December 19, 2019

Department of Health and Human Services
Hubert H. Humphrey Building
200 Independence Avenue, SW
Washington, DC 20201

Submitted electronically via regulations.gov

RE: RIN 0991-AC16, proposed rule to repromulgate or revise certain regulatory provisions of the Department of Health and Human Services, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS Awards.

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The American Civil Liberties Union ("ACLU") submits these comments on the proposed rule published at 84 Fed. Reg. 63,831 (proposed Nov. 19, 2019), RIN 0991-AC16, that seeks to repromulgate or revise certain regulatory provisions of the Department of Health and Human Services, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for HHS Awards (the "Proposed Rule" or "Rule").

For nearly 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. With more than 8 million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C. for the principle that every individual's rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, gender identity or expression, disability, national origin, or record of arrest or conviction.

The Proposed Rule rolls back protections that ensure recipients of grants from the Department of Health and Human Services ("the Department" or "HHS") do not deny people the benefits of those grants for discriminatory reasons. The Department fails to acknowledge how permitting grantees to discriminate against people seeking services undercuts the effectiveness of those services. And by authorizing discrimination in programs it administers, the Department is

undermining its mission to protect the health and well-being of people in the United States.

Although the Department offers several reasons for the Proposed Rule, none withstands scrutiny. In effect, the Department has acted on the complaints of a small number of grantees to craft a broad rule that harms the very people the Department is tasked with serving. While the Proposed Rule permits discrimination on a variety of bases across multiple programs, it specifically targets lesbian, gay, bisexual, transgender, and queer ("LGBTQ") individuals by removing protections against discrimination based on sexual orientation and gender identity from virtually all HHS-funded programs. Putting service providers' interests in discriminating above eligible individuals' ability to access those services jeopardizes the success of the Department's programs, and allows taxpayer funds to unconstitutionally subsidize discrimination.

For these reasons, as well as the ones that follow, we urge the Department to decline to finalize changes to the nondiscrimination provisions in the Proposed Rule.

I. BACKGROUND

The Department's mission is to enhance and protect the health and well-being of all people in the United States by providing eligible individuals with a broad range of health and human services. To that end, the Department distributes about $500 billion in taxpayer funds through grants annually. Under existing regulations, the Department is required to manage and administer grant awards to ensure that federal funding accords with federal statutory and public policy requirements, "[i]ncluding, but not limited to, those protecting public welfare, the environment, and prohibiting discrimination." 45 C.F.R. § 75.300(a).

Under the current rule, as last modified on December 12, 2016, in administering programs supported by the Department's awards, "[i]t 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." 81 Fed. Reg. 89,395 (codified at 45 C.F.R. § 75.300(c)) ("Current Rule"). Impermissible discrimination includes discrimination based on "age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation." *Id.* The Current Rule also provides that "all recipients must treat as valid the marriages of same-sex couples," in accordance with *United States v. Windsor*, 570 U.S. 744 (2013), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). *Id.* (codified at 45 C.F.R. § 75.300(d)).

On November 19, 2019, the Department published the Proposed Rule, which strips away the discrimination prohibition in the Current Rule. Instead of the clear statement that no one should be denied the Department's services due to non-merit factors, and a detailed list of such factors, the Proposed Rule states that "no person

otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination . . . to the extent doing so is prohibited by federal statute." 84 Fed. Reg. 63,835 (to be codified at 45 C.F.R. § 75.300(c)). Additionally, the Proposed Rule no longer explicitly states that marriages of same-sex couples will be treated as valid. Instead, it merely provides that "HHS will follow all applicable Supreme Court decisions in administering its award programs," without specifying which Court decisions are applicable, or how it will "follow" those decisions. *Id.* (to be codified at 45 C.F.R. § 75.300(d)).

That same day, the Department published the "Notification of Nonenforcement of Health and Human Services Grants Regulation," stating that it will not enforce the parts of the Current Rule codified as 45 C.F.R. § 75.300(c) and (d), among other regulations, due to a stated concern about compliance with the requirements of the Regulatory Flexibility Act ("RFA"). 84 Fed. Reg. 63,809 (the "Nonenforcement Notice"). Thus, before a single comment has been made about the Proposed Rule, the Department has already rolled back protections against discrimination for those who receive HHS-funded services.

II. THE PROPOSED RULE FOSTERS DISCRIMINATION.

By removing the explicit protections against discrimination contained in the Current Rule, the Proposed Rule authorizes HHS-grant recipients to discriminate in federally funded services. There are many HHS programs that do not have governing nondiscrimination provisions as extensive as the Current Rule, whether in the statutes or implementing regulations. Accordingly, the Proposed Rule enables grantees to deny services to many people who are qualified to receive them.

