

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FACING FOSTER CARE IN ALASKA;
FAMILY EQUALITY; TRUE COLORS
UNITED, INC.; and SERVICES &
ADVOCACY FOR GLBT ELDERS,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES; and
NORRIS COCHRAN, in his official
capacity as Acting Secretary, United States
Department of Health and Human Services,

Defendants.

Civil Action No. 1:21-cv-00308-KBJ

**PLAINTIFFS' APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND
MOTION FOR A STAY UNDER 5 U.S.C. § 705 PENDING JUDICIAL REVIEW OR, IN
THE ALTERNATIVE, A PRELIMINARY INJUNCTION**

Plaintiffs Facing Foster Care in Alaska, Family Equality, True Colors United, Inc., and Services & Advocacy for GLBT Elders (collectively, "Plaintiffs") challenge the recently issued U.S. Department of Health and Human Services ("HHS") Rule entitled *Health and Human Resources Grants Regulation*, 86 Fed. Reg. 2,257 (Jan. 12, 2021) ("2021 Grants Rule") as violating the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). Pursuant to Local Rule 65.1 and 5 U.S.C. § 705, Plaintiffs bring this application for a temporary restraining order and motion for a stay pursuant to 5 U.S.C. § 705 or, in the alternative, preliminary injunctive relief pursuant to Federal Rule of Civil Procedure 65 (the "Motion"). In particular, Plaintiffs request immediate entry of a temporary restraining order staying the effective date, enforcement, and

implementation of the 2021 Grants Rule, pending resolution of Plaintiffs' Motion, but for no longer than 30 days unless expressly extended by order of this Court. Although Plaintiffs are filing this application for a temporary restraining order after business hours to ensure it is available for the Court's review at the start of the day tomorrow, Plaintiffs do not seek overnight review of the application. Plaintiffs further request an Order pursuant to 5 U.S.C. § 705 postponing the effective date of the 2021 Grants Rule pending entry of final judgment in this case and staying implementation of the 2021 Grants Rule pending conclusion of these review proceedings, or, in the alternative, an Order pursuant to Federal Rule of Civil Procedure 65 enjoining Defendants from applying, enforcing, or issuing any guidance relating to the 2021 Grants Rule as it relates to 45 C.F.R. §§ 75.300(c) and (d) nationwide during the pendency of this action until further order of the Court.

This Motion is accompanied by a Memorandum of Points and Authorities, five supporting declarations, and two proposed Orders.

Pursuant to Local Rule 65.1(d), Plaintiffs respectfully request an expedited hearing on the application and Motion. The 2021 Grants Rule, which eliminates explicit and uniform nondiscrimination protections for beneficiaries of and participants in HHS grant programs, is scheduled to go into effect on February 11, 2021. 86 Fed. Reg. at 2,257.¹ As set forth in the

¹ President Biden's Chief of Staff issued a memorandum to all agency heads on January 21, 2021, instructing them to consider, for rules that have been published in the Federal Register but have not taken effect, postponing the rules' effective dates for 60 days from the date of the memorandum, consistent with applicable law and certain specified exceptions, "for the purpose of reviewing any questions of fact, law, and policy the rules may raise." Ronald A. Klain, Mem. for the Heads of Executive Dep't & Agencies (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/regulatory-freeze-pending-review/>. As of the date of this filing, HHS has not taken action on the 2021 Grants Rule in response to this memorandum. If HHS does issue such a stay, the effective date of the 2021 Grants Rule will be March 21, 2021. This extension would postpone, but not eliminate, the irreparable injuries resulting from the 2021

accompanying Memorandum of Points and Authorities, if it goes into effect, the 2021 Grants Rule will cause Plaintiffs irreparable harm.

Plaintiffs therefore respectfully request that the Court immediately grant Plaintiffs' request for a temporary restraining order and enter the following proposed briefing schedule with respect to Plaintiffs' Motion for a stay under 5 U.S.C. § 705 or a preliminary injunction under Federal Rule of Civil Procedure 65:

- Defendants' Opposition, if any, due February 11, 2021;
- Plaintiffs' Reply, if any, due three calendar days following the filing of Defendants' Opposition.

Pursuant to Local Rule 7(m) and Local Rule 65.1(a), counsel for Plaintiffs contacted Defendants in advance of filing this motion. In particular, Plaintiffs informed Defendants on January 28, 2021, that Plaintiffs intended to file this action and request a stay of the effective date of the 2021 Grants Rule under 5 U.S.C. § 705, and Plaintiffs asked Defendants to take agency action to stay the effective date of the 2021 Grants Rule pending judicial review. Plaintiffs emailed Civil Division staff in the U.S. Department of Justice on February 3, 2021, to provide them with an electronic copy of the Complaint and inform them that Plaintiffs planned to file the present Motion within about a day, and asked for Defendants' position on the Motion. Department of Justice attorney, Michelle R. Bennett, informed undersigned counsel that she would alert Defendants to the litigation and the anticipated Motion and inquire about their position, but she was unsure of a time frame for Defendants to state their position on this Motion.

Grants Rule. If HHS does issue such a stay, Plaintiffs will inform the Court as soon as they become aware of it.

Plaintiffs will provide Ms. Bennett with this Motion and accompanying papers via email immediately after filing it on February 4, 2021.

DATED: February 4, 2021

Respectfully submitted,

/s/ Robin Thurston

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* *Pro hac vice* application forthcoming

NAMES OF PERSONS TO BE SERVED WITH PROPOSED ORDER UPON ENTRY

In accordance with Local Rule 7(k), below are the names and addresses of attorneys entitled to be notified of entry of the above Proposed Order:

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