parents*, THE WILLIAMS INSTITUTE UCLA SCHOOL OF LAW (2012), available at: <https://williamsinstitute.law.ucla.edu/press/in-the-news/why-gay-parents-may-be-the-best-parents/>

²⁵ Ed Harris, & Amanda Hopping-Winn, *LGBTQ Family Building Survey*, Family Equality (2019), available at: <https://www.familyequality.org/resources/lgbtq-family-building-survey/>.

In short, by eliminating the protections from discrimination that are contained in the Final Rule, and thus allowing applicants to be turned away for reasons unrelated to parenting ability, finalization of the Proposed Rule would have a dramatically negative consequence for the child welfare system by decreasing placement options for all children in the system and increasing the likelihood of unsuitable placements. This would cause real harm to our nation's most vulnerable children. The Proposed Rule should be withdrawn.

3. The Proposed Rule harms LGBTQ foster youth by allowing discrimination, service denials, and disparate treatment targeting them

The Proposed Rule allows direct discrimination against LGBTQ foster children and youth because of their sexual orientation and gender identity, again contradicting the central tenet of child welfare policy, which is to act in the best interests of the child. This could result in LGBTQ children being denied needed support services, health care, and educational opportunities, as well as appropriate and affirming placements as outlined above. It could result in a transgender foster child being denied needed transition-related health care. Finally, as mentioned above, it could lead to a youth being subjected to conversion therapy, a medically discredited practice attempting to change the sexual orientation or gender identity of the child.

4. The Proposed Rule Causes Substantial Harm by Allowing Discrimination Against Prospective Foster and Adoptive Parents

In addition to the harms caused to children in the child welfare system by decreasing placement options and increasing the risk of inappropriate placements, and allowing discrimination against youth

directly, the Proposed Rule fails to take into account – as it is required to do²⁶ – the substantial harm to the individuals turned away by placing agencies for non-merit-based discriminatory reasons: the prospective foster and adoptive parents that the system so desperately needs.

There are gaps in statutory protection for participants in HHS child welfare programs based on sex (including sexual orientation and gender identity) as well as religion.²⁷ However, it is beyond dispute that eradication of sex discrimination, both by public and private entities, is a compelling government interest,²⁸ and that laws prohibiting discrimination on the basis of sexual orientation²⁹ and gender

²⁶ An agency rule is invalid as arbitrary and capricious if the agency “entirely failed to consider an important aspect of the problem.” *Motor Veh. Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S. Ct. 2856 (1983).

²⁷ Several statutes pertaining to HHS programs provide protection against discrimination for religiously-affiliated organizations in contracting to provide services; each one further provides that such organizations may not discriminate against an individual in regard to assistance under the program “on the basis of religion, a religious belief, or a refusal to actively participate in a religious practice.” See, e.g., Title IV-A, of the Social Security Act, 42 U.S.C. §604a(g). Other programs lack such statutory provisions, such as those administered under Title IV-E, 42 U.S.C. §670 *et seq.* Although this gap was partially filled by regulation through 45 C.F.R. 87.3, its application to services provided by child placing agencies to prospective foster and adoptive parents is unclear. (Paragraph (d) of the regulation prohibits discrimination on the basis of religion against a “program beneficiary or prospective program beneficiary.”) The provisions of the Final Rule, §75.300(c), clear up this ambiguity in the regulation, whereas the provisions of the Proposed Rule muddy it further by bringing into doubt the validity of the prohibition on religious discrimination itself, since it is not “prohibited by statute” as required by paragraph (c).

²⁸ *Roberts v. United States Jaycees*, 468 U.S. 609, 624 (1984) (Minnesota’s Human Rights Act, prohibiting discrimination on the basis of sex in places of public accommodation “reflects the State’s strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services....That goal, which is unrelated to suppression of expression, plainly serves compelling state interests of the highest order.”)