The Proposed Rule would create a patchwork of protections depending on the statutes and regulations that apply to any particular program, resulting in gaps where some eligible individuals will lose protections against discrimination provided by the Current Rule. There are federal statutes that create blanket protections against discrimination based on race, color, national origin, disability and age. *See* Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (race, color, national origin); Rehabilitation Act of 1973, 29 U.S.C. § 794 (disability); Age Discrimination Act of 1975, 42 U.S.C. § 6102 (age). However, there are no such across-the-board protections against discrimination based on religion, sex, sexual orientation, gender identity, or other grounds. While some programs have program-specific statutes offering protections against one or more of these forms of discrimination, there are many programs that have no statutory protection against discrimination based on religion, sex, sexual orientation and/or gender identity.

Despite significantly weakening the current protections, the Department does not even mention the risk of discrimination faced by those served by its programs, or the harms that result from such discrimination. Instead, the Department is focused entirely on asserted concerns that particular service providers may choose

not to participate in its programs if required to comply with the Current Rule prohibiting discrimination based on non-merit factors. 84 Fed. Reg. 63,832. As this section describes, the Department has failed to consider the "facts and circumstances that underlay or were engendered by the prior policy," which is required when an agency changes its position. *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2126 (2016) (citation omitted).

The following are just some examples of the kind of discrimination we could see as a result of eliminating the Current Rule and replacing it with the Proposed Rule:

- A federally funded agency providing foster care services could refuse to license families that do not share its faith, turning away, for example, all non-Christian families.
- A federally funded agency providing foster care services could keep children in a group home rather than place them with qualified Jewish or LGBTQ parents.
- Children of same-sex parents could be denied enrollment in Head Start and other federally funded childcare facilities.
- Federally funded after-school programs could refuse to serve the children of single mothers or LGBTQ parents and could also exclude transgender youth.
- A senior services center could continue to receive government funding while ignoring sexual harassment of women it serves.
- A program providing assistance to caregivers could decline to provide services to men.
- Community meal programs designed to support older adults could refuse to deliver food to older Americans who are LGBTQ.

Such discrimination by HHS grantees would be explicitly prohibited by the Current Rule, but not the Proposed Rule.

The risk of discrimination and the harms it creates are not simply academic. For example, under the Proposed Rule, federally funded foster care providers could refuse to place children with foster or adoptive families because of those families' faith or sexual orientation, even if the placement would be in the best interest of the children in the agency's care. This has already happened to children:

- In one case, in Michigan, a child in foster care was separated from his siblings because the agency caring for him would not place him with the foster family caring for his siblings since they were a same-sex couple. *Special Investigation Report 2018C0223029* at 9, State of Michigan, Department of Health and Human Services (May 2, 2018), https://cwl-search.apps.lara.state.mi.us/Home/ViewReport/236855.

- In a second case, also in Michigan, children placed with a same-sex couple had their adoptions delayed because the agency caring for them would not approve the adoption once their caregiver's marriage to his partner was legally recognized in the state. *Special Investigation Report 2017C0208001* at 7, State of Michigan, Department of Health and Human Services (May 2, 2018), https://cwl-search.apps.lara.state.mi.us/Home/ViewReport/208062.
- In South Carolina, the largest foster-care agency in the state accepts only Christian families that adhere to its specific religious beliefs,[1] which leaves children of other faiths in the agency's care without the possibility of being placed with a family that shares their faith.[2]

Under the Proposed Rule, discrimination by any agency that results in separation of siblings, delays in adoption, or children's inability to be placed with families that share their faith would not be a basis to deny federal funding.[3]

Although many groups could lose protections, the Proposed Rule is particularly targeted at LGBTQ individuals.[4] While several programs have statutes

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[1] *See* Miracle Hill Ministries, *Foster Care Inquiry Form*, https://miraclehill.org/foster-care-inquiry-form/ (requiring families to agree with the agency's doctrinal statement).

[2] The Department has already granted South Carolina a waiver from the Current Rule to allow such discrimination. *See* January 1, 2019 Letter from Steven Wagner to Governor Henry McMaster, https://governor.sc.gov/sites/default/files/Documents/newsroom/HHS%20Response%20Letter%20to%20McMaster.pdf.

[3] The ACLU's position is that even without the Current Rule, a separate regulation—45 C.F.R. § 87.3(d)—still bars discrimination against prospective foster parents based on their faith. That regulation prohibits discrimination against "program beneficiar[ies]" on the basis of religion. However, the Department has made clear that it does not consider prospective foster and adoptive parents to be protected "program beneficiaries," as the Department did not address 45 C.F.R. § 87.3(d) in granting the waiver to South Carolina to permit grantees to engage in religious-based discrimination against prospective foster parents. *See* January 1, 2019 Wagner Letter, *supra* note 2. If HHS believed prospective foster parents were covered by that regulation, the waiver would have been meaningless without also granting a waiver from compliance with § 87.3(d). The Current Rule, which applies to all program participants—whether or not they are considered "beneficiaries"—clearly extends to prospective foster parents. *See* 45 C.F.R. § 75.300(c) (it is the policy of HHS "that no person otherwise eligible will be excluded from participation in . . . HHS programs and services" based on non-merit factors).

