State of California
Office of the Attorney General
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ATTORNEY GENERAL

December 19, 2019

Via e-filing at www.regulations.gov

Secretary Alex Azar
U.S. Department of Health & Human Services
Hubert H. Humphrey Building, Room 514-G
200 Independence Avenue SW
Washington, DC 20201

RE: Comments on Proposed Rule, "Office of the Assistant Secretary for Financial Resources; Health and Human Services Grants Regulation," 84 Fed. Reg. 63,831 (November 19, 2019), RIN 0991-AC16

Dear Secretary Azar:

The undersigned State Attorneys General of California, Massachusetts, Pennsylvania, Colorado, Delaware, District of Columbia, Hawai'i, Illinois, Iowa, Maryland, Minnesota, Nevada, New Jersey, New York, North Carolina, Rhode Island, Vermont, Virginia, and Washington (the States) submit these comments to oppose the Proposed Rule: "Office of the Assistant Secretary for Financial Resources; Health and Human Services Grants Regulation," 84 Fed. Reg. 63,831 (November 19, 2019), RIN 0991-AC16 ("Proposed Rule").

Under the Proposed Rule, U.S. Department of Health & Human Services (HHS) would eliminate explicit protections for "age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation" and replace these protections with a generic prohibition of discrimination: "to the extent doing so is prohibited by federal statute." The Proposed Rule would also remove explicit requirements that grantees treat as valid the marriages of same-sex couples, consistent with Supreme Court precedent. The Proposed Rule will inflict harm on the States' residents—particularly lesbian, gay, bisexual, transgender, and queer or questioning (LGBTQ) individuals—by undermining and calling into question legal protections that guarantee equal access to HHS grant-related activities. While the Proposed Rule does not preempt anti-discrimination laws and policies in the States, it undermines their enforcement by sending the message that HHS grantees are free to discriminate if they so choose, and creates unnecessary confusion. HHS has also failed to provide adequate explanation for its harmful Proposed

Rule, including falsely asserting that nondiscrimination protections reduce the effectiveness of HHS-funded programs, when the evidence instead demonstrates that charitable service providers have embraced policies that welcome, not exclude, those in need of their services.

I. The Proposed Rule will harm the States' LGBTQ residents

Prospective LGBTQ foster and adoptive parents are among those most likely to be harmed under the Proposed Rule. Indeed, many same-sex couples volunteer to become foster or adoptive parents. Already, an estimated 27,000 same-sex couples are raising 58,000 adopted and foster children in the United States.[1] In Massachusetts, in each of the last 10 years, between 15 and 28 percent of adoptions of foster children have involved same-sex parents.[2] Full inclusion of LGBTQ people in the pool of foster parents ensures that LGBTQ foster and adoptive parents are able to make their own choices regarding the personal, intimate, and important choices of whether and how to raise children.[3]

Ensuring nondiscrimination is also vitally important to the provision of services to LGBTQ foster youth. LGBTQ youth are greatly overrepresented in the foster care population: the number of LGBTQ foster youth is twice as high as the number of LGBTQ youth in general population.[4] Foster youth experience discrimination based on their perceived sexual orientation, gender identity, or gender expression at remarkably

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[1] *See* Gary J. Gates, *Demographics of Married and Unmarried Same-sex Couples: Analyses of the 2013 American Community Survey*, The Williams Institute 7–8 (Mar. 2015), http://williamsinstitute.law.ucla.edu/wp-content/uploads/Demographics-Same-Sex-Couples-ACS2013-March-2015.pdf.

[2] Information provided by the Massachusetts Adoption Resource Exchange on September 19, 2018.

[3] *Cf. Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) ("[P]ersonal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," *i.e.*, "matters involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.").

