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December 19, 2019

VIA Electronic Submission

Secretary Alex Azar
Department of Health and Human Services
330 C St. SW
Attention: RIN 0991-AC16
Washington, DC 20210

Re: **Agency Notice of Proposed Rulemaking; Public Comment Request; Re-promulgate or Revise certain regulatory provisions of the Department of Health and Human Services, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS Awards RIN 0991-AC16 – Lambda Legal Opposition**

Dear Secretary Alex Azar:

Lambda Legal Defense & Education Fund, Inc. ("Lambda Legal") submits these comments in response to the U.S. Department of Health and Human Services ("HHS") Notice of Proposed Rulemaking ("Proposed Rule" or "NPRM") to express our opposition to the proposed rule published in the Federal Register on November 19, 2019.

Founded in 1973, Lambda Legal is the oldest and largest national legal organization dedicated to achieving full recognition of the civil rights of lesbian, gay, bisexual, transgender and queer ("LGBTQ") people and everyone living with HIV through impact litigation, education, and policy advocacy. The matters addressed in the Proposed Rule are of great concern to Lambda Legal because LGBTQ people and those living with HIV routinely face discrimination in programs federally funded by HHS, with a disturbing amount of that discrimination explained as being prompted by others' religious beliefs. Lambda Legal opposes the Proposed Rule for the reasons explained in these comments, and we urge the Department to rescind the rule.

There is no federal agency within this administration that has incited more widespread harm to LGBTQ people than HHS, the agency charged by Congress with enhancing the health and well-being of everyone in the United States.[1] Instead of advancing the health and well-being of ***all*** Americans however, HHS has done all it can do to undermine and subvert the health and well-being of LGBTQ people and people living with HIV, and this rulemaking is one more example.

The Proposed Rule seeks to remove and replace 45 C.F.R. 75.300(c) and 45 C.F.R. 75.300(d), of the HHS Grants Rule ("Final Rule"). Section 45 C.F.R. 75.300(c) clearly and simply states: "It is a public policy requirement of HHS 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 non-merit factors such as age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation. Recipients must comply with this public policy requirement in the administration of programs

[1] Health and Human Services Mission Statement, *available at* https://www.hhs.gov/about/strategic-plan/introduction/index.html#mission (last visited on Dec. 15, 2019).

supported by HHS awards." 45 C.F.R. 75.300(d) requires that "In accordance with the Supreme Court decisions in *United States v. Windsor* and in *Obergefell v. Hodges*, all recipients must treat as valid the marriages of same-sex couples. This does not apply to registered domestic partnerships, civil unions or similar formal relationships recognized under state law as something other than a marriage."

By repealing and replacing sections 45 C.F.R. 75.300(c) and 75.300(d), and reverting to nondiscrimination protections found in underlying authorizing federal program authorizing statutes, the NPRM seeks to revert to a crazy quilt of unpredictability and inadequate protection from discrimination that, if promulgated, would cause serious harm to LGBTQ people, people living with HIV and other vulnerable communities. The proposed rule would also confuse beneficiaries and recipients, and inevitably lead to extensive and expensive litigation.

As the Department assuredly contemplated and fully comprehends, Title VI of the 1964 Civil Rights Act, along with section 504 of the Rehabilitation Act prohibit discrimination on the basis of race, color, national origin and disability in federally funded programs—leaving these protected categories the same as before the proposed rule. But the rule effectively eliminates express protections across federally funded programs for religion or sex, including sexual orientation and gender identity. The proposed rule seeks to eliminate protections for religious minorities, women and LGBTQ people, regardless of whether the program is secular or religious. If enacted, the rule would embolden religious and secular grantees to inappropriately deny services to religious minorities, women and LGBTQ beneficiaries and participants in HHS programs, causing serious harm to millions of vulnerable people in its wake. This is especially troubling for women and LGBTQ people who have the fewest protections within this patchwork of programs, yet experience the most religious-based discrimination.[2] Not only would the proposed rule be harmful because of the discriminatory actions taken by beneficiaries who wrongfully believe it greenlights discrimination, but also because even the threat of discrimination often deters LGBTQ from seeking federally funded life-saving programs they desperately need in the first place.[3]

I. The NPRM's proposed erasure of explicit protections would cause serious harm to LGBTQ people and people living with HIV in a wide array of programming funded by HHS.

Contrary to the statutory responsibility of HHS to enhance the health and well-being of all Americans, the proposed rule illegitimately aims instead to embolden grantees to deny federally funded critical and life-saving programs to LGBTQ people. Most of the programs that receive HHS funding do not have explicit protections against discrimination on the basis of religion or sex, including sexual orientation or gender identity. Therefore, individuals might be explicitly protected in one program, but the lack of explicit protections in another may lead providers (or recipients) to believe those individuals are not protected in other programs. The proposed rule would fall especially hard on LGBTQ people and people living with HIV because it lacks the clarity of the current rule and blurs the lines between permissible and

[2] *See You Don't Want Second Best; Anti-LGBT Discrimination in U.S. Health Care*, HUMAN RIGHTS WATCH, available at https://www.hrw.org/report/2018/07/23/you-dont-want-second-best/anti-lgbt-discrimination-us-health-care.
[3] See Shabab Ahmed Mirza and Caitlin Rooney, *Discrimination Prevents LGBTQ People from Accessing Health Care*, (Jan. 18, 2018), Center for American Progress, *available at* https://www.americanprogress.org/issues/lgbtq-rights/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/.

impermissible conduct. Many of the legal protections will remain, but the Department sends a dangerous message to grantees that they may discriminate.

HHS grants around $525 billion dollars a year to various entities that provide vital services to millions of people across the country.[4] HHS's budget funds a wide array of programming that includes major health initiatives, including grants for child welfare agencies, HIV/AIDS prevention, programs servicing older Americans (such as Meals on Wheels), programs serving youth experiencing homelessness, programs serving early childhood programs (such as Head Start) trafficking prevention, refugee assistance, and many other important programs. The sections listed below represent only a few ways in which the proposed rule would cause serious harm to the LGBTQ community and people living with HIV.

A. The NPRM would harm LGBTQ children and prospective parents who rely upon child welfare agency programs funded by HHS.

The proposed rule seeks to erase uniform protections against discrimination in federally funded, state administered foster care and adoption programs. It undermines the clarity and predictability of the Final Rule by replacing express protections with a confusing patchwork of provisions carving out key protections for LGBTQ children and families who are reliant upon child welfare programming funded by HHS.[5]

1. Impact on LGBTQ youth in the child welfare system.

Although the proposed rule does not directly contemplate the impact of the rule on youth in the child welfare system—one of HHS's core constituencies—the rule would undoubtedly cause serious harm to LGBTQ youth in that system.

There are approximately 437,000 children and youth in foster care at any given time.[6] In a study funded by HHS's Administration for Children and Families ("ACF"), almost one in five children in Los Angeles's foster care system identified as LGBTQ (around 20%).[7] Those LGBTQ children had a larger number of placements while in care and had higher rates of placement in congregate care (versus family homes), hospitalization in acute psychiatric facilities, involvement with the juvenile justice system, and exiting care to homelessness than their non-LGBTQ peers.[8] LGBTQ youth experience twice the rate of poor treatment than their peers. [9] Many LGBTQ youth have experienced traumatic discrimination, including abuse, neglect

[4] See Health and Human Services, A Closer Look at HHS Total Assistance, *available at* https://taggs.hhs.gov/TotalAssist (last visited on Dec. 15, 2019).
[5] Much of the funding for private child welfare agencies flows from HHS through states to these agencies pursuant to Title IV-E of the Social Security Act which prohibits discrimination based only on race, color, and national origin.
[6] See, The Adoption and Foster Care Analysis Reporting System (AFCARS) Report (FY2016), *available at* https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport24.pdf.
[7] Bianca D.M. Wilson et al, 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_report_final-aug-2014.pdf.
[8] *Id.*
[9] One study showed that an estimated 12% of LGBT foster youth ran away or were kicked out of their home because of their identity. 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).

and abandonment by their families because of their identity, contributing to their overrepresentation in care. The impact of the rule would fall especially hard on children who already are not currently served well by the child welfare youth of minority faiths, youth of color, including American Indian and Alaska Native youth, and youth with disabilities who are also LGBTQ. Even if youth don't experience discrimination directly, the message sent is harmful in numerous ways: a government-endorsed message that LGBTQ youth are second class citizens, undermining the trust and relationships with caregivers and service providers that youth need to heal and thrive and understand are charged with protecting them, and by creating a chilling effect resulting in keeping youth isolated and unable to express themselves freely.