[4] This is not the first instance of the Trump administration targeting LGBTQ individuals, and transgender and gender non-conforming people in particular. The Administration banned transgender members of the military from openly serving, and prohibited coverage for certain critical medical procedures. Dept. of Defense, *Military Service by Transgender Individuals* (Feb. 22, 2018), https://media.defense.gov/2018/Mar/23/2001894037/-1/-1/0/military-service-by-transgender-individuals.pdf. The administration has argued that federal employment law permits discrimination against LGBT people. Brief for the Federal Respondent at 12, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (U.S. Oct. 24, 2018), https://www.aclu.org/sites/default/files/field_document/20181024152750333_18-107_rg_gr_harris_funeral_homes.pdf. The Administration has proposed a rule to allow taxpayer-funded shelters to turn away transgender people experiencing homelessness. *Revised Requirements Under Community Planning and Development Housing Programs (FR-6152)*, U.S. Office of Info. &

or regulations prohibiting discrimination based on sex, religion, and other characteristics, very few explicitly cover sexual orientation or gender identity. And the Trump Administration has stated time and again that it does not consider existing protections against sex discrimination to cover discrimination based on gender identity and sexual orientation. Moreover, the Proposed Rule was prompted by an effort to enable federally-funded foster care agencies to exclude prospective families headed by same-sex couples. *See* 84 Fed. Reg. 63,832 (discussing *Buck v. Gordon*, No. 1:19-cv-286 (W.D. Mich. Sept. 26, 2019) (lawsuit by agency claiming right to exclude same-sex couples)). Removing the Current Rule's umbrella protections against discrimination based on sexual orientation and gender identity invites agencies to discriminate against LGBTQ people.

Specifically targeting LGBTQ people is particularly pernicious, because they are more likely to need and participate in public benefit programs,[5] and to be subjected to discrimination. Such discrimination can take the form of service providers using harsh or abusive language, being physically rough, or refusing to touch them.[6] In some cases, people are completely refused necessary services.[7] As a result, fear of such discrimination causes people to postpone or avoid seeking out services.[8] Being denied services or failing to seek services due to discrimination

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Regulatory Affairs (Spring 2019), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201904&RIN=2506-AC53. Additionally, the Administration proposed a rule that would erase antidiscrimination protections for transgender, non-binary, and gender-nonconforming people seeking to access health care and coverage. 84 Fed. Reg. 27,846 (proposed June 14, 2019), RIN 0945-AA11, "Nondiscrimination in Health and Health Education Programs or Activities."

[5] Caitlin Rooney et al., *Protecting Basic Living Standards for LGBTQ People*, Ctr. for Am. Progress (Aug. 13, 2018), https://www.americanprogress.org/issues/lgbt/reports/2018/08/13/454592/protecting-basic-living-standards-lgbtq-people/.

[6] Lambda Legal, *When Health Care Isn't Caring: Lambda Legal's Survey on Discrimination Against LGBT People and People Living with HIV* (July 31, 2014), http://www.lambdalegal.org/publications/when-health-care-isnt-caring.

[7] Nat'l Gay and Lesbian Task Force and Nat'l Ctr. for Transgender Equality, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (2011), https://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf; Lambda Legal, *When Health Care Isn't Caring*, *supra* note 6.

[8] *National Transgender Discrimination Survey*, *supra* note 7, at 76; Fenway Institute, *Promoting Cervical Cancer Screening Among Lesbians and Bisexual Women* (2013), http://www.lgbthealtheducation.org/wp-content/uploads/Cahill_PolicyFocus_cervicalcancer_web.pdf.

results in serious negative consequences,[9] which are only further exacerbated when those same individuals are also members of other disadvantaged groups.[10]

Considering these serious risks and resulting harms of discrimination, putting service providers' interests in discriminating above eligible individuals' ability to access those services contravenes the Department's mission and existing regulatory obligations to enhance the health and well-being of everyone. By making clear that people cannot be denied services for "non-merit factors," the Current Rule ensures that people who need assistance are not arbitrarily turned away. The Proposed Rule reverses that framework, authorizing grantees who receive taxpayer dollars to provide important health and human services to turn away eligible individuals in need of services.

The Department failed to consider the many contexts in which the Proposed Rule would remove necessary checks on discriminatory behavior by agencies. Its failure to account for these practical effects is fatal to the Proposed Rule for two reasons: First, the Department must consider such interests because it is changing its existing nondiscrimination policy to one that is significantly less protective. *Encino Motorcars*, 136 S. Ct. at 2126. Second, the Department is required to assess a proposed policy's impact on family wellbeing, which includes families related by blood, marriage, adoption, and other legal custody arrangements. *Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999*, Pub. L. No. 105-277, § 654 (1998) (codified at 5 U.S.C. § 601). The Department acknowledges this requirement, but states that "these proposed regulations will not have an impact on family well-being." 84 Fed. Reg. 63,835. As described above, this assessment is deeply flawed, as the Proposed Rule will have a profound impact on its programs, in particular as they impact LGBTQ families.