²⁹ *Christian Legal Soc’y v. Kane*, 2006 U.S. Dist. LEXIS 27347, *aff’d* 2009 U.S. App. LEXIS 5654 (9th Cir. Cal., 2009), *aff’d sub nom. Christian Legal Soc’y v. Martinez*, 561 U.S. 661 (2010). See also, *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*, 536 A.2d 1, 37, (D.C. App. 1987) in which the court examined the question and concluded:

The compelling interests, therefore, that any state has in eradicating discrimination against the homosexually or bisexually oriented include the fostering of individual dignity, the creation of a climate and environment in which each individual can utilize his or her potential to contribute to and benefit from society, and equal protection of the life, liberty and property that the Founding Fathers guaranteed to us all.

identity,³⁰ which are forms of sex discrimination,³¹ also serve a compelling government interest.

Similarly, there can be no dispute that protections against discrimination based on religion are vital to society.³² Because the Proposed Rule reduces, rather than preserves or expands, protections against discrimination in HHS programs based on non-merit factors such as religion and sex, sexual orientation or gender identity, it does not serve any public interest and causes real harm to prospective foster and adoptive parents, including the dignitary harm of being turned away because a particular agency doesn't serve their kind.

Another way in which the Proposed Rule would cause substantial harm to prospective foster and adoptive parents is by removing the requirement in the Final Rule that all grant recipients “must treat as valid the marriages of same-sex couples.” §75.300(d). The deletion of this requirement by a federal agency, thus tacitly approving the unequal treatment of same-sex couples by HHS grantees, smacks of the same infirmity as the Defense of Marriage Act (“DOMA”) suffered, struck down by the Supreme Court in *United States v. Windsor*.³³ As the Court declared:

DOMA singles out a class of persons deemed by a State entitled to recognition and protection to enhance their own liberty. It imposes a disability on the class by refusing to acknowledge a status the State finds to be dignified and proper. DOMA instructs all federal officials, and indeed all persons with whom same-sex couples interact, including their own children, that their marriage is less worthy than the marriages of others. The federal statute is invalid, for **no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity.** [emphasis added]

³⁰ See, e.g., *Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 529 (3rd Cir. 2018) (school district had a compelling state interest in protecting transgender students from discrimination).

³¹This is the firm position of the EEOC, the governmental agency charged with enforcing Title VII: “EEOC interprets and enforces Title VII’s prohibition of sex discrimination as forbidding any employment discrimination based on **gender identity or sexual orientation.**” https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm.

³² See, e.g., Titles I, II, III, IV and VII of the Civil Rights Act of 1964 prohibiting discrimination on the basis of religion in voting, public accommodations, public facilities, public education, and employment. 42 U.S.C. §2000a *et seq.*,

³³ *United States v. Windsor*, 570 U.S. 744, 775, 133 S. Ct. 2675 (2013).

Just as DOMA was invalid because it had “the purpose and effect to disparage and injure” legally married same-sex couples, the Proposed Rule’s deletion of the requirement that marriages of same-sex couples be treated as valid by grant recipients has “the purpose and effect to disparage and injure” them. The Proposed Rule would cause same-sex couples to suffer the humiliation and indignity of being turned away when they want only to provide loving homes to abused or neglected children and would thus cause them substantial stigmatic and dignitary harm.³⁴ The Proposed Rule must be withdrawn to avoid this harm.

5. The Proposed Rule Causes Substantial Harm by Allowing Discrimination Against Families of Origin

The Proposed Rule could harm children of LGBTQ parents by permitting discrimination in removals and family prevention and support services provided under Title IV of the Social Security Act, the Child Abuse Prevention and Treatment Act, and the Family First Prevention Services Act. Under the Proposed Rule, parents who identify as LGBTQ and/or who are in same-sex marriages could be denied prevention services designed to preserve families and avoid foster care, such as substance abuse and mental health services. This is not a hypothetical concern. In the first quantitative study of its kind, in 2018, of 339 low income African American mothers, the 21.3% who identified as lesbian/bisexual were four times more likely than those who identified as heterosexual to have lost