Child welfare systems are obligated by law to support the safety and well-being of children in care and discrimination in any form negatively impacts wellbeing.[10] Removing the express protections threatens to undermine this obligation by injecting confusion about the rights and obligations of grantees, effectively inviting organizations who receive federal funding to wrongfully deny youth the ability to be themselves and engage in LGBTQ-affirming activities.[11]

The beneficiaries of HHS-funded child welfare services are children in care and not providers. Thus, it is crucial to center the voices of LGBTQ youth in this discussion and analysis, and the proposed rule's decision to allow discrimination ignores those voices of youth leaders with first-hand experience in foster care, who have recommended policies and practices that protect youth in care from discrimination. In August 2019, the Children's Bureau released an Information Memorandum encouraging agencies to center youth and family voices in child welfare planning and improvement efforts.[12] This is consistent with federal law, which stresses the importance of focusing on the youth's needs.[13] Rather than centering the voices of the youth most impacted however, the proposed changes threaten to further discrimination in homes that deny LGBTQ supportive services by asserting that their own belief system should trump the children in their care. Allowing discrimination is a dereliction of HHS's core obligation and ignores those voices of youth leaders with first-hand experience in foster care, who have worked to identify, create and recommend policies and practices that protect youth in care from discrimination. Using federal funds to diminish services that support their interest is harmful to children and inconsistent with federal law.

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[10] Trent M, Dooley DG, Dougé J, AAP SECTION ON ADOLESCENT HEALTH, AAP COUNCIL ON COMMUNITY PEDIATRICS, AAP COMMITTEE ON ADOLESCENCE. The Impact of Racism on Child and Adolescent Health. Pediatrics. 2019;144(2):e20191765, available at https://pediatrics.aappublications.org/content/pediatrics/early/2019/07/25/peds.2019-1765.full.pdf.; Brief of Amici Curiae Organizations Serving LGBTQ Youth in Support of Appellees and Intervenors-Appellees, *Sharonell FULTON, et al., Appellants, v. CITY OF PHILADELPHIA*, et al., Appellees., 2018 WL 4862578 (3d Cir.).

[11] See Kristina Davis, *Religious rights vs. foster youth rights weighed in lawsuit over sex-trafficking shelter* (Dec. 8, 2019), *available at* https://www.sandiegouniontribune.com/news/courts/story/2019-12-08/religious-rights-vs-foster-youth-rights-weighed-in-lawsuit-over-sex-trafficking-shelter. (A California children's shelter was recently denied a license for refusing to allow foster youth to engage in LGBT-related activities the organization found "religiously objectionable.").

[12] U.S. Department of Health and Human Services Administration for Community Living Information Memorandum (Aug. 1, 2019), available at https://www.acf.hhs.gov/sites/default/files/cb/im1903.pdf.

[13] The Adoption and Safe Families Act, Pub. L. No. 105-89, H.R. 867, 195thCong. (1997) (The legislation clarifies the statutory goals of safety, well-being and permanency for foster youth and ensuring children in foster care are placed in the least restrictive and family-like settings); Preventing Sex Trafficking and Strengthening Families Act, PL 113-183, September 29, 2014, 128 Stat 1919 (providing that "extracurricular, enrichment, cultural, and social activities" should focus on the "best interest of a child while at the same time encouraging the emotional and developmental growth of the child.").

The Family First Prevention Services Act of 2018 ("Family First") emphasizes the important role of family-based care, and the importance of foster families will increase as systems shift from the use of congregate care.[14] But the child welfare system will be unable to meet this increase in demand if the personal beliefs of grantees are allowed to trample the needs of the youth they should be centering and serving. The proposed rule also conflicts with the priorities HHS has formerly communicated to potential grantees. For example, one announcement for grant funding for a model intervention program for youth with child welfare involvement at risk of homelessness stipulates that LGBTQ youth be taken into consideration in the program design, that applicants consider how their programs will be inclusive of and non-stigmatizing of LGBTQ youth and that grantees will "establish and publicize policies prohibiting harassment based on sexual orientation, gender identity and other characteristics in order to receive an award.[15]

The proposed rule could also potentially be wrongfully used as justification to support so-called conversion therapy efforts or to force a child to dress and behave inconsistently with their gender identity because it conflicts with the caregiver's belief system. This is especially troubling given that rejection by a family of origin is a notable cause of child welfare involvement for LGBTQ youth who are overrepresented, experience greater levels of suicidality and related behavioral health outcomes compared to heterosexual youth.[16]

HHS-funded services for families play an important role in preventing child abuse and neglect. As child welfare increases investments in prevention, allowing agencies that provide those services to discriminate against parents will undermine the goal of preventing unnecessary placements in foster care. LGBTQ youth, who interact with contract preventive service agencies outside of court oversight and without an advocate in those circumstances, are at particular at risk to be blamed for family conflict around their identities, condemned for who they are, or subjected to harmful and infective efforts to change their identity. The proposed rule sanctions discrimination and wrongfully signal to funding recipients that they may discriminate. This would cause serious harm for LGBTQ youth and create significant legal liability for those beneficiaries who choose to discriminate.

Child welfare agencies that are federally funded by HHS should act in the best interest of each youth and, in fact, are legally required to do so. Allowing a grantee to impose their religious beliefs in ways that conflict with that interest is detrimental to their health and well-being and will lead to long term negative outcomes. Discrimination based on sexual orientation or gender identity can cause significant damage to a child's mental and behavioral health, in the short term and over a lifetime.

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[14] Bipartisan Budget Act of 2018 (H.R. 1892).

[15] *See, e.g.*, Administration for Children and Families, Planning Grants to Develop a Model Intervention for Youth/Young Adults with Child Welfare Involvement At-Risk of Homelessness, *available at* https://web.archive.org/web/20130616012252/https:/www.acf.hhs.gov/grants/open/foa/view/HHS-2013-ACF-ACYF-CA-0636.

[16] See Shannan Wilber et al., Child Welfare League of America, CWLA Best Practice Guidelines, Serving LGBT Youth in Out-of-Home Care 4 (2006) https://familyproject.sfsu.edu/sites/default/files/bestpracticeslgbtyouth.pdf; Michael P. Marshall et al., Suicidality and Depression Disparities Between Sexual Minority and Heterosexual Youth: A Meta-Analytic Review, 49 J. of Adolescent Health 115, 119 (2011).

2. Impact on LGBTQ prospective parents in the child welfare system.

Allowing and encouraging discrimination will harm children by reducing the number of options and will diminish the contributions of LGBTQ foster and adoptive parents. There are more than 125,000 children, who cannot safely return to their families of origin, waiting to be adopted into loving homes.[17] It is deeply troubling that HHS seeks to allow agencies to turn away competent and loving foster and adoptive parents and thereby jeopardizing an opportunity of permanency for tens of thousands of youth simply because a prospective family does not comport with the belief system of a federally funded grantee. This decision flies in the face of professional child welfare standards, from the Child Welfare League of America and others, that prohibit the use of non-merit factors, like sexual orientation and gender identity, as criteria for an individual's suitability to parent.[18] The proposed rule also flies in the face of HHS's prior policy guidance and technical assistance materials.[19] Including the many examples of technical assistance provided by the Children's Bureau Child Information Network Gateway emphasizing the importance of support and affirmation for LGBTQ youth in the child welfare system.

There are over 700,000 same-sex couples in the U.S.[20] An estimated 114,000 of those couples are already raising children, and many of those families are a result of adoption. There are an estimated one in five same-sex couples are raising adoption children (compared to 3% for different-sex couples).[21] HHS should prioritize the permanency needs of the more than 125,000 children waiting to find homes and prospective parents should not be discriminated because based on based on characteristics that do not relate to parenting ability such as their sexual orientation.[22] Turning care and able adoptive and foster parents away because of who they are jeopardizes the permanence of each child in foster care. Being turned away by a federally funded state child welfare provider simply because of who they are or what they believe can have a chilling effect on a person's willingness to move forward as a foster or adoptive parent.