III. THE PROPOSED RULE WOULD ALLOW FOR UNCONSTITUTIONAL GOVERNMENT-FUNDED DISCRIMINATION.

Government-funded discrimination is unacceptable. By permitting entities to discriminate with federal funds, the Proposed Rule unconstitutionally puts the

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[9] *See, e.g.*, Institute of Medicine, *The Health of Lesbian, Gay, Bisexual, and Transgender People: Building a Foundation for Better Understanding* (2011), https://www.ncbi.nlm.nih.gov/pubmed/22013611; HHS, *Lesbian, Gay, Bisexual, and Transgender Health* (last visited Aug. 6, 2019), http://www.healthypeople.gov/2020/topics-objectives/topic/lesbian-gay-bisexual-and-transgender-health; *Lesbian, Gay, Bisexual, and Transgender Health*, Ctrs. for Disease Control & Prevention (last visited Aug. 6, 2019), http://www.cdc.gov/lgbthealth/about.htm; *When Health Care Isn't Caring*, *supra* note 6.

[10] Institute of Medicine, *supra* note 9; Center for American Progress, *Health Disparities in LGBT Communities of Color: By the Numbers* (Jan. 15, 2010), https://www.americanprogress.org/issues/lgbt/news/2010/01/15/7132/health-disparities-in-lgbt-communities-of-color; Center for Reproductive Rights, et al., *Reproductive Injustice: Racial and Gender Discrimination in U.S. Health Care* (2014), https://reproductiverights.org/sites/default/files/documents/CERD_Shadow_US_6.30.14_Web.pdf.

government's imprimatur on discrimination in violation of the Equal Protection Clause and the Establishment Clause.

"It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) (plurality opinion). And "[i]t is . . . axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." *Norwood v. Harrison*, 413 U.S. 455, 465 (1973) (citation and internal quotation marks omitted); *cf. United States v. Burke*, 504 U.S. 229, 238 (1992). As the government's "constitutional obligation" prevents it from discriminating, it is also prohibited from "giving significant aid to institutions that practice racial or other invidious discrimination." *Norwood*, 413 U.S. at 467. "Direct discrimination by Federal, State, or local governments is prohibited by the Constitution. But indirect discrimination, through the use of Federal funds, is just as invidious." Civil Rights Div., U.S. Dep't of Justice, Title VI Legal Manual at 1 (2019), https://www.justice.gov/crt/case-document/file/934826/download (quoting Pres. John F. Kennedy, H.R. Misc. Doc. No. 124, 88th Cong., 1st Sess. 3, 12 (1963)).

The Department asserts that the Proposed Rule is necessary because some entities have religious objections to the current antidiscrimination protections, 84 Fed. Reg. 63,832, but government-funded discrimination is no more permissible when it is done for religious reasons. While religiously affiliated organizations may participate in government-funded programs, such organizations may not use those funds to discriminate. *See Bob Jones Univ. v. United States*, 461 U.S. 574, 591 (1983). In fact, allowing government-funded agencies to use religious criteria to exclude program beneficiaries would violate the Establishment Clause. *See, e.g. Bowen* v. *Kendrick*, 487 U.S. 589, 608–09 (1988) (when faith-based organizations receive government funds, they may not use those funds to advance religion).[11] The programs and services made available through the Department's grants must be open to any eligible person in need. Allowing agencies that get these grants to pick and choose whom they will serve—denying certain groups access to government-funded programs—would violate the Constitution.

[11] The government further violates the Establishment Clause when it accommodates religious beliefs to the detriment of third parties. "The First Amendment . . . gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities." *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985) (internal quotation marks and alterations omitted)); *see also Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (holding that "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries"); *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 706 (1994) ("accommodation is not a principle without limits"); *Barber v. Bryant*, 193 F. Supp. 3d 677, 721 (S.D. Miss. 2016) (holding a law "violates the First Amendment" when "its broad religious exemption comes at the expense of other citizens"), *rev'd on standing grounds,* 860 F.3d 345 (5th Cir. 2017).

IV. HHS OFFERS NO REASONED ANALYSIS THAT SUPPORTS THE PROPOSED RULE.

The Department asserts that the Proposed Rule is necessary to create predictability, enhance the effectiveness of the programs, and to address religious exercise claims. None of these grounds for the Proposed Rule withstands scrutiny. In reality, the Proposed Rule will create more confusion and decrease the effectiveness of the programs by allowing grantees to refuse to provide services to eligible individuals. Further, the Proposed Rule is not needed to address conflicts with grantees' religious beliefs—and, indeed, those issues will persist under the Proposed Rule. As such, the changes offered by the Proposed Rule are without justification, and will accomplish nothing but harming those seeking aid through the Department's programs and services. In addition, where the Department is changing an existing position "the agency must at least display awareness that it is changing position and show that there are good reasons for the new policy." *Encino Motorcars*, 136 S. Ct. at 2126 (internal quotation marks omitted). Further, "in explaining its changed position, an agency must be cognizant that longstanding policies may have engendered serious reliance interests that must be taken into account." *Id.* (internal quotation marks omitted). The Department does not meet this standard. Accordingly, the Department should maintain the Current Rule, and abandon its proposed changes.