³⁴ See *Dumont v. Lyon*, 341 F. Supp. 3d 706 (E.D. Mich. 2018) (Same-sex married couple turned away by faith-based child placing agencies suffered sufficient stigmatic injury to support Equal Protection and Establishment claims.); *Marouf v. Azar*, 391 F. Supp. 3d 23 (D.D.C. 2019) (same).

their children to the state in child welfare proceedings.³⁵ Given that numerous studies have shown, as mentioned above, that children with same-sex parents have the same advantages and expectations for health, social, and psychological expectations as children with parents whose parents are different-sex³⁶, it is reasonable to infer that bias towards same-sex couples plays a major factor in removal decisions. This shows a need for nondiscrimination protections for families of origin in child welfare to protect the well-being of their children, yet the Proposed Rule removes those protections.

The HHS Child Welfare Information Gateway states that “When children must be removed from their families to ensure their safety, the first goal is to reunite them with their families as soon as possible; the Proposed Rule undermines this “first goal” of foster care.³⁷ Under the Proposed Rule, child welfare providers could discriminate against parents of origin who meet criteria for family reunification because they identify as LGBTQ or are in a same-sex marriage. Further, needed services to support family reunification could be denied to LGBTQ parents of origin, undermining the well-being of their children.

The Proposed Rule could lead to service denials directly for the children of LGBTQ people. A lesbian couple in Tennessee reported their two-year-old son was rejected from a childcare facility attended by many neighboring children because his parents were a same-sex couple:

³⁵ Kathi L.H Harp & Carrie B. Oser, *Factors associated with two types of child custody loss among a sample of African American mothers: A novel approach*, 60 SOCIAL SCIENCE RESEARCH 283-296 (2016).

³⁶ Timothy J. Biblarz & Judith Stacey, *How Does the Gender of Parents Matter?*, 72 JOURNAL OF MARRIAGE AND FAMILY 3, 22 (2010), available at: <https://www.apa.org/pi/lgbt/resources/biblarz-stacey.pdf>; Stephanie Pappas, *Why Gay Parents May Be the Best Parents*, THE WILLIAMS INSTITUTE UCLA SCHOOL OF LAW (2012), available at: <https://williamsinstitute.law.ucla.edu/press/in-the-news/why-gay-parents-may-be-the-best-parents/>

³⁷ Child Welfare Information Gateway, *Reunification: Bringing Your Children Home From Foster Care*, U.S. D.H.H.S. CHILDREN’S BUREAU, (2016), available at <https://www.childwelfare.gov/pubPDFs/reunification.pdf>.

When our son was denied an application because he had two Moms, we were heartbroken. He had been very excited about going to school with his friends and didn't understand when we had to tell him he couldn't. These events altered the bonds he had formed with the neighborhood children from birth and his personal connection with his community.³⁸

The Proposed Rule would allow such discrimination against children of LGBTQ parents as well as against LGBTQ children and youth themselves in federally funded head start, childcare, and after-school programs.

6. The Proposed Rule Conflicts with the Compelling Government Interest in Avoiding Taxpayer Funding of Discrimination

Perhaps the most glaring deficiency of the Proposed Rule is that it runs contrary to the strong public policy against federal funding of discrimination through government programs. “It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice.” *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989).

The landmark 1964 Civil Rights Act, 24 U.S.C. §2000a *et seq.*, took direct aim at private discrimination in programs receiving federal financial assistance. 24 U.S.C. §2000d (“Title VI”).³⁹ The history of Title VI dramatically demonstrates the public policy against use of federal dollars to support discriminatory programs, whether by state agencies or private institutions. This purpose was

³⁸ Brief for Lambda Legal & Family Equality Council as Amicus Curiae, *Masterpiece Cakeshop, LTD v. Colorado Civil Rights Commission*, No. 16-111 (Supreme Court, 2017), available at: <https://www.familyequality.org/wp-content/uploads/2018/07/20171030-LambdaLegal-FamEq-Amicus-Brief-Masterpiece.pdf>.