One especially troubling section of the proposed rule is the Department's evaluation of whether the proposed rule could effect "family well-being" pursuant to Section 654 of the Treasury and General Government Appropriations Act of 1999.[23] The Department concluded, without discussion or analysis, that the proposed rule does not affect family well-being. The Department provides no assessment and gives no recognition to the obvious harm that the rule would create for LGBTQ families. This shameful erasure of LGBTQ families is at odds with Supreme Court precedent in *Obergefell v. Hodges* recognizing that same-sex couples have the right to marry because of the stamp of exclusion it places on those families, and the same

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[17] *See* U.S. Dep't of Health and Human Servs., Admin. For Children and Families, Admin. On Children, Youth and Families, Children's Bureau, AFCARS Report 26 (2018).
[18] *See*, *e.g.*, U.S. Dep't of Health and Human Servs., Information Memorandum regarding LGBTQ Youth in Foster Care, (Apr. 6, 2011), *available at* https://www.courts.ca.gov/documents/ACFMemo.pdf.
[19] *See, e.g.*, U.S. Dep't of Health and Human Servs., Child Welfare Information Gateway, Working with LGBTQ Youth and Families, available at https://www.childwelfare.gov/topics/systemwide/diverse-populations/lgbtq/ (last visited on Dec. 19, 2019).
[20] See Shoshana K. Goldberg and Kerith J. Conron, How Many Same-Sex Couples in the U.S. are Raising Children?, The Williams Institute, (July 2018), available at https://williamsinstitute.law.ucla.edu/wp-content/uploads/Parenting-Among-Same-Sex-Couples.pdf.
[21] *Id.*
[22] *See* U.S. Dep't of Health and Human Servs., Admin. For Children and Families, Admin. On Children, Youth and Families, Children's Bureau, AFCARS Report 26 (2018)
[23] 84 FR 63835.

principle applies here. The proposed rule would harm the "family well-being" of LGBTQ families by encouraging discrimination and harassment and there is no excuse for this erasure in the Department's analysis. Sanctioning federal funded discrimination by failing to recognize the impact the NPRM would have on same-sex families is inconsistent with *Obergefell* and would have a serious and harmful effect on the family well-being of same-sex families, whether families of origin, kin, or foster or adoptive parents.

The failure to consider the well-being of LGBTQ families in the Department's analysis is even more disturbing in light of the proposed rule's repeal of section 75.300(d).[24] The failure to consider, or the intentional locking out, of LGBTQ families from the Department's section 654 analysis demonstrates why this section was needed in the first place and raises serious questions about the Department's effort to remove the clarity provided in this section of the Final Rule that LGBTQ families should be recognized in "childrearing, procreation, and education."[25]

Allowing discrimination means that fewer services will be available to every family. Allowing providers to discriminate makes it more difficult for parents to address mental health needs, overcome addition or meet other challenges that prevent them from safe parenting.

B. The proposed rule would cause serious harm to LGBT elders.

There are around four million LGBT elders in America.[26] LGBT older adults have survived a lifetime of discrimination, social stigma, family rejection and minority stress, and as a result, experience high rates of poverty. They are also less likely to have children who can financially support them.[27] Many LGBT adults struggle to afford basic necessities and one third of LGBT older adults live at or below 200% of the federal poverty level.[28] Indeed, over 40% of LGBT people in a recent survey stated they are concerned they will outlive their savings for retirement as opposed to 25% for non-LGBT people.[29] Transgender elders in particular have experienced high rates of discrimination, resulting in greater economic insecurity in later life. A 2014 report showed that 25% of transgender elders experienced housing discrimination.[30] Because of these disparities, LGBT elders are especially reliant upon social services programming funded by HHS through the Older Americans Act, which funds such programs as senior centers, meal delivery and similar critical programs.

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[24] 45 C.F.R. § 75.300(d) (d) ("In accordance with the Supreme Court decisions in *United States v. Windsor* and in *Obergefell v. Hodges*, all recipients must treat as valid the marriages of same-sex couples. This does not apply to registered domestic partnerships, civil unions or similar formal relationships recognized under state law as something other than a marriage."

[25] *Obergefell*, 135 S.Ct. 2584, 2590.

[26] Soon Kyu Choi & Ilan H. Meyer, Williams Inst., *LGBT Aging: A Review of Research Findings, Needs, and Policy Implications* (2016), available at http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Aging-White-Paper.pdf.

[27] *Id.*

[28] Understanding Issues Facing LGBT Older Adults (2017), The Movement Advancement Project, *available at* http://lgbtmap.org/file/understanding-issues-facing-lgbt-older-adults.pdf.

[29] Out & Visible, *The Experiences and Attitudes of Lesbian, Gay, Bisexual and Transgender Older Adults, Ages 45-75*, *available at* https://www.sageusa.org/wp-content/uploads/2018/05/sageusa-out-visible-lgbt-market-research-full-report.pdf.

[30] The express purpose of the Older Americans Act is "to assist our older people to secure equal opportunity to the full and free enjoyment" of a range of goods including economic security, health, employment, retirement, community participation, "[f]reedom, independence, and the free exercise of individual initiative in planning and managing their own lives, full participation in the planning and operation of community-based services and programs provided for their benefit, and protection against abuse, neglect, and exploitation."

HHS itself has long recognized the unique disparities and considerations of LGBT seniors.[31] For example, HHS's Administration for Community Living announced an online learning tool to help increase the awareness of the issues faced by LGBT people living in long term care.[32] And the National Center on Elder Abuse in partnership with HHS also issued a research brief recognizing those disparities.[33] The Administration for Community Living acknowledged that "minority Americans are often greater risk of poor health, social isolation, and poverty" and lists resources for LGBT people.[34]

The proposed rule ignores those disparities however and proposes a rule that would be harmful to older LGBT Americans. The proposed rule, if enacted, would harm LGBT seniors who benefit from programs such as Senior Centers, transportation assistance, Meals on Wheels, daycare provider or home health aide programs that are covered by the Older Americans Act.

Examples of the kind of discrimination that the NPRM seeks to sanction include:

- A communal meal program (aka Meals on Wheels) deliverer could decide to refuse to deliver food to a transgender woman or to a gay man.
- A federally funded adult daycare provider could tell a bisexual man that he is not welcome there.
- A senior services center could turn away LGBT people or treat married same-sex couples as unmarried but continue to receive federal funding.

By eliminating the umbrella nondiscrimination protections outlined in 45 C.F.R. § 75.300(c), the explicit protections against discrimination in those programs is stripped and protected only by the federal statute that prohibits discrimination based on race, color and national origin in federally funded programming.[35] The Health and Human Services agency should be striving to improve the health and well-being of Americans and should be working to end discrimination, not seeking to advance discrimination against vulnerable elders.

C. The proposed rule would cause serious harm to LGBTQ people living with HIV.

The proposed rule would undermine efforts to end the HIV epidemic. The 2016 protections are essential to ensure that people living with HIV and those at risk for HIV have access to health care services and other essential services. The negative effects of stigma and discrimination work to prevent patients from accessing the services and treatment that allow them to stay healthy and that prevent HIV transmission.

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[31] https://longtermcare.acl.gov/the-basics/lgbt/index.html
[32] Administration for Community Living: Educational tool helps LGBT residents of long term care facilities. https://acl.gov/news-and-events/press-release-latest-news/educational-tool-helps-lgbt-residents-long-term-care
[33] National Center on Elder Abuse, Mistreatment of Lesbian, Gay, Bisexual, and Transgender (LGBT) Elders, available at https://ncea.acl.gov/NCEA/media/Publication/Mistreatment-of-Lesbian-Gay-Bisexual-and-Transgender-LGBT-Elders-2013.pdf
[34] Administration for Community Living, Diversity and Cultural Competency, , available at https://acl.gov/programs/strengthening-aging-and-disability-networks/diversity-and-cultural-competency
[35] 42 U.S.C. § 2000d.

LGBTQ people are much more likely than other populations to seek assistance from federally funded HIV prevention grant programs administered by HHS.[36] The proposed rule could hinder critical access to health services, including HIV prevention and treatment, which would seriously undermine the work being done to end the epidemic by further stigmatizing and seemingly encouraging discrimination against gay and bisexual men and transgender people, the populations most likely to be diagnosed with HIV.[37] Sanctioning discrimination in grant funding against the very population most affected by HIV is counter-productive and would undermine the HHS-led effort to reduce new HIV diagnoses by 75% within the next five years.