A. The Proposed Rule Generates Confusion, Not Simplicity.

Noting claims for exceptions to the Current Rule and lawsuits, the Department argues that the current regulations "created a lack of predictability and stability" for grantees as a rationale for its changes. 84 Fed. Reg. 63,832. But under the Current Rule, there is a clear policy barring discrimination based on non-merit factors, and the regulations go on to enumerate that those factors include, but are not limited to, "age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation." 45 C.F.R. § 75.300(c). This policy is uniform across programs, so it is predictable for grantees; grantees are not required to parse individual statutes, creating stability in their expectations for administering the grant awards.

The Proposed Rule, in contrast, would leave in place only piecemeal protections that are more, not less, difficult to understand and navigate. The Proposed Rule bars discrimination "to the extent doing so is prohibited by federal statute." 84 Fed. Reg. 63,832. This leaves grantees to figure out which statutes apply to any particular programs, even where the statutes are not specific to that program.

Further, the Proposed Rule mentions that discrimination prohibited by federal *statute* is prohibited, but makes no mention of federal *regulations* that

prohibit discrimination, thus raising questions about how the Department will treat violations of nondiscrimination provisions contained in regulations.[12] The emphasis on statutes is particularly concerning, considering that many program-specific antidiscrimination provisions are housed in regulations. For example, the Family Violence Prevention and Services Act ("FVPSA") prohibits grantees from excluding people from accessing services under the grant based on age; disability; sex; race, color, or national origin; or religion. 42 U.S.C. § 10406(c)(2). It is the applicable *regulations* that require grantees to provide services without regard to gender identity, sexual orientation, and immigration status. 45 C.F.R. § 1370.5(a), (c).

The FVPSA's nondiscrimination provisions also illustrate another area of confusion under the Proposed Rule: the statute bars discrimination based on sex, but does not explicitly bar discrimination based on sexual orientation or gender identity. However, most courts to address the question have ruled that prohibitions on sex discrimination also protect individuals from discrimination based on gender nonconformity.[13] Further, the Supreme Court has ruled that the marriages of same-sex couples must be treated as valid.[14] Under the Proposed Rule, grantees would need to be familiar with ongoing litigation across the country that does not directly address the programs they administer in order to understand the full import of the applicable antidiscrimination prohibitions. The Current Rule, by contrast, explicitly bans discrimination based on gender identity and sexual orientation, avoiding confusion about what conduct is prohibited by a rule against discriminating based on sex. Eliminating that clear language only invites confusion.[15]

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[12] The Department has fueled this concern, by stating that it is revising the nondiscrimination provisions in part "to establish *enforcement priorities* with respect to those programs," 84 Fed. Reg. 63,832 (emphasis added), suggesting that it may not treat grantees who discriminate in violation of regulations as enforcement priorities. Whatever the Department's intent may be in including this language, grantees are left without clarity as to how it will treat violations of antidiscrimination regulations.

[13] *See, e.g.*, *EEOC v. R.G. &. G.R. Harris Funeral Homes, Inc.,* 884 F.3d 560, 572 (6th Cir. 2018), *cert. granted in part,* 139 S. Ct. 1599 (2019); *Whitaker ex rel. Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1046–54 (7th Cir. 2017); *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011); *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000); *Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213, 215–16 (1st Cir. 2000); *cf. Tovar v. Essentia Health*, 342 F. Supp. 3d 947, 953 (D. Minn. 2018); *Flack v. Wis. Dep't of Health Servs.*, 328 F. Supp. 3d 931, 951 (W.D. Wis. 2018); *Prescott v. Rady Children's Hosp.-San Diego*, 265 F. Supp. 3d 1090, 1098–1100 (S.D. Cal. 2017).

[14] *Obergefell*, 135 S. Ct. 2584; *Windsor*, 570 U.S. 744.