³⁹ Title VI provides that: “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” (Pub. L. 88-352, title VI, §601, July 2, 1964, 78 Stat. 252.)

first expressed in President Kennedy's June 19, 1963, message to Congress proposing the legislation that subsequently became the Civil Rights Act of 1964:

Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination. **Direct discrimination by Federal, State or local governments is prohibited by the Constitution. But indirect discrimination, through the use of Federal funds, is just as invidious** [emphasis added]; and it should not be necessary to resort to the courts to prevent each individual violation....

Instead of permitting this issue to become a political device often exploited by those opposed to social or economic progress, it would be better at this time to pass a single comprehensive provision making it clear that the Federal Government is not required, under any statute, to furnish any kind of financial assistance -- by way of grant, loan, contract, guaranty, insurance, or otherwise -- to any program or activity in which racial discrimination occurs. 109 Cong. Rec. 11161 (1963).

As Senator Humphrey declared: "In all cases, such discrimination is contrary to national policy, and to the moral sense of the Nation. Thus, Title VI is simply designed to ensure that Federal funds are spent in accordance with the Constitution and the moral sense of the Nation." 110 Cong. Rec. 6544 (1964).

While, in 1964, Title VI's focus was on race discrimination (just as Supreme Court cases of that era were focused on securing the right of African-Americans to Equal Protection), subsequent statutes, such as Title IX, 20 U.S.C. §1681 *et seq.*,⁴⁰ Section 503 of the Rehabilitation Act of 1973, 29 U.S.C. §703, the Age Discrimination Act of 1975, 42 U.S.C. §6102, as well as Executive Orders⁴¹ and federal

⁴⁰ Title IX, like its model Title VI, "sought to accomplish two related, but nevertheless somewhat different, objectives. First, **Congress wanted to avoid the use of federal resources to support discriminatory practices**; second, it wanted to provide individual citizens effective protection against those practices." *Cannon v. University of Chicago*, 441 U.S. 677, 704 (1979) (emphasis added).

⁴¹ For example, over 50 years ago, President Johnson signed Executive Order 11246, prohibiting organizations that receive federal contracts from discriminating in employment based on sex, race, color, religion, or national origin. Most recently, President Obama expanded nondiscrimination protection under EO 11246 to include an explicit prohibition of discrimination based on sexual orientation and gender identity, which are aspects of sex discrimination.

regulations, have made further progress in advancing public policy by prohibiting discrimination on other non-merit-based classifications in federally funded programs.⁴²

There is no public interest served by a regulation that allows federal funds to be paid to organizations that engage in invidious discrimination, even if based on religious belief. In *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983), the Supreme Court found that an IRS regulation denying tax benefits to educational institutions that engaged in racial discrimination advanced compelling public interests. The Court found that the IRS was justified in promulgating a regulation that withheld tax-exempt status – a valuable tax benefit – based on an institution’s violation of a fundamental public policy against racial discrimination in education. The Court rejected the institution’s claim that the regulation constituted an unconstitutional infringement on their free exercise rights under the First Amendment; the governmental interest “substantially outweighs whatever burden denial of tax benefits places on petitioners’ exercise of their religious beliefs.” *Id.* at 604.

The compelling public interest against funding discrimination with taxpayer dollars does not vary based on the type of discrimination. As President Kennedy observed, the bar on federal funding of discrimination should be co-extensive with the Constitutional guarantee of Equal Protection, such that what the government cannot do directly, it cannot do indirectly. This important principle of public policy clearly prohibits funding grantee entities engaged in discrimination on the basis of sex, sexual