Furthermore, the NPRM undermines the objectives set out in the *Ending the HIV Epidemic in America* public health initiative. The initiative recognizes that new cases of HIV are highly concentrated among gay men of color and that one of the most debilitating barriers to obtaining HIV health care treatment is stigma.[38] But the proposed rule would undermine this objective by eliminating explicit protections that will wrongly signal to health care providers they are free to stigmatize or discriminate against the very population the Department is trying to reach to meet its objectives.

The Centers for Disease Control and Prevention has recognized and warned against the negative consequences of allowing discrimination towards LGBTQ people, which includes reducing access to healthcare and contributing to mental health and substance use issues.[39] While federal laws offer some degree of protection against these forms of discrimination, the 2016 Final Rule ensured that they would apply clearly and consistently to all HHS grants. The proposed rule would have a harmful impact on individual and public health. It is not possible to end HIV as an epidemic without advancing non-discrimination protections for LGBTQ people.

D. Housing and Homelessness

LGBTQ people experience high rates of housing insecurity and are more likely than non-LGBTQ people to depend upon federally funded HHS programs.[40] Sadly, many LGBTQ people often experience familial rejection that contributes to the physical and mental stress with which homeless people already struggle.

This is an issue especially important for LGBTQ youth who are 120% more likely than straight or cisgender peers to be homeless.[41] This higher rate of homelessness is driven by family rejection, harassment in schools, and problems with juvenile justice and their experience of being homeless often involves violence,

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[36] Including programs funded through SAMHSA, the CDC, Health Resources and Services Administration (HRSA) and the Administration on Children and Families.
[37] The CDC estimates that 70% of new HIV diagnoses are among adult and adolescent gay and bi-sexual men. See, https://www.cdc.gov/hiv/group/msm/index.html; Transgender people are nearly five times more likely to be HIV positive the rate of non-transgender people. See USTS [CITE].
[38] Department of Health and Human Services; Ending the HIV Epidemic: A Plan for America https://www.hhs.gov/blog/2019/02/05/ending-the-hiv-epidemic-a-plan-for-america.html
[39] https://www.cdc.gov/msmhealth/stigma-and-discrimination.htm
[40] See, HHS Grants for Ending Homelessness, *available at* https://www.hhs.gov/programs/social-services/homelessness/grants/index.html.
[41] At the Intersections; A Collaborative resource on LGBTQ Youth homelessness (2019), True Colors United, available at https://truecolorsunited.org/wp-content/uploads/2019/04/2019-At-the-Intersections-True-Colors-United.pdf (last visited on Dec. 15, 2019); Homelessness in America: Focus on Youth, United States Interagency Council on Homelessness, available at https://www.usich.gov/resources/uploads/asset_library/Homelessness_in_America_Youth.pdf (last visited on Dec. 14, 2019).

discrimination, and poor health.[42] In addition, the message the proposed rule sends is inconsistent with existing HHS regulations protecting youth homelessness programs funded by HHS.[43] Being homeless imperils a young person's physical and emotional security. It is important that homelessness programs funded by HHS acknowledge these risks and create an inclusive environment that reduces the incidence of such events for LGBTQ people.

One in five transgender individuals have experienced homelessness at some point in their lives.[44] Unfortunately, social service programs funded by HHS already often fail to appropriately serve transgender people by denying them housing altogether or by inappropriately housing them inconsistently with their gender identity. The proposed rule will exacerbate this disparity and will drive away transgender people who already avoid social service programs based on fear of discrimination.

On any given night, there are approximately 550,000 people experience homelessness.[45] HHS should not send a message that it will tolerate discrimination in taxpayer-funded programs to end homelessness.[46] By removing explicit protections for women, religious minorities and LGBTQ people, the Department fosters discrimination by wrongfully sending the message to beneficiaries that they are free to discriminate, which would cause serious harm and will exacerbate the homelessness crisis.

In addition, the proposed rule undermines the purpose and mission of the Federal initiative to prevent and end homelessness, *Home, Together: The Federal Strategic Plan to Prevent and End Homelessness*, by inviting grantees to turn away or discriminate against LGBTQ people and other vulnerable populations.[47] The Plan acknowledges that to be successful it must create strategies to reflect the diverse population that is homeless.[48] The proposed rule undercuts that objective by isolating one of those diverse groups and stigmatizing them with a badge of inferiority.

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[42] Andrew Cray et al, *Seeking Shelter; The Experiences and Unmet Needs of LGBT Homeless Youth* (Sept. 2013), CENTER FOR AMERICAN PROGRESS, *available at* https://www.americanprogress.org/wp-content/uploads/2013/09/LGBTHomelessYouth.pdf.
[43] *See* Runaway and Homeless Youth (RHY) Act Final Rule 45 C.F.R. 1351.22(a) ("[n]o runaway youth or homeless youth shall, on any of the foregoing bases, be excluded from participation in, be denied the benefits of, or be subject to discrimination under, any program or activity funded in whole or in part under the Runaway and Homeless Youth Act.").
[44] James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). The Report of the 2015 U.S. Transgender Survey. Washington, DC: National Center for Transgender Equality.
[45] Henry, Meghan et al., "The 2017 Annual Homelessness Assessment Report (AHAR) to Congress, Part 1: Point-in Time Estimates of Homelessness." (U.S. Department of Housing and Urban Development, December 2017): https://www.hudexchange.info/resources/documents/2017-AHAR-Part-1.pdf.
[46] https://www.hhs.gov/programs/social-services/homelessness/grants/index.html#targeted
[47] https://www.usich.gov/resources/uploads/asset_library/Home-Together-Federal-Strategic-Plan-to-Prevent-and-End-Homelessness.pdf.
[48] *Id.* at 6.

II. The proposed rule would undermine other program areas and initiatives.

LGBTQ people are also more likely than their peers to experience poverty[49] rely upon public benefit programs that are funded by HHS.[50] HHS funded programs like "Head Start" are crucial in helping low income LGBTQ families by providing subsidized educational programming and childcare to preschool children.

The proposed rule would put LGBTQ families at risk of violence. [51] LGBTQ people are more reliant upon programs that are funded by HHS that support victims of violence. According to the CDC, lesbian, gay and bisexual people experience sexual violence at similar or higher rates than heterosexuals.[52] A 2015 survey of transgender people reported that 47% of transgender people are sexually assaulted at some point in their lifetime.

The proposed rule subverts and undercuts the Department's objective of improving the health and well-being of LGBTQ Americans in other health care programming. For example, the proposed rule would undermine the objectives of the Health People 2030 initiative. The Department's Healthy People 2030 program aims to eliminate health disparities and achieve health equity and to "improve the health and well-being of all."[53] It is difficult, if not impossible, to understand how fostering discrimination in social service programming will further those aims. In fact, removing nondiscrimination protections will likely increase health care disparities and undermine the health and well-being of all.

Another health care initiative the NPRM would undermine is the Department's initiative to address the opioid crisis.[54] This initiative seeks to address this public health emergency by reducing stigma associated with addiction and identifying risk groups. The NPRM would compromise that initiative by increasing, rather than decreasing stigma associated with LGBTQ populations already at risk. LGB people across all ages are at three times greater risk of opioid use disorder than heterosexual people.[55] Transgender people are also much more likely experience opioid use disorder, with 36% reporting misusing prescription opioids.[56]

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[49] M.V. Lee Badgett, *LGBT Poverty in the United States: A study of differences between sexual orientation and gender identity groups* (October 2019), available at https://williamsinstitute.law.ucla.edu/wp-content/uploads/National-LGBT-Poverty-Oct-2019.pdf.
[50] Caitlin Rooney et al, *Protecting Basic Living Standards for LGBTQ People* (Aug. 13, 2018), CENTER FOR AMERICAN PROGRESS, available at https://www.americanprogress.org/issues/lgbtq-rights/reports/2018/08/13/454592/protecting-basic-living-standards-lgbtq-people/
[51] *See*, e.g., Family Violence Prevention and Services Act, the Office on Trafficking in Persons and Trafficking Victims Protection Act, programs in the Office on Women's Health to prevent sexual assault, and the Center for Disease Control's Rape Education and Prevention program.
[52] The National Intimate Partner and Sexual Violence Survey, An Overview of 2010 Findings on Victimization by Sexual Orientation (last visited on Dec. 14, 2019).
[53] Office of Disease Prevention & Health Promotion, Health People 2030 Framework (last visited Dec. 14, 2019).
[54] Dept. of Health & Human Services., Strategy to Combat Opioid Abuse, Misuse, and Overdose: A Framework Based on the Five-Point Strategy (Sept. 17, 2018), https://www.hhs.gov/opioids/sites/default/files/2018-09/opioid-fivepoint-strategy-20180917-508compliant.pdf.
[55] Addressing Opioid Use Disorder Among LGBTQ Populations, National LGBT Health Education Center (June 2018), available at https://www.lgbthealtheducation.org/wp-content/uploads/2018/06/OpioidUseAmongLGBTQPopulations.pdf (last visited on Dec. 14, 2019).
[56] Michelle Johns et al. *Transgender Identity and Experiences of Violence Victimization, Substance Use, Suicide Risk and Sexual Risk Behaviors among Hight School Students*, Morbidity and Mortality Weekly Report 67, 69 (Jan. 25, 2019) https://www.cdc.gov/mmwr/volumes/68/wr/pdfs/mm6803a3-H.pdf.