[4] *See* Bianca D.M. Wilson & Angeliki A. Kastanis, *Sexual and Gender Minority Disproportionality and Disparities in Child Welfare: A Population-based Study*, 58 Child. & Youth Servs. Rev. 11, 11 (2015) (estimating that 19.1 percent of foster youth aged 12 to 21 identify as LGBTQ, compared to 8.3 percent of the general population); Alan J. Dettlaff et al., *Lesbian, Gay, and Bisexual (LGB) Youth Within in Welfare: Prevalence, Risk and Outcomes*, 80 Child Abuse & Neglect 183, 191 (2018) (similar results).

high levels,[5] including within the foster care system. Many of them have been abused, neglected, or abandoned by their birth parents because of their LGBTQ identity. One study found that an estimated 12 percent of LGBTQ foster youth aged 17 to 21 had run away from, or were kicked out of, their homes or foster placements because of their sexual orientation or gender identity.[6]

By permitting entities to deny HHS-funded services to same-sex couples and their children—as well as LGBTQ youth—these individuals suffer the "humiliation, frustration, and embarrassment that a person must surely feel" when excluded from services or activities otherwise available to the public. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 292 (1964) (Goldberg, J., concurring) (quoting S. Rep. No. 872, at 16 (1964)); *see Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 549 (1987). When same-sex couples are discriminated against in their personal decisions about child-rearing, these families are further deprived of the "profound benefits" recognized in *Obergefell v. Hodges*— recognition that allows children "to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." 135 S. Ct. 2584, 2600 (2015). This lack of recognition harms and humiliates children of same-sex couples, and they will "suffer the stigma of knowing their families are somewhat lesser." *Id*. at 2600-01.

In the healthcare setting too it is well-documented that LGBTQ individuals face discrimination. LGBTQ individuals report experiencing barriers to receiving medical services, including disrespectful attitudes, discriminatory treatment, inflexible or prejudicial policies, and even outright refusals of essential care, leading to poorer health outcomes and often serious or even catastrophic consequences.[7] Transgender people in

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[5] *See* Wilson et al., *supra* note 4 at 35 (documenting that 18.5 percent of all foster youth and 37.7 percent of LGBTQ foster youth reported discrimination on this basis in all domains of their life in the prior year).

[6] *See* Bianca D.M. Wilson et al., *Sexual and Gender Minority Youth in Foster Care: Assessing Disproportionality and Disparities in Los Angeles*, The Williams Institute 34-35 (Aug. 2014), http://williamsinstitute.law.ucla.edu/wp-content/uploads/LAFYS_report_final-aug-2014.pdf; *see also* Dettlaff et al., *supra* note 4, at 191 (noting that LGB youth involved in the child welfare system were significantly more likely to report having run away from home in the last six months than their non-LGB counterparts).

[7] Lambda Legal, *When Health Care Isn't Caring: Lambda Legal's Survey on Discrimination Against LGBT People and People Living with HIV* at 5-7, https://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-report_when-health-care-isnt-caring.pdf; *see also* Jennifer Kates, et al., Kaiser Family Found., *Health and Access to Care and Coverage for Lesbian, Gay, Bisexual, and Transgender (LGBT) Individuals in the U.S.* (May 3, 2018), https://www.kff.org/report-section/health-and-access-to-care-and-coverage-lgbt-individuals-in-the-us-health-challenges/.

particular report hostile and disparate treatment by providers.[8] More broadly, LGBTQ individuals experience worse physical health compared to their heterosexual and non-transgender counterparts,[9] have higher rates of chronic conditions,[10] and are at higher risk for certain mental health and behavioral health conditions, including depression, anxiety, and substance misuse.[11] LGBTQ youth, in particular, report a greater incidence of mental health issues and suicidal behaviors, suffer bullying and victimization to a greater extent than heterosexual youth, and have difficulty addressing concerns related to their sexual identity with their medical providers.[12] The Proposed Rule would embolden those who are inclined to discriminate, further increasing disparities in health outcomes for LGBTQ individuals.

Because of these well-documented disparities and harms, legitimate and compelling interests support the enforcement of explicit nondiscrimination policies, including in the context of foster care services and healthcare.