⁴² The accretion of statutes and regulations pertaining to federally funded programs, with disparate provisions, over time have resulted in a patchwork of prohibitions on discrimination that vary from program to program. Paragraph (c) of the Final Rule “fills in the gaps”, *Chevron v. NRDC, Inc.*, 487 U.S. 837, 843 (1984), and brings uniformity by ensuring that no covered program uses non-merit factors to discriminate in the administration of HHS programs. It fulfills the Uniform Administrative Requirements mandate that “federal funding is expended and associated programs are implemented in full accordance with U.S. **statutory and public policy requirements**, including...prohibiting discrimination. 2 CFR §200.300(a); 45 CFR 75.300(a) (emphasis added). The Proposed Rule, which address only statutory requirements, thus fails to fulfill that express mandate.

orientation, gender identity, and same-sex marriage; such categories are squarely protected by the Equal Protection Clause.⁴³

Accordingly, the Proposed Rule, which strips such protections from HHS-funded programs, wrongfully fails to “ensure that Federal funding is expended, and associated programs are implemented in full accordance with”⁴⁴ the important public policy of avoiding taxpayer funding of discrimination based on these protected classes.

7. Allowing Child Placing Agencies to Discriminate in Providing HHS-Funded Services Violates the Equal Protection Rights of Prospective Foster and Adoptive Parents

In addition to the above reasons why the Proposed Rule should be withdrawn, there is another fundamental problem with allowing invidious discrimination by child placing agencies in Title IV Part E grant programs funded by HHS: HHS would be a joint participant with the states and the agencies in violating the Equal Protection rights of the persons who are subjected to discrimination.

The Equal Protection Clause of the Fourteenth Amendment guarantees that no State⁴⁵ shall deny to any person “the equal protection of the laws.”⁴⁶ In basic terms, neither the Federal Government, nor

⁴³ See, e.g., *Unites States v. Virginia*, 518 U.S. 515, 532 (1996) (“the Court has repeatedly recognized that neither federal nor state government acts compatibly with the equal protection principle when a law or official policy denies to women... full citizenship stature”); *Romer v. Evans*, 517 U.S. 620 (1996) (Colorado constitutional amendment prohibiting state or local civil rights protections for gays and lesbians violated the Equal Protection clause); *Windsor, supra* (federal law treating same-sex and opposite-sex married couples differently violated Due Process and Equal Protection clauses); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (discrimination against transgender person because of her gender non-conformity is sex discrimination that violates the Equal Protection Clause).

⁴⁴ 2 CFR §200.300(a); 45 CFR 75.300(a).

⁴⁵ This prohibition extends to the Federal Government through the Due Process Clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

⁴⁶ While for the first 100 years of its existence, the Equal Protection clause was used as a check on state action that discriminated against persons on the basis of their race, color or national origin, its use was eventually expanded to protect

any State or political subdivision can discriminate in its laws – either facially or through application or enforcement⁴⁷ – or in providing benefits or services, against a person based on that person’s membership in a class without at least a rational basis; if the discrimination involves a “suspect” class (such as race, national origin, or religion), or “quasi-suspect” class (such as sex), the government must show a much greater governmental interest to justify its action.

Accordingly, it is beyond dispute that, under the Equal Protection Clause, neither the federal government nor any state can directly discriminate against persons based on their sex, including their sexual orientation, gender identity, or being in a same-sex marriage, without showing that the discriminatory treatment furthers an important government interest by means substantially related to that interest.⁴⁸ For more than two decades, every challenged government action involving discrimination against those classes has failed to meet that standard, or even the lower “rational basis” test. See *Romer v. Evans*, 517 U.S. 620, 116 S. Ct. 1620 (1996).

As a result, under the Equal Protection Clause, neither HHS nor any state department of human services can directly discriminate in providing benefits or services to program participants based on

against other types of class-based discrimination, including discrimination based on sex, sexual orientation, and gender identity. See footnote 43, *supra*.

⁴⁷ Despite the impartial wording of a statute, if it is applied and administered so as to result in class-based discrimination, the statute violates the Equal Protection Clause. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Here, although the Proposed Rule is neutral on its face, it will clearly be applied and administered so as to result in class-based discrimination based on religion and sex, including sexual orientation and gender identity.