These protections are critical in ensuring HHS funded programs do not discriminate against LGBTQ people who are seeking smoking cessation and substance abuse assistance. LGBTQ people are more likely to use such programs. Sadly, people who are LGBTQ have higher rates of smoking than non-LGBTQ people,[57] and LGBTQ people also experience higher rates of substance abuse.[58] More than two times as many LGBTQ adults compared to straight adults reported using drugs.[59]

III. The proposed rule creates confusion and conflicts with federal, state and local law.

LGBTQ people continue to be protected under federal, state and local law, and the elimination of explicit protections and default to program-level protections conflicts with other existing federal, state and local law. The proposed rule will result in profound confusion and reduce, not increase, predictability and stability for grant recipients. In creating ambiguity, however, HHS has signaled an unwillingness to protect the rights of recipients of federally funded services, which will cause serious harm to organizations and beneficiaries.

A. The proposed rule conflicts with prior Executive Orders.

The proposed rule abdicates the Executive Branch's role in preventing discrimination in federally funded programs administered by government. For example, Executive Order 11063 (prohibiting discrimination in federally funded housing) established the central principle of eradicating discrimination in federally funded programming.[60] Similarly, Executive Order 13559 continued this advance by clarifying the religious discrimination protections that should be preserved for beneficiaries using social services. The proposed rule undermines EO 13559 and similar Executive Orders by seeking to allow an organization to discriminate on the basis of the beneficiary's adherence to a religious belief in federally funded programs.

The core of requirement of section 45 C.F.R. § 75.300 is the prohibition of discrimination "based on non-merit factors," of which the listed characteristics are simply examples. This provision in essence requires grant awardees to apply eligibility and program requirements without denying help to eligible persons for any other, unrelated reason. It therefore furthers the mandate that "Federal financial assistance for social service programs should be distributed in the most effective and efficient manner possible."[61]

Although the proposed rule would apply to both secular and religious grantees, the Department frames the proposed rule as providing religious organizations a license to discriminate against LGBTQ people under the authority of the Religious Freedom Restoration Act (RFRA).[62] But RFRA was not intended to give religious exercise the right to trample all other protections for beneficiaries and participants in federally

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[57] Smoking & Tobacco Use, Lesbian, Gay, Bisexual, and Transgender Persons and Tobacco Use, Center for Disease Control Center for Disease Control and Prevention, available at https://www.cdc.gov/tobacco/disparities/lgbt/index.htm (last visited on Dec. 15, 2019).

[58] Grace Medley et al, *Sexual Orientation and Estimates of Adult Substance Use and Mental Health*, *Results from the 2015 National Survey on Drug Use and Health* NSDUH Data Review (2015), *available at* https://www.samhsa.gov/data/sites/default/files/NSDUH-SexualOrientation-2015/NSDUH-SexualOrientation-2015/NSDUH-SexualOrientation-2015.htm.

[59] *Id.*

[60] Exec. Order 11063.

[61] Exec. Order 13559 § 2(a) (Nov. 17, 2010).

[62] 42 U.S.C.A. § 2000bb-1.

funded services. The government has a compelling interest in ensuring that all beneficiaries and participants are served without discrimination, and policies that bar discrimination in federal programs are the least restrictive means to advance that interest.

Furthermore, the government is barred from creating a religious accommodation that causes harm or results in discrimination, and the Department has a duty to protect the religious exercise of beneficiaries and participants in its programs.[63] RFRA should not be misemployed to weaponize religious liberty in order to strip protections from vulnerable communities. Such actions hollow out the purpose to protect sincerely held religious beliefs and seeks to erode civil right protections.

B. The proposed rule conflicts with extensive Federal case law precedent.

Although the proposed rule seeks to strip express protections prohibiting discrimination based on sex from many programs funded by HHS (such as the Older Americans Act administered by the Administration for Community Living), it is important to note that the current rule's express protections were based on extensive case law precedent. The proposed rule fails to distinguish or even acknowledge that countervailing case law and instead turns to a single district court injunction for its legal rationale. The proposed rule simply ignores decades of case law from across the country holding that people are protected against discrimination based on transgender status or sexual orientation as a form of sex discrimination under federal statutes. The 2016 rule merely recognized that principle, and ignoring it will lead to serious harm to both beneficiaries of LGBTQ programming as well as social service providers who take up this offer to discriminate and learn they are incorrect in that assessment.

An overwhelming majority of federal courts have applied Supreme Court precedent to hold that discrimination against someone because of their transgender status or sexual orientation is a form of unlawful sex discrimination under a variety of federal laws. In particular, there is an especially large number of circuit court and district court cases holding that transgender people are protected under Federal law.[64] In addition, there are multiple E.E.O.C. decisions similarly holding that sex discrimination bans cover discrimination based on transgender status.[65] Federal courts have also clarified that sex-based

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[63] See *Cutter v. Wilkinson*, 544 U.S. 709, 722, 726 (2005); *see also Estate of Thorton v. Caldor, Inc.*, 472 U.S. 703, 708-710 (1985).

[64] *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F. 3d 560 (6th Cir. 2018); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir.2011); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. March 25, 2005); *Smith v. City of Salem*, 378 F. 3d 566 (6th Cir. Aug. 5, 2004); *Boyden v. Conlin*, 341 F. Supp. 3d 979 (W.D. Wis. 2018); *Equal Employment Opportunity Comm'n v. A & E Tire, Inc.*, 325 F. Supp. 3d 1131 (D. Colo. 2018): *Parker v. Strawser Construction*, 307 F. Supp. 3d 744 (S.D. Ohio Apr. 25, 2018); *E.E.O.C. v. Rent-a-Center East, Inc.*, 264 F. Supp. 3d 952 (C.D. Ill. Sept. 8, 2017); *Mickens v. Gen. Elec. Co.*, No. 3:16CV-00603-JHM, 2016 WL 7015665 (W.D. Ky. Nov. 29, 2016); *Roberts v. Clark Cty. Sch. Dist.*, 215 F. Supp. 3d 1005 (D. Nev. 2016); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509 (D. Conn. Mar. 18, 2016); *Doe v. State of Arizona*, No. CV-15-02399-PHX-DGC, 2016 WL 1089743 (D. Ariz. Mar. 21, 2016); *United States v. Se. Oklahoma State Univ.*, No. CIV-15-324-C, 2015 WL 4606079 (W.D. Okla. July 10, 2015); *Finkle v. Howard County.*, 12 F. Supp. 3d 780 (D. Md. 2014); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. Sept. 19, 2008); *Lopez v. River Oaks Imaging & Diagnostic Group. Inc.*, 542 F. Supp. 2d 653 (S.D. Tex. 2008); *Mitchell v. Axcan Scandipharm, Inc.*, No. CIV.A. 05-243, 2006 WL 456173 (W.D. Pa. Feb. 17, 2006); *Tronetti v. TLC HealthNet Lakeshore Hosp.*, No. 03-CV-0375E (SC), 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003).

[64] *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017), *cert. dismissed sub nom. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. v. Whitaker ex rel. Whitaker*, 138 S. Ct. 1260415 (2018)

[65] *See Lusardi v. Dep't of the Army*, EEOC Appeal No. 0120133395, 2015 WL 1607756 (April 1, 2015); *Complainant v. Dep't of Veterans Affairs*, EEOC Appeal No. 0120133123, 2014 WL 1653484 (Apr. 16, 2014); *Jameson v. U.S. Postal Service*, EEOC Appeal

considerations and sex-stereotyping protections also apply to sexual orientation discrimination, which similarly must be recognized as a form of unlawful sex discrimination.[66] The EEOC has also definitively interpreted Title VII to cover sexual orientation-related discrimination as sex discrimination prohibited both as an unavoidably sex-based consideration and as necessarily involving illicit sex stereotyping.[67]

C. The proposed rule prematurely regulates on a subject presently being addressed by the Supreme Court in the Title VII context.