Yet, HHS entirely fails to consider these harms, which would likely flow from what appears to be a free pass to discriminate provided under the Proposed Rule. HHS's failure to consider these impacts is in direct contravention to the requirements of Executive Order 12,866, which requires agencies to consider costs in complying with the regulation, including "any adverse effects" the rule might have on "the efficient functioning of the economy, private markets . . . health, safety, and the natural environment."[13] The costs of an agency's action are "a relevant factor that the agency must consider before deciding whether to act," and are "an essential component of reasoned decision-making under the Administrative Procedure Act." *Mingo Logan Coal Co. v. EPA*, 829 F.3d 710, 732-33 (D.C. Cir. 2016); *see also Michigan*, 135 S. Ct. at 2707-08 ("Agencies have long treated costs as a centrally relevant factor when deciding whether to regulate.").

HHS's failure to consider harm to LGBTQ individuals is particularly arbitrary because HHS has previously recognized the seriousness of continuing discrimination

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[8] Nat'l Ctr. for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey* at 97 (2016), http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf; *see also* Kates, *supra* note 7.

[9] Kates, *supra* note 7, at 5.

[10] *Id*.

[11] *Id*. at 8.

[12] Hudaisa Hafeez, et al., *Health Care Disparities Among Lesbian, Gay, Bisexual, and Transgender Youth: A Literature Review*, Cureus (April 2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5478215/.

[13] E.O. 12,866 § 6(a)(3)(C)(ii); *see also Michigan v. EPA*, 135 S. Ct. 2699, 2707 ("reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions").

against LGBTQ persons. The current regulation specifies that "no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services" based on listed protected characteristics, including gender identity and sexual orientation. 45 C.F.R. § 75.300(c). In promulgating the current regulation, HHS stated:

> HHS is codifying its implementation of the decisions in *U.S. v. Windsor*, 570 U.S. ___ (2013), 133 S.Ct. 2675 and *Obergefell v. Hodges*, 576 U.S. ___ (2015), 135 S.Ct. 2584. The HHS codification of its interpretation of these Supreme Court decisions ensures that same-sex spouses, marriages, and households are treated the same as opposite-sex spouses, marriages, and households in terms of determining beneficiary eligibility or participation in grant-related activities.

81 Fed. Reg. 45,270, 45,271 (July 13, 2016).

HHS has also previously concluded that continued discrimination against the LGBTQ community warranted further clarification about the prohibition of discrimination on the basis of sex to not only include women, but also transgender individuals in particular. "Nondiscrimination in Health Programs and Activities," 81 Fed. Reg. 31,376, 31,460 (May 18, 2016). HHS's proposed reversal of these critical gains for the LGBTQ community will result in precisely the consequences HHS previously warned against—increased healthcare disparities, including higher rates of mental health issues, such depression and suicide attempts, among other consequences. The failure to consider significant costs is particularly problematic because it results from a reversal of a prior policy that induced significant reliance interests. *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). A more "detailed justification" is needed when "serious reliance interests" are at stake. *Id.* But none is provided here; only vague and unsupported justifications for the drastic policy reversal.

Further, by permitting entities to deny HHS-funded healthcare services to LGBTQ persons, the Proposed Rule clashes with several provisions of the Affordable Care Act, most notably section 1554, which prohibits the Secretary of HHS from creating barriers to healthcare, and section 1557, which prohibits discrimination in health programs or activities. 42 U.S.C. §§ 18114, 18116. The Constitution prohibits government conduct that may have a primary effect, which advances a particular religious practice. Conduct unlawfully advances religion by favoring religion at the expense of the rights, beliefs, and health of others. *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334-35 (1987) ("At some point, accommodation may devolve into 'an unlawful fostering of religion.'").

II. The Proposed Rule is not justified

HHS offers several justifications for why, despite the harm that will follow, the Proposed Rule is needed. None, however, is adequate.