⁴⁸ For example, the denial of federal tax benefits to a same-sex married couple under DOMA required “heightened scrutiny” because it discriminated against a quasi-suspect class (homosexuals); the statute violated the plaintiffs’ right to Equal Protection because it was not substantially related to an important government interest. *Windsor v. U.S.*, 699 F.3d 169 (2nd Cir. 2012), *aff’d sub. nom. United States v. Windsor*, 570 U.S. 744 (2013).

their sex, including their sexual orientation, gender identity, or being in a same-sex marriage.⁴⁹

Specifically, turning away a same sex married couple who seek services from a state DHS in connection with either a foster care or private adoption is a violation of the Equal Protection Clause.⁵⁰

It has long been held that when a state engages in indirect discrimination through government funding of private discriminatory conduct, it also violates the Equal Protection Clause. In *Norwood v. Harrison*, 413 U.S. 455 (1973), the Court struck down Mississippi’s textbook lending program because, although neutral on its face, it aided schools with racially discriminatory policies; a state “may not grant the type of tangible financial aid here involved if that aid has a significant tendency to facilitate, reinforce, and support private discrimination.” The Court further declared: “Racial discrimination in state-operated schools is barred by the Constitution and ‘it is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish.’”⁵¹

Here, because discrimination based on sex, including sexual orientation, gender identity, and being in a same-sex marriage in state-operated child welfare programs is barred by the Constitution, neither a state nor HHS may “facilitate, reinforce and support” private discrimination on that basis; placing agencies must not be encouraged to accomplish what any state or HHS is constitutionally forbidden to

⁴⁹ The Court’s decision in *Pavan* has definitively settled the question as to whether a state can constitutionally treat married same-sex and opposite-sex couples differently with respect to creating families. The answer is no. *Pavan v. Smith*, 137 S. Ct. 2075 (2017). See also *Henderson v. Adams*, 209 F. Supp. 3d 1059 (S.D. Ind. 2016) (holding that state parentage statutes which provide for unequal treatment of same-sex and opposite-sex married couples violates the Equal Protection and Due Process Clauses).

⁵⁰ *Campaign for Southern Equality v. Mississippi Dept. of Human Servs.*, 175 F. Supp. 3d 691 (S.D. Miss. 2016).

⁵¹ 413 U.S. at 465, citing *Lee v. Macon County Bd. of Ed.*, 267 F. Supp. 458, 475-76 (M.D. Ala. 1967).

accomplish, i.e., refusal of services to same-sex prospective foster and adoptive parents. See, e.g., *Dumont v. Lyon*, 341 F. Supp. 3d 706 (E.D. Mich. 2018) (plaintiff same-sex couples who were turned away by state-contracted, taxpayer-funded, religiously-affiliated child placing agencies stated a plausible claim against the state’s HHS department for violation of their Equal Protection rights and violation of the Establishment Clause).⁵²

Two other pending cases raise the same claims, but add claims against HHS for its role in aiding discrimination by child-placing agencies against same-sex couples.⁵³ In *Marouf*, the court squarely rejected HHS’s claim that it could not be liable for the conduct of a third party (USCCB) in refusing a same-sex couple’s request to foster an unaccompanied refugee child. The court observed: “the Federal Defendants caused Plaintiffs’ injury both by creating a system that permits religiously affiliated grant recipients to deny federally funded services to same-sex couples *and* by failing to take any action after Plaintiffs gave notice of what happened to them.” *Marouf v. Azar*, 391 F. Supp. 3d 23, 37 (D.D.C. 2019).

Here, HHS proposes eliminating protections against discrimination by grantees on the basis of sex, sexual orientation, gender identity, and being in a same-sex marriage – at the behest of entities that are actively discriminating – and thus is would be partnering in unconstitutional discrimination by knowingly allowing those agencies to continue to engage in such discrimination.