In addition to the large number of courts that have held that Title VII prohibits discrimination based on sexual orientation and transgender status, many courts have held that LGBTQ people are protected under other federal statutes that are not under consideration right now before the Supreme Court including Title IX,[68] the Affordable Care,[69] the Equal Credit Opportunity Act,[70] and the Gender Motivated Violence Act.[71] Proceeding with rulemaking at this time could lead to tremendous confusion and legal uncertainty for grantees, beneficiaries, and other stakeholders.

It is unclear how the Supreme Court will decide the cases it recently considered addressing the question of whether sexual orientation and transgender status is encompassed under Title VII.[72] It is our opinion that the Court will concur with the vast majority of courts who have held that Title VII's sex discrimination

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No. 0120130992, 2013 WL 2368729 (May 21, 2013); *Macy v. Dep't of Justice*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (April 20, 2012).

[66] *See Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 123 (2d Cir. 2018), *cert. granted sub nom. Altitude Exp., Inc. v. Zarda*, 139 S. Ct. 1599 (2019); *Hively v. Ivy Tech Cmty. Coll. Of Indiana*, 853 F.3d 339 (7th Cir. 2017). A growing number of district court decisions have also supported coverage of sexual orientation discrimination as sex discrimination. *See also Boutillier v. Hartford Pub. Schs.*, 2016 WL 6818348 (D. Conn. Nov. 17, 2016); *EEOC v. Scott Med. Health Ctr., P.C.*, 2016 WL 6569233 (W.D. Pa. Nov. 4, 2016); *Winstead v. Lafayette Cty., Bd. Of Cty. Comm'rs,* 197 F. Supp. 3d 1334 (N.D. Fla. 2016); *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151 (C.D. Cal. 2015); *Isaacs v. Felder Servs., Inc.*, 143 F. Supp. 3d 1190 (M.D. Ala. 2015); *Hall v. BNSF Ry. Co.*, 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014); *Terveer v. Billington*, 34 F. Supp. 3d 100 (D.D.C. 2014); *Koren v. Ohio Bell Tel Co.* 894 F. Supp. 2d 1032 (N.D. Ohio 2012); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212 (D. Or. 2002); *Centola v. Potter*, 183 F. Supp. 2d 403 (D. Mass. 2002).

[67] *See Baldwin v. Foxx*, 2015 WL 4397641 (E.E.O.C. July 16, 2015); *Complainant v. Cordray*, 2014 WL 7398828 (E.E.O.C. Dec. 18, 2014); *Complainant v. Donahoe*, 2014 WL 6853897 (E.E.O.C. Nov. 18, 2014); *Complainant v. Sec'y, Dep't of Veterans Affairs*, 2014 WL 5511315 (E.E.O.C. Oct. 23, 2014); *Complaint v. Johnson*, 2014 WL 4407457 (E.E.O.C. Aug. 20, 2014); *Couch v. Dep't of Energy*, 2013 WL 4499198 (E.E.O.C. Aug. 13, 2013); *Brooker v. U.S. Postal Serv.*, 2011 WL 3555288 (E.E.O.C. May 20, 2013); *Castello v. U.S. Postal Serv.*, 2011 WL 3560150 (E.E.O.C. Dec. 20, 2011); *Veretto v. U.S. Postal Serv.*, 2011 WL 2663401 (E.E.O.C. July 11, 2011).

[68] *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017), *cert. dismissed sub nom. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. v. Whitaker ex rel. Whitaker*, 138 S. Ct. 1260415 (2018).

[69] *See Callum v. CVS Health Crop.*, 137 F. Supp. 3d 817, 848 (D.S.C. 2015); *see also S.E. Pennsylvania Transp. Auth. V. Gilead Scis.*, Inc., 102 F. Supp. 3d 688, 698 (E.D. Pa. 2015); *Rumble v. Fairview Health Servs.*, No. 14-CV-2037, 2015 WL 1197415, at *7 n.3 (D. Minn. Mar. 16, 2015); *East v. Blue Cross & Blue Shield of Louisiana,* No. 3:14-CV-00115-BAJ, 2014 WL 8332136, at 2 (M.D. La. Feb. 24, 2014).

[70] *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. June 8, 2000).

[71] *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. Feb. 29, 2000).

[72] *Altitude Express Inc. v. Zarda* consolidated with *Bostock v. Clayton County, Georgia* (on the issue of whether the prohibition in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), against employment discrimination "because of . . . sex" encompasses discrimination based on an individual's sexual orientation); *R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission* (addressing the legal issue of whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*.).

prohibitions encompasses discrimination based on transgender status or sexual orientation. But the uncertainty regarding how the Court will decide underscores the impropriety of moving forward with rulemaking at this point.

Although Title VII is separate and distinct from the nondiscrimination statutes at issue in the rule, the Court's holding may prove instructive on this question, and moving forward without that decision would deprive the public of a meaningful opportunity to comment on the proposed rule. The Supreme Court might well hold, consistent with the enormous and growing body of case law, that discrimination based on transgender status or sexual orientation both are prohibited forms of sex discrimination under Title VII.[73]

Even if the Department is confident the Supreme Court will agree with their contrary reasoning with regard to how sex should be understood under Title VII, many courts have disagreed, as discussed above. Therefore, unless and until the Supreme Court agrees with the Department's view, it is premature for the Department to act in a manner contrary to the overwhelming body of current case law. Accordingly, we urge the Department immediately to rescind this NPRM and to wait until the Supreme Court has issued a decision. If warranted at that time, the Department could open up another notice and comment period. If the Proposed Rule is permitted to remain extant, it will only invite harmful discrimination against LGBTQ people, place health care grantees who choose to discriminate as a result of the NPRM in legal jeopardy by falsely signaling it is fine to discriminate, and prompt litigation by those who are injured.

D. The proposed rule will undermine stability and predictability because it conflicts with state and local laws.

Twenty-three (24) states and the District of Columbia prohibit discrimination based on sexual orientation in public accommodations, of which 21 do so explicitly and three (3) others have interpreted their sex discrimination protections to also cover sexual orientation. Similarly, 23 states and the District of Columbia prohibit discrimination based on gender identity in public accommodations, of which 20 do so explicitly and three (3) others have interpreted their sex discrimination protections to also cover transgender status.[74] In states without state-wide explicit protections, many localities have established such protections.[75] Allowing grantees to discriminate against HHS recipients would undermine state and local government's ability to provide services on a nondiscriminatory basis and their commitment to protecting the public welfare. The proposed rule would also place grantees who are unsure of their legal obligations in a precarious legal position if they rely on federal guidance and do not review and understand their obligations under state and local provisions.

In short, the proposed rule forces grantees and beneficiaries and other stakeholders to wander through a tangled thicket of program nondiscrimination provisions, state and local protections, Federal statutes and

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[73] It is worth repeating the point that it is a shocking oversight to fail to address all of the countervailing Title VII case law authority if the Department understands the Supreme Court's upcoming decision on Title VII to hold so much weight on how Section 1557 should be properly interpreted.

[74] See, Movement Advancement Project, Non-Discrimination Laws, *available at* http://www.lgbtmap.org/equality-maps/non_discrimination_laws/public-accommodations (last visited on Dec. 19, 2019).

[75] See LGBT Movement Advancement Project, Non-Discrimination Laws. https://www.lgbtmap.org/equality-maps/non_discrimination_laws; See also, www.lambdalegal.org/map/child-welfare.

case law precedent, obligations under prior Executive orders and obligations under the U.S. Constitution and state constitutions.

IV. The proposed rulemaking violates the Administrative Procedures Act.

When an agency moves forward with rulemaking, it is subject to the arbitrary and capricious review under the Administrative Procedures Act (APA).[76] Proposed rules must examine the relevant information and articulate adequate reasons[77] for its decision along with a reasoned analysis for the change."[78] Pursuant to the APA, agency action is arbitrary if an agency "failed to consider an important aspect of the problem" or if the agency's explanation "runs counter to the evidence before it."[79] To meet this standard, "an agency must examine the relevant data" in adopting a regulation, and an agency action may be arbitrary and capricious if it is implausible or "runs counter to the evidence before the agency[.]"[80] Here, HHS has failed utterly to provide a reasoned analysis for its proposed changes and the course it has charted, which runs directly counter to the evidence before the agency and its statutory mandates.