First, HHS claims that the Proposed Rule will make regulatory compliance "more predictable and simpler." 84 Fed. Reg. 63,833. In fact, the Proposed Rule will have the opposite effect. The Proposed Rule strips away clear and explicit protections, instead pointing generally to "federal statute." But the reference to "federal statute" provides only a patchwork of protections, some of which are hotly contested. For example, federal case law has long held that the definition of "sex discrimination" in a variety of federal civil rights laws, including Title IX, includes discrimination on the basis of gender-based assumptions and stereotypes, and the vast majority of federal courts have found that disparate treatment based on gender identity constitutes unlawful discrimination in employment, education, and healthcare. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 223 (6th Cir. 2016) (transgender girl denied access to girls' bathroom was likely to succeed on merits of Title IX sex discrimination claim); *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 721, 723 (4th Cir. 2016) (David, J., concurring), *cert. granted in part*, 137 S. Ct. 369 (Oct. 28, 2016) (noting the "weight of circuit authority concluding that discrimination against transgender individuals constitutes discrimination 'on the basis of sex'"); *Kastl v. Maricopa Cty. Cmty. Coll. Dist.*, 325 F. App'x 492, 493 (9th Cir. 2009) ("After *Hopkins* and *Schwenk*, it is unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with an employer's expectations for men or women."); *Schwenk v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000) ("'[S]ex' under Title VII encompasses both sex—that is, the biological differences between men and women—*and* gender.") (emphasis added). However, this remains a complex area of law, leaving States and other grantees responsible for determining the relevant federal statutes and how HHS will interpret and apply them in this context.

If HHS expects that its instruction that grant recipients must comply with the Religious Freedom Restoration Act (RFRA), 84 Fed. Reg. 63,833, will add clarity and predictability to grant administration, HHS's expectation is off base. RFRA creates a judicial remedy for individuals when the government substantially burdens religious exercise, but only if the burden is not the least restrictive means of further a compelling interest. 42 U.S.C. § 2000bb-1. What a grant recipient must do to comply with RFRA—a law that of course applies against only the federal government, *see City of Boerne v. Flores*, 521 U.S. 507 (1997)—is far from certain, especially in the abstract.

Second, HHS cites to the preliminary injunction issued in *Buck v. Gordon*, No. 1:19–cv–286 (W.D. Mich. Sept. 26, 2019) (ECF No. 70), as justification for the Proposed Rule. But this case clearly does not warrant the broad and harmful changes the Proposed Rule seeks to enact. In *Buck*, the court preliminarily enjoined Michigan from taking adverse action against St. Vincent Catholic Charities based on protected religious exercise, finding that such adverse action would amount to anti-religious hostility in this specific case. Moreover, the court found that although the placement agency refused to certify same-sex couples, it nevertheless would place children for foster care or adoption in any home approved by the state, including households with same-sex couples. The court approvingly acknowledged that the placement agency served LGBTQ children in

its foster program and group homes, and welcomed LGBTQ couples at its parent support group. But the Proposed Rule could result in LGBTQ individuals being turned away altogether, regardless of whether the discriminatory conduct is based on protected religious exercise, a result that is inapposite to the *Buck* opinion.

Nor could the limited scope of this single district court ruling—which is presently pending on appeal—warrant the dramatic reversals set forth in the Proposed Rule. The new rule would implicate foster and adoption services and remove nondiscrimination protections in a broad range of critical HHS funded services, including:

- Programs for the transition of persons from homelessness, Section 533 of the Public Health Service Act;
- Federally-Assisted Health Training Programs, Title VII of the Public Health Service Act;
- Federally-Assisted Health Training Programs, Title VIII of the Public Health Service Act;
- Preventive Health and Health Services Block Grants, Title XIX, Part A of the Public Health Service Act;
- Block Grants Regarding Mental Health and Substance Abuse, Sections 1911 and 1921 of the Public Health Service Act;
- Maternal and Child Health Services Block Grant, Title V of the Social Security Act;
- Low-Income Home Energy Assistance Program;
- Community Economic Development Program;
- Head Start programs;
- Community Services Block Grant;
- Programs funded under the Family Violence Prevention and Services Act; and
- Any health program or activity, any part of which is receiving Federal financial assistance. *See* 42 U.S.C. § 18116.