⁵² In *Dumont*, Plaintiffs challenged the actions of Defendant state officials in entering into contracts for the provision of state-contracted services, expressly acknowledging and accepting that certain faith-based agencies may elect to discriminate on the basis of sexual orientation in carrying out those state-contracted services, conduct that the Defendants concede the State could not take itself. The Proposed Rule in this case would lead to exactly the same type of constitutional violations.

⁵³ *Rogers v. U.S. Dept of HHS*, No. 19-01567 (D.S.C. May 30, 2019); *Marouf v. Azar*, No. 18-00378 (D.D.C. Feb. 2018).

Moreover, the Proposed Rule shirks HHS’s constitutional duty “to police the operations of and prevent such discrimination by State or local agencies funded by” HHS. *NAACP, W. Region v. Brennan*, 360 F. Supp. 1006, 1012 (D.D.C. 1973).

8. The Proposed Rule Serves No Legitimate Purpose Because Alleged “Concerns” That the Final Rule Violates RFRA Are Without Basis in Law or Fact

To the extent that HHS claims that the Final Rule’s prohibitions against discrimination based on non-merit factors must be rescinded based on some unspecified “concerns” by unspecified entities that requiring compliance violates the Religious Freedom Restoration Act (RFRA), 42 U.S.C. §2000bb *et seq.*, such concerns are without basis in law or fact.

RFRA merely provides that, if a federal action (even a neutral one of general applicability) substantially burdens the free exercise of religion,⁵⁴ it must be justified by a compelling government interest and it must use “the least restrictive means” to further that interest. 42 U.S.C. §2000bb-1. This was the legal standard for assessing whether government action violated the Free Exercise clause prior to *Employment Div. v. Smith*, 485 U.S. 660 (1988). RFRA does not create any substantive right of religiously affiliated entities to an exemption from neutral laws of general applicability if those laws meet the legal standard.

⁵⁴ It is highly debatable that requiring a religiously affiliated program grantee to adhere to the same contract conditions as non-religious grantees imposes a “substantial burden.” The essence of the *Trinity Lutheran* case was that, under the Free Exercise clause, the plaintiff church’s exercise of religion was substantially burdened because it was not considered for a playground resurfacing grant on equal terms with a secular applicant; not that it had a right to impose special terms on the grant process based on its religious beliefs. *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017). Similarly, in *Masterpiece Cakeshop*, the plaintiff bakery owner had a right under the Free Exercise clause to have his faith-based defense to violating the Colorado civil rights law (refusing service to a gay couple) heard by a neutral adjudicatory body, i.e., one that would treat him equally with other alleged violators; he did not have a right to an exemption from the law based on his religious beliefs. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018).

In the nearly three years since it was promulgated, no court has ever held that the Final Rule – or any other prior or subsequent law or regulation that conditions the award of government grants or contracts on compliance with non-discrimination laws or policies – violates RFRA or is an unconstitutional burden on Free Exercise rights.⁵⁵ Only one case, *Buck v. Gordon*, has even raised such a claim relating to the Final Rule, and it is so early in that litigation that the only ruling on the issue has been that the words of the Complaint make out a RFRA claim.⁵⁶ It should be noted that the preliminary injunction entered by the court in *Buck* is limited to the State of Michigan and to the particular subgrantee’s contract (and was granted solely as a result of perceived animus by the state attorney general); the court’s decision to enjoin enforcement of the Final Rule occurred without any analysis whatsoever about whether there was any likelihood of success on the merits of the RFRA claim.

In contrast, in *Fulton v. City of Philadelphia*,⁵⁷ after a thorough review of the record and the law, the Third Circuit affirmed the denial of a preliminary injunction based on a Free Exercise claim similar

⁵⁵ Although the case involved the prohibition against racial discrimination in places of public accommodation under Title II, rather than in programs receiving federal assistance under Title VI of the 1964 Civil Rights Act, it is worth noting that the Supreme Court approved the award of plaintiffs’ attorney fees because the defendant’s contentions – including that “the Act was unconstitutional because it ‘contravenes the will of God’ and constitutes an interference with the ‘free exercise of Defendant’s religion’” -- were “patently frivolous.” *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 403, n. 5 (1968).