A. HHS violates the APA by failing to grapple with prior factual findings.

When an agency decides to revise a Final Rule, it is subject to certain procedural requirements.[81] Although agencies can decide to reconsider a final rule, it must still comply with a notice and comment period and all of the other procedural requirements that are required under the APA.[82] This is required to ensure that the public has an opportunity to comment on the "wisdom of repeal."[83] One of those requirements is that an agency must grapple with prior factual findings and provide a coherent justification when they decide to repeal an existing regulation that contradicts a prior finding.[84] The current rule has been operative since 2015 and was finalized in 2017. The proposed rule scraps a four year policy that provided consistency and clarity for grantees and beneficiaries and provided an equal level of protection across HHS programming.
But in this case, the Department has failed to address the Final rule in a substantive manner other than to put forward a specious conclusion that the Final Rule created an economic burden on some entities.

B. The rationale that "some" members of the public have alleged concerns about a lack of stability and predictability with the current rule is arbitrary and capricious.

The NPRM attempts to justify the erasure of express protections against discrimination based on sexual orientation, gender identity and other protected characteristics by asserting that "some" members of the public have expressed concerns to the Department regarding purported burdens created by sections (c) and (d). The Department then refers to four comments (out of over 12,306 comments posted) that were

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[76] 5 U.S.C. § 706(2)(A); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983).

[77] *Encino Motorcars, LLC v. Navarro*, 136 S.Ct 2117, 2125 (2016).

[78] *Id.*

[79] *Id.*

[80] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[81] Clean Air Council v. Pruitt, 862 F.3d 1, 14 (D.C. Cir. 2017).

[82] *Id.*

[83] *Consumer Energy Council of Am. v. Fed. Energy Regulatory Comm'n*, 673 F.2d 425, 446 (D.C. Cir. 1982).

[84] *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515-16 (2009).

received in a Request for Information.[85] Unsurprisingly, all four comments were submitted by organizations that historically have been deeply opposed to LGBTQ protections. Only one of them substantively addressed the proposed erasure in 45 CFR 75.300(c).[86]

Pursuant to the APA, an agency must consider relevant data and support regulatory action with data and evidence.[87] HHS asserts that these complaints and a single preliminary injunction demonstrates that § 75.300(c) and (d) created a lack of predictability and stability for the Department and stakeholders. The Department's conclusion that the mere "existence" of some criticism of a regulation demonstrates a "burden" or "lack of predictability and stability" justifies a repeal of a regulation that will impact more than 500 billion dollars in a wide array of programming is simply dumfounding. Indeed, recent court decisions vacating a recently finalized HHS rule relying upon a similar rationale are instructive.[88] The district courts in those cases recognized that HHS's factual claim that there was a "significant increase of complaints of Conscience Provision violations is flatly untrue."[89] While HHS is not claiming a significant increase with respect to this rule, justifying a proposed rule that would affect hundreds of billions of dollars in grant funding and would impact millions of people based on four complaints that are vaguely worded and mostly address issues that are not relevant to this rulemaking is unreasonable and unconscionable.

The proposed rule is a solution in search of a problem. The rule asserts that the loss of grantees with religious programs would reduce the effectiveness of programs funded by federal grants by reducing the number of entities who participate in programs that are federally funded by HHS, including those providing adoption and foster care placements.[90] But the Department provided zero data in the NPRM to support the proposition that prohibiting discrimination would reduce the number of available placements. And there is no evidence that allowing or promoting discrimination by agencies will increase foster homes for desperate children. In addition, HHS has not pointed to any evidence that any faith-based organization who would otherwise be eligible and competitive candidates for HHS grants have not received such grants based on an unwillingness or inability to comply with section 75.300(c) or section 75.300(d). Neither has HHS provided any evidence that any otherwise successful HHS grantees have discontinued participation in a grant program based on an unwillingness or inability to comply with section 75.300(c) or section 75.300 (d). Lastly, HHS has not provided evidence that any faith-based organization otherwise eligible and competitive for an HHS grant award has declined to seek such an award solely because of an unwillingness or inability to comply with section 75.300(c) or section 75.300(d).

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[85] https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&D=HHS-OS-2017-0002

[86] *See* https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&s=75.300&dct=PS&D=HHS-OS-2017-0002 (comments submitted by Family Policy Alliance, Alliance Defending Freedom, USCCB and the Virginia Catholic Conference).

[87] See *Motor Vehicles Mfrs. Ass'n v. State Farm Ins.*, 463 U.S. 29, 43 (1983); *Islander E. Pipeline Co. v. Conn. Dep't of Envtl. Prot.*, 482 F.3d 79, 103 (2d Cir. 2006).

[88] 83 FR 3880 (Protecting Statutory Conscience Rights in Health Care; Delegations of Authority) *State v. Dep't of Health and Hum. Servs.*, --- F.Supp. 3d ---, 2019 WL 5781789 (S.D.N.Y. Nov. 6, 2019); *Washington v. Azar*, 2:19-cv-00183, 2019 WL 6219541 (E.D. Wash. Nov. 21, 2019.

[89] *State v. Dep't of Health and Hum. Servs.*, 2019 WL 5781789 at 40.

[90] 84 FR 63831.

The reality is that most organizations—including faith based organizations—have historically complied willingly with inclusionary nondiscrimination provisions. But in some places, faith-based organizations have decided to stop providing services because the state has prohibited discrimination against LGBTQ people. For example, some faith based organizations in Massachusetts, Washington D.C. and in Illinois have chosen to stop providing care due to their religious objections to nondiscrimination policies.[91] But the effect of these withdrawals has not led to a loss in services.[92] Other organizations have reliably filled the gap. In Massachusetts, a network filled the gap left by the religious organizations and the average percentage of children placed for adoption did not decrease. In fact, the average number of children placed increased by one percent.[93] Similarly, other groups rushed in to fill the gap in Washington D.C. and in Illinois with little to no gaps in coverage.[94] As these case studies show, the loss of entities who insist upon discriminating has not led to a loss of qualified entities willing and able to provide services free from discrimination who welcome a large pool of prospective parents willing to provide a home. By proposing to repeal these beneficiary protections entirely based on concerns regarding a small minority of potential applications, the proposal fails to demonstrate a "rational connection between the facts found and the choice made."[95]

C. The preliminary injunction in *Buck v. Gordon* does not justify the proposed rule.

The Department fails to provide a reasoned analysis with regard to the case law it cites. Specifically, the Department gives improper weight to a preliminary injunction issued by a single district court that is currently under appeal.[96] In *Buck v. Gordon*, the district court granted a preliminary injunction to an individual plaintiff in an as-applied challenge.[97] The district court's decision was centered squarely on what the Court perceived to be hostility emanating from the recently appointed Attorney General.[98] The decision did not address the rule's application to non-merit factors that have been stripped in the NPRM. Furthermore, the agency failed to address countervailing (and binding) case law holding that agencies are subject to such regulation consistent with the First Amendment.[99] The Department inappropriately attempts to justify this sweeping rule change, which would apply to a wide array of HHS programming not considered in the as-applied challenge, by citing exclusively to this one decision addressing a single program in a single state regarding just one of the non-merit provisions HHS seeks to repeal. It also must be noted that the proposed rule is not the first time that HHS has justified a proposed rule almost entirely upon a single preliminary

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[91] See, Patricia Wen, Catholic Charities Stuns Stata, Ends Adoptions, Boston Globe (Mar. 11, 2006); Michelle Boorstein, Citing Same-Se Marriage Bill, Washington Archdiocese Ends Foster-care Program, Wash. Post (Feb. 17, 2010); Kevin Eckstrom, Catholic Charities Loses Same-Sex Couple Adoption Fight in Illinois, Religion News Service (Aug. 20, 2011).

[92] Brief of Amici Curiae, 17 States and the District of Columbia in Support of Fulton v. City of Philadelphia, No. 18-2574 (3d Cir. Oct. 4, 2018) (explaining that when faith-based providers chose not to operate in Massachusetts "…a network of agencies stepped in to fill the gap" and "children continued to be placed in similar numbers" and that "similar transitions occurred in the District of Columbia and Illinois."), *available at* https://www.aclu.org/sites/default/files/field_document/fulton_v_city_of_philadelphia_-_states_amicus_brief.pdf.