Third, HHS seeks to justify the proposed changes based on four comments it received complaining about the nondiscrimination requirements, but fails to explain why the exemption process discussed in the Proposed Rule is insufficient to address the concerns raised in those comments. *See* 84 Fed. Reg. 63,832. And HHS fails to explain how these four comments provide a basis to conclude that the current regulation will cause religiously-based organizations to leave federally-funded programs or that it imposes a "regulatory burden" that creates "lack of predictability and stability for the Department and stakeholders with respect to [the current] provisions' viability and enforcement." *Id*. Where, as here, there is "no direct evidence" to support an agency's decision, that decision is arbitrary and capricious. *New York v. v. U.S. Dep't of Health & Human Servs.*, 2019 WL 5781789, at *43 (S.D.N.Y. Nov. 6, 2019), *citing Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins*., 463 U.S. 29, 52–53 (1983).

Fourth, HHS expresses the belief that maintaining nondiscrimination provisions will "likely reduce the effectiveness of programs funded by federal grants by reducing the number of entities available to provide services under these programs." 84 Fed. Reg. 63,832. But in our States, the vast majority of health and human services providers have enthusiastically complied with inclusionary policies that prohibit discrimination in these services. Where, in some of our States, a few organizations have discontinued offering certain services because of religious beliefs that conflicted with nondiscrimination requirements, other organizations have stepped in to provide the services in question. For example, in Massachusetts, the Catholic Charitable Bureau of the Archdiocese of Boston ("Catholic Charities Boston") halted adoption services in 2006, citing its religious objections to facilitating adoptions by same-sex parents as required by state law.[14] At that time, Catholic Charities Boston handled more adoptions of foster children than any other private agency in Massachusetts.[15] Fortunately, a network of other agencies was able to fill the gap. In the years that followed, the percentage of foster children placed for adoption (of those who had a service plan goal of adoption) did not falter. For the two years prior to Catholic Charities' decision to withdraw, the average percentage of such children placed for adoption was 72%; for the two years after, the average was 73%.[16] In other words, although Massachusetts and its contracted agencies had to make adjustments, children continued to be placed in similar numbers and the state's foster care and adoption systems continued to be equally effective.

Similar transitions occurred in other states and the District of Columbia when religious organizations ceased to provide foster care services due to nondiscrimination requirements. Other existing foster care service organizations, including faith-based agencies, continued to take new cases in compliance with antidiscrimination requirement, and the effectiveness of these programs did not falter. In Illinois, under a transition plan developed by the state, an existing child welfare organization agreed to take all of Catholic Charities' cases based out of one diocese and a separate organization was formed to assume the cases from another diocese, "to…provide a seamless transition for children."[17] Other existing foster care service organizations, including faith-based agencies, continued to take new cases in compliance with antidiscrimination requirements. For example, Catholic Social Services of Southern Illinois formed a new

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[14] *See* Patricia Wen, *Catholic Charities Stuns State, Ends Adoptions*, Boston Globe (Mar. 11, 2006), http://archive.boston.com/news/local/articles/2006/03/11/catholic_charities_stuns_state_ends_adoptions/.

[15] *Id.*

[16] Information provided by the Massachusetts Department of Children and Families on September 20, 2018.

[17] *See* Manya A. Brachyear, Three Dioceses Drop Foster Care Lawsuit, Chi. Trib. (Nov. 15, 2011), http://www.chicagotribune.com/news/ct-xpm-2011-11-15-ct-met-catholic-charities-foster-care-20111115-story.html.

faith-based organization to provide nondiscriminatory foster care and adoption services,[18] and Lutheran Child and Family Services of Illinois also connects foster children with "welcoming homes and loving caregivers regardless of . . . sexual orientation[.]"[19] As these experiences demonstrate, state and local governments have had no shortage of agencies qualified to provide nondiscriminatory foster care services and to welcome a broad pool of foster parents.

For these reasons, the States oppose the Administration's continued unlawful and cruel targeting of vulnerable populations, including LGBTQ persons. The States thus urge HHS to withdraw the Proposed Rule.

Sincerely,

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[18] *Id.*; *see also* Caritas Family Solutions, History, https://caritasfamilysolutions.org/about/history/.

[19] *See* Lutheran Child and Family Servs. of Ill., Foster Care, https://www.lcfs.org/foster.

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