⁵⁶ The court merely stated in a footnote: “Plaintiffs have stated a plausible RFRA claim. Plaintiffs allege that the Federal Defendants are requiring Michigan to comply with § 45 C.F.R. 75.300(c); that the regulation is unlawful; and that the regulation forces St. Vincent to violate its sincere religious beliefs in order to comply with the State and federal requirements. They have alleged that the federal government has imposed a substantial burden on their sincere religious exercise, and that the burden is neither justified by a compelling state interest nor the least restrictive means of achieving the interest. Dismissal under Rule 12(b)(6) is not appropriate.” *Buck v. Gordon*, 1:19-CV-286 (W.D. Mich. Sept. 26, 2019), appeal pending.

⁵⁷ *Fulton v. City of Philadelphia*, 922 F.3d 140 (3rd Cir. 2019), *cert. pending*. If the Court grants the cert. petition, it would obviously be premature to finalize the Proposed Rule before the Court renders a decision on the questions presented, since they bear on the relationship between non-discrimination laws and the Free Exercise clause.

to Buck. The court held that CSS, a child placing agency, failed to demonstrate a sufficient likelihood of success on the merits of its Free Exercise claim, which was based on the City's requirement that CSS comply with the City's non-discrimination ordinance (which protects same-sex couples) when providing child placement services.

Under the Administrative Procedures Act (APA), agency rules must be based on facts and relevant data;⁵⁸ "concerns" are not facts. There is no factual basis for any "concern" that the non-discrimination provisions of the Final Rule, which are neutral toward religion and of generally applicability, violate RFRA. As set forth above, it is undeniable that there is a compelling governmental interest in eradicating discrimination, and a twin compelling interest in avoiding taxpayer funding of discrimination. The Final Rule was narrowly tailored to serve those interests by prohibiting discrimination based on non-merit factors, such as sexual orientation, in administering federally funded child welfare programs. Thus, there is no reasonable basis for eviscerating the protections in the Final Rule based on RFRA.⁵⁹

Finally, in the Notice of Proposed Rulemaking, it is alleged that the existence of "complaints and legal actions" indicates that the non-discrimination provisions of the Final Rule "imposed regulatory burden." Clearly, every prohibition on discrimination – whether based in the Constitution, a state or federal statute, a state or federal regulation or policy, or the terms of a government contract or grant –

⁵⁸ An agency action will be set aside if it is "arbitrary, capricious, and abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §706(2)(A). In determining whether an agency has acted in an arbitrary and capricious fashion, the question is whether the agency has "examined the relevant data and articulated a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Veh. Mfrs. Ass'n v. State Farm, supra*, 463 U.S. at 42.


⁵⁹ See, e.g., *Pennsylvania v. President United States*, 930 F.3d 543 (3rd Cir. 2019) *cert. pending*, holding that HHS's regulation expanding the availability of a religious exemption to the "Contraceptive Mandate", which HHS claim was required by RFRA, was in fact not required by RFRA and should be enjoined.

burdens the entity that wants to continue to discriminate, whether due to religious belief or otherwise. But, as the Supreme Court held in *Bob Jones Univ., supra*, the burden on a (in that case, religious) entity, i.e., losing a governmental benefit, as a result of a regulation prohibiting discrimination is far outweighed by the compelling government interest in eradicating discrimination. Consequently, the “regulatory burden” of complying with nondiscrimination requirements cannot be a legitimate basis for revising the Final Rule.

CONCLUSION

For all of the above reasons – the harm it would cause to foster children, prospective foster parents, and LGBTQ parents and their children, the violations of law and public policy it promotes by funding discrimination, and the absence of any legitimate basis for action – Family Equality respectfully requests that HHS withdraw the Proposed Rule and lift the suspension of sections §75.300(c) and (d) of the Final Rule.

Respectfully,



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