[93] *Id.*

[94] Annie E. Casey Foundation, KIDS COUNT Data Center, Children in Foster Care by Placement Type in the United States 2008-2017, https://datacenter.kidscount.org/ (last visited on Dec. 14, 2019).

[95] Burlington Truck Lines v. United States, 371 U.S. 156, 168 (1962).

[96] *See* 84 FR 27846.

[97] *Buck v. Gordon*, No. 1:19-CV-286, 2019 WL 4686425 (W.D. Mich. Sept. 26, 2019).

[98] Id. at *16.

[99] *See, e.g.*, *Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019); *New Hope Family Services, Inc. v. Poole*, 387 F. Supp. 3d (N.D.N.Y. 2019).

injunction without properly considering all of the evidence before it, including countervailing case law.[100] It is troubling that HHS administrators, who are placed in a position of public trust, continue to fail to properly distinguish or even acknowledge contrary legal precedent. For example, the Department fails to even acknowledge, much less consider, a Third Circuit decision denying a preliminary injunction on the grounds that a religiously-affiliated organization was unlikely to succeed in its challenge to a generally applicable nondiscrimination provision.[101] Another example includes a recent decision holding that a same-sex couple has standing to challenge federal funding provided to a religiously-affiliated organization that seeks to discriminate against same-sex couples.[102]

D. The Department failed to conduct a proper costs and benefits analysis.

Agencies are required to examine both the costs and the benefits of implementing a rule.[103] In this case, the Department has only considered the cost of implementation the rule by justifying the repeal on a single as-applied preliminary injunction that is under appeal. The Department failed to balance the short and long term benefit of having express and uniform nondiscrimination protections. The Department also fails to consider the costs associated with the reduced number of foster homes that are made available as a result of the rejection of suitable would-be foster and adoptive parents based on discriminatory grounds.

Furthermore, the Department failed to consider the economic costs of sanctioning discrimination against religious minorities, women and LGBTQ people. Protections for LGBTQ people is an economic issue. Exclusion can lead to economic costs associated with stigma such as poorer health outcomes and disparities and shorter lifespans, mental health disparities and lower productivity.[104] Social theorists have identified the social stress that people from stigmatized groups experience as "minority stress" that lead to mental and physical ill effects that inevitably create long term economic costs.[105] These costs are not intangible, and they can and should be actuarially computed to determine the actual cost of discrimination.

In addition, the Department failed to consider the massive legal and administrative costs associated with potential—and even likely—misunderstanding of the rule. Despite the purported stability and predictability of the proposed rule, it in fact invites chaos as grantees, beneficiaries and state and federal employees attempt to accurately assess their legal obligations within a patchwork of program nondiscrimination provisions, federal statutes, legal precedent, their obligations pursuant to the Constitution, prior executive orders, other federal regulatory action, and state and local nondiscrimination protections.

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[100] *See* Nondiscrimination in Health and Health Education Programs or activities 84 FR 27846 (also using a preliminary injunction as primary rationale and also failing to acknowledge extensive case law) See Lambda Legal comment for further explanation, available at https://www.regulations.gov/document?D=HHS-OCR-2019-0007-154936.
[101] *Fulton v. City of Philadelphia*, 922 F.3d 140, 147 (3d Cir. 2019).
[102] *Marouf v. Azar*, 391 F. Supp. 3d 23 (D.D.C. 2019).
[103] *State v. United States Bureau of Land Management*, 277 F. Supp. 3d 1106 (N.D. Cal. 2017).
[104] *See,* e.g., Michael K. Lavers, *U.N. highlights economic cost of anti-LGBT discrimination*, Washington Blade (Dec. 10, 2015), available at https://www.washingtonblade.com/2015/12/10/u-n-highlights-economic-cost-of-anti-lgbt-discrimination/; Jordyn Taylor, There's an economic cost to homophobia – and the numbers are staggering, Business Insider (July 18, 2016), *available at* https://www.businessinsider.com/researchers-calculated-the-economic-cost-of-homophobia-2016-7.
[105] *See* Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*. Psychol Bull. (2003) 129(5).

E. The NPRM fails to provide sufficient detail with regard to its content to allow for meaningful public comment.

Without explanation or analysis, the proposed rule blithely repeals the prohibitions on discrimination that were promulgated through a proper notice and comment period and replaces those clear and express protections with a generic requirement that grantees comply with federal statutes and Supreme Court precedent. Pursuant to Supreme Court case law precedent, Federal agencies are tasked with clarifying aspects of a statute that Congress did not make clear, but the proposed rule abdicates this responsibility and instead eliminates provisions in order to go back to a bizarre and truly confounding patchwork of legal protections, which does not increase clarity or predictability in any way whatsoever.[106] The Final Rule furthered helped provide by providing a detailed list of non-merit factors based on existing and statutory precedential law. The proposed rule does the opposite.

Furthermore, the NPRM does not adequately explain the substance of current §§ 75.300(c) and 75.300(d), let alone describe why their various elements are undesirable. The failure to provide an analysis of the costs and benefits of the NPRM also means that the agency failed to provide a factual basis for revising §§75.300(c) and 75.300(d) preventing the public from having a meaningful opportunity to provide comment. Such obscurity frustrates the purpose of the APA's requirements by depriving the public sufficient information about its justification and impacts.[107]

The inadequacy of the factual and legal justification the Proposed Rule is further exacerbated by an unusually short comment period of only 30 days, which does not provide the public with a meaningful opportunity to engage with a rule of this complexity and magnitude. The Department's unexplained shortening of the comment period deprives the public of a meaningful opportunity to weigh in on a rule that affects more than 500 billion dollars in federal grants. A 60-day comment period would have provided the public with sufficient time to fully understand the magnitude of the proposed rule.

In addition, there was little time provided to the public to express concerns about the rule while it was with the Office of Management and Budget, and with very short notice about that process, there were unsurprisingly—no Executive Order 12866 meetings.[108] The rule was sent to OMB on October 23, 2019 and the agency concluded its review on October 31, 2019—giving the public exactly eight days to request, receive and have an EO 12866 meeting.

VI. The Department's "concerns" do not justify non-enforcement pending rulemaking.

Associated with the proposed rule is a notice of non-enforcement based on a finding there was not a sufficient regulatory flexibility analysis (RFA) and that the certification was not published in the Federal Register. This notice of non-enforcement effectively issues an interim final rule that fails to comply with the notice and comment requirements under the APA, as well as the requirement that the agency provide a

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[106] See *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 104 S. Ct. 2778, 2782 (1984).
[107] *Conn. Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 531 (D.C. Cir. 1982). "If the notice of proposed rule-making fails to provide an accurate picture of the reasoning that has led the agency to the proposed rule, interested parties will not be able to comment meaningfully upon the agency's proposals."
[108] https://www.reginfo.gov/public/do/eom12866SearchResults?pubId=201910&rin=0991-AC16&viewRule=true

reasoned explanation for its decision. There is not a reasoned explanation or analysis exploring the impact of proposed rule on smaller entities but only a conclusory statement that the rule would likely impact a large number of entities. Furthermore, the 2016 rule's explanation that it would not have a significant economic impact was not unusual or surprising. A nondiscrimination provision costs to small entities should not entail significant costs.[109] In addition, HHS provides no explanation for why it chose to single out this RFA in light of the many other rules that contain only a brief certification that does not include statistical analysis.[110] Furthermore, the Department failed to provide any kind of analysis whatsoever regarding its decision to rescind the rule.

VII. Conclusion

As discussed at length above, it is well-documented that LGBTQ people may be more likely to be eligible for and need assistance from HHS grant programs; that these populations are vulnerable to discrimination in health and human service settings; and that such discrimination can have substantial economic and non-economic costs for individuals, families, communities, and society as a whole. In light of these facts, HHS has provided no evidence or reasoned analysis for repealing these protections.

For all the reasons stated above, we urge the Department not to finalize the NPRM and instead immediately to withdraw it.

Thank you for the opportunity to submit comments on the Proposed Rule. Please do not hesitate to contact Sasha Buchert at sbuchert@lambdalegal.org if further information would be of assistance.

Most respectfully,

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[109] *See* 81 FR at 89394.
[110] Notice of Nonenforcement, 84 Fed. Reg. 63809.