[15] The Supreme Court has heard argument in three cases addressing the question of whether, under Title VII, sex discrimination encompasses discrimination based on sexual orientation or gender identity. *Altitude Express, Inc. v. Zarda*, 139 S. Ct. 1599 (2019); *Bostock v. Clayton Cty., Ga.*, 139 S. Ct. 1599 (2019); *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 139 S. Ct. 1599 (2019). Because the cases currently before the Court are Title VII cases, it is not clear how the Court's ruling will apply in other contexts where discrimination based on sex (but not sexual orientation or gender identity) is prohibited. And since a primary impact of the Proposed Rule is to remove explicit protections against discrimination based on sexual orientation or gender identity, any comments or final rule may be mooted by the Court, and a new comment period would be necessary to address the impact of the Court's decisions on the proper interpretation of the

Relatedly, the Proposed Rule's justification for cutting mention of *Obergefell* and *Windsor* completely misses the reason for the Current Rule's language: to leave no doubt that grantees must treat the marriages of same-sex couples as valid. The Proposed Rule states that the Department "is committed to complying not just with those decisions, but with all applicable Supreme Court decisions and all applicable court orders," so it should not single out specific cases. 84 Fed. Reg. 63,833. If the Department were genuinely concerned with singling out specific Supreme Court cases, it could have excised mention of *Obergefell* and *Windsor*, leaving in the recognition that "all recipients must treat as valid the marriages of same-sex couples." 45 C.F.R. § 75.300(d).

A result of the patchwork of protections is that grantees could be bound by disparate antidiscrimination requirements across the programs they administer. This means that even though the funds are granted by the same source (the Department), a grantee could be barred from discriminating against a class of beneficiaries (e.g. women, LGBTQ people) in one program but turn members of that same class away from another. There is no reason to permit the use of non-merit factors to exclude eligible individuals from *any* program, and yet rolling back the Current Rule does just that. This inconsistency undermines the very purpose of antidiscrimination protections—to ensure that all eligible individuals can access HHS-funded services.

Finally, if figuring out what forms of discrimination are prohibited in particular programs is a challenge for grantees, who at least may have some familiarity with the statutes governing their programs, imagine the challenge for beneficiaries. Such a complex scheme of nondiscrimination protections makes it impossible for beneficiaries to know their rights and whether discrimination they experience is impermissible or authorized by the Department by its removal of the Current Regulation.

B. The Proposed Rule Undermines the Effectiveness of the Department's Programs.

The Department has also argued that requiring compliance with the Current Rule "reduces the effectiveness of programs" by, for example, "reducing foster care placements." 84 Fed. Reg. 63,832. The problem, as the Department describes it, is that grantees with religious objections to the nondiscrimination provisions "will leave the program(s) and cease providing services rather than comply." *Id.* The

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antidiscrimination provisions. It is not enough to delay the issuance of a final rule until after the decisions—there must be a chance for new comments at that time, given the many directions the Court's holdings could take. By contrast, if the Department leaves in place the Current Rule, parsing the definition of sex discrimination would not be necessary, as denying people services based on their gender identity or sexual orientation does not qualify as using merit-based factors.

Department says this reduces the number of entities providing services and, thus, reduces the effectiveness of the programs. *Id.* The Department offers no facts to support the assertion that the Current Regulation has reduced the effectiveness of any program, including foster care programs. It states only that "[s]ome non-Federal entities have expressed concerns," about this matter, and that "[s]ome members of the public have submitted comments to the Department." *Id.*

In fact, the available information indicates that the *Proposed* Rule will reduce the effectiveness of the Department's programs. That is because the challenge for foster care programs is not finding *agencies* to facilitate child placements, it is finding eligible *families* to place them with.

There is no shortage of agencies—both faith-based and secular—that are willing to comply with professional child welfare standards and accept all qualified families, regardless of the agencies' religious beliefs. In Massachusetts, Illinois, and Washington, D.C., when agencies chose to cease providing public child welfare services because of religious objections to a nondiscrimination requirement, other agencies stepped in and services to children continued without any impact on the number of family placements. States Amicus Br. 22–26, *Fulton v. City of Philadelphia*, 922 F.3d 140 (3d Cir. 2019) (No. 18-2574). Michigan has likewise acknowledged that should a child placing agency cease operations in the state due to its objections to accepting same-sex couples, the state could simply use other agencies to provide the same services. Dumont Br. at 33, *Buck v. Gordon*, 2019 WL 4686425 (W.D. Mich. Aug. 20, 2019) (No. 19-286), https://www.aclu.org/sites/default/files/field_document/62_response_in_opposition_to_motion_for_preliminary_injunction.pdf.

As child welfare professionals recognize, discrimination by child placing agencies reduces the number of families available for children. *See* Child Welfare Non-profits Amicus Br. at 8, *Fulton*, 922 F.3d 140, https://www.aclu.org/sites/default/files/field_document/fulton_v_city_of_philadelphia_-_voice_for_adoption_et_al_amicus_brief.pdf ("Allowing foster agencies to deny certification to same-sex couples on the basis of LGBTQ status shrinks the pool and hinders the primary goals of foster care placement."). Discrimination can discourage LGBTQ people from reaching out to foster or adopt. *Id.* at 9. If they face rejection—even if there are other agencies available, which is not always the case—the pain of discrimination can lead families to abandon the process. *Id.* at 9–10; *see also* MAP & Family Equality Council, *Putting Children at Risk: How Efforts to Undermine Marriage Equality Harm Children* at 1, http://www.lgbtmap.org/file/Undermining-Parenting-FINAL.pdf.

Moreover, LGBTQ people are more likely to be open to fostering and caring for children with disabilities.[16] Ensuring that agencies do not discriminate against prospective foster and adoptive families headed by same-sex couples also increases the diversity of those families. Including LGBTQ people in the foster care system is particularly crucial to support LGBTQ youth, who are overrepresented in the foster care population, and have often been abused, neglected, or abandoned because of their identity.[17] They face discrimination both inside and outside of the foster care system.[18] For foster care programs to succeed, it is crucial that they have a sufficient pool of LGBTQ-affirming families, and LGBTQ people are a great source of affirming families. For these reasons, the major professional organizations committed to promoting child welfare have taken the position that children's best interests are not served when an agency excludes potential foster or adoptive parents based on their sexual orientation.[19] And rejection of LGBTQ families is

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[16] Jeanne Howard & Madelyn Freundlich, *Expanding Resources for Waiting Children II: Eliminating Legal & Practice Barriers to Gay & Lesbian Adoption from Foster Care*, Donaldson Adoption Inst.12 (2008), https://www.adoptioninstitute.org/publications/expanding-resources-for-waiting-children-ii-eliminating-legal-practice-barriers-to-gay-lesbian-adoption-from-foster-care/; David Brodzinsky, *Expanding Resources for Children III: Research-Based Best Practices in Adoption by Gays and Lesbians*, Donaldson Adoption Inst. 33–34 (2011), https://www.adoptioninstitute.org/publications/expanding-resources-for-children-iii-research-based-best-practices-in-adoption-by-gays-and-lesbians/.

[17] *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); 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); 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 (2014), http://williamsinstitute.law.ucla.edu/wpcontent/uploads/LAFYS_report_final-aug-2014.pdf.

[18] Wilson et al., *supra* note 17, at 35, 40.

[19] *See, e.g.*, Am. Acad. of Child and Adolescent Psychiatry, *Gay, Lesbian, Bisexual, or Transgender Parents* (2019), https://www.aacap.org/AACAP/Families_and_Youth/Facts_for_Families/FFF-Guide/Children-with-Lesbian-Gay-Bisexual-and-Transgender-Parents-092.aspx; Am. Acad. of Pediatrics, Policy Statement, *Promoting the Well-Being of Children Whose Parents Are Gay or Lesbian* (2013), http://pediatrics.aappublications.org/content/pediatrics/131/4/827.full.pdf; Am. Med. Ass'n, *Partner Co-Adoption H-60.940* (2014); Am. Acad. of Fam. Physicians, *Resolution No. 505* (2002), quoted in Am. Acad. Fam. Physicians Congress of Delegates Update, 30 Wash. Fam. Physician 8, 9 (2003), http:// wafp.net/wp-content/uploads/2015/07/WA_Jan03.pdf; Am. Psychiatric Ass'n, *Position Statement on Issues Related to Homosexuality* (2013); Am. Psychol. Ass'n (APA), *Resolution, Sexual Orientation, Parents, & Children* (2004); Child Welfare League of Am. et al., *Position Statement on Parenting of Children by Lesbian, Gay, Bisexual, and Transgender Adults* (2015), https://www.cwla.org/wp-content/uploads/2015/04/PositionStatementOnParentingOfChildrenbyLGBT.pdf; Nat'l Adoption Ctr., *Adoption by Members of the LGBT Community* (2008), http://www.adopt.org/our-policies#LGBT; Nat'l Ass'n of Social Workers, *Foster Care and Adoption* (2002), https://www.socialworkers.org/assets/secured/documents/da/da2010/referred/Foster%20Care.pdf; N. Am. Council on Adoptable Children, *Gay and Lesbian Adoptions and Foster Care* (2002), https://www.nacac.org/advocate/nacacs-positions/#gay; *Eliminating Categorical Restrictions in Foster Care and Adoption*, https://www.nacac.org/advocate/nacacs-positions/categorical-restrictions/.

simply not about their merit, as LGBTQ people are just as qualified as heterosexual parents to provide supportive, healthy environments for children.[20]

The Proposed Rule not only invites discrimination against prospective foster families headed by same-sex couples, but also discrimination against families based on their faith, further undermining the effectiveness of foster care programs. We've already seen loving families turned away from fostering because they are Jewish or Catholic.[21] This does nothing to increase the effectiveness of the foster care programs the Department administers. In the case of South Carolina, the Department issued a waiver to allow agencies in the state to discriminate based on religion after doing an assessment of the specific circumstances on the ground and concluding that those circumstances warranted the waiver.[22] Under the Proposed Rule, there would be no such case-specific assessment to determine the impact of such discrimination on children and families—all federally funded agencies across the country could turn away qualified families because of their faith and continue to receive federal funding, regardless of the consequences for children in foster care.

The harm of the Proposed Rule is not limited to HHS-funded foster care programs. For example, programs serving youth, such as Head Start and after school programs, could discriminate against LGBTQ youth or children whose parents are same-sex couples, denying eligible youth the services they need. Programs serving elders such as community meals programs could refuse to bring food to LGBTQ seniors, undermining the goal of the program of providing nutrition to those in need. A program providing assistance to family caregivers could refuse to provide service to men.

The Department has not explained what other programs it thinks will improve by permitting discrimination against those receiving services. Nor could it.

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[20] *See, e.g.*, Wendy D. Manning et al., *Child Well-Being in Same-Sex Parent Families: Review of Research Prepared for American Sociological Association Amicus Brief*, 33 Population Res. Pol'y Rev. 485, 485–502 (2014); Helen Cosis Brown et al., *The Recruitment, Assessment, Support and Supervision of Lesbian, Gay, Bisexual and Transgender Foster Carers: An International Literature Review* 7–9 (2015), https://sateenkaariperheet.fi/wp-content/uploads/2018/05/ARTIKKELI-JA-SUOSITUKSET-The-recruitment-assessment-support-and-supervision-of-lesbian-gay-bisexual-and-transgender-foster-carers.pdf; Howard & Freundlich, *supra* note 16, at 14.

[21] Lydia Currie, *I was barred from becoming a foster parent because I am Jewish*, Jewish Telegraphic Agency (2019) https://www.jta.org/2019/02/05/opinion/i-was-barred-from-becoming-a-foster-parent-because-i-am-jewish; Liz Hayes, *Aimee Maddonna Was Told She's The 'Wrong' Kind Of Christian To Help Foster Kids. AU Says That's Discrimination – And We're Suing*, Americans United for Separation of Church and State (2019), https://www.au.org/blogs/wall-of-separation/aimee-maddonna-was-told-shes-the-wrong-kind-of-christian-to-help-foster.

[22] The ACLU strongly disagrees that there was any legitimate basis for the waiver and has challenged it in court. *See* Complaint, *Rogers v. U.S. Dept. HHS*, No. 6:19-cv-1567 (S.C. May 30, 2019).

If eligible people are unable to access services funded by the Department, then the programs are not fulfilling their missions.[23]

C. The Proposed Rule Does Not Address RFRA or Free Exercise Violations.

The Proposed Rule is also not supported by the Department's contention that it is needed to address violations of the Religious Freedom Restoration Act ("RFRA") and the Free Exercise Clause, 84 Fed. Reg. 63,832, as the rule is both too broad and too narrow to serve that purpose. Moreover, requiring agencies that provide government-funded services to comply with nondiscrimination requirements does not violate grantees' rights under RFRA or the Free Exercise Clause.

1. The Proposed Rule does not address or protect religious liberty.

The Proposed Rule cannot be justified as necessary to protect religious liberty as it withdraws protections against discrimination for all grantees, whether or not they are faith-based organizations, and regardless of the motive for wanting to discriminate. Grantees can exclude LGBTQ people or people of particular faiths based on any or no reason. It could be religious, or it could be "we just don't care for your kind."

The Proposed Rule is also too narrow to achieve the purported goal of protecting religious liberty. Grantees in all programs will continue to be required to comply with nondiscrimination requirements regarding race, color, national origin, age, and disability. And program-specific statutes (and regulations) remain in place that protect against discrimination based on sex, sexual orientation, gender identity, and/or religion, among other grounds. Thus, the Proposed Rule does not permit grantees to discriminate whenever they feel compelled by their faith to do so.

As a result, the Proposed Rule will not "minimize disputes and litigation," 84 Fed. Reg. 63,833, and is so seriously over- and underinclusive that there is a complete mismatch between the rule and its purported policy objective of avoiding violations of RFRA or the Free Exercise Clause.

2. The Current Rule does not violate the Free Exercise Clause or RFRA.

The Current Rule does not violate the Free Exercise Clause or RFRA by requiring government-funded foster care agencies or other grantees to comply with

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[23] There are numerous other programs whose effectiveness would be jeopardized if grantees are permitted to discriminate against already vulnerable populations, including, but not limited to, the President's Ending the HIV Epidemic: A Plan for America initiative; the Department's Strategy to Combat Opioid Abuse, Misuse, and Overdose; the Department's Healthy People 2030 initiative; and Home, Together: The Federal Strategic Plan to Prevent and End Homelessness.

nondiscrimination requirements and accept all eligible individuals. Accordingly, the Proposed Rule is a solution in search of a problem.

There is no right under the Free Exercise Clause to a government contract to provide public services according to one's religious beliefs. Moreover, "[t]he Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens." *Bowen v. Roy*, 476 U.S. 693, 699 (1986).

The Proposed Rule completely ignores relevant precedent upholding nondiscrimination policies against challenge by religiously-affiliated child-welfare agencies. In *Fulton*, for example, the Third Circuit held that there was no violation of a foster care agency's free exercise right when the City of Philadelphia ceased referring foster children to the agency because the agency was unwilling to accept families headed by same-sex couples in violation of the City's nondiscrimination requirement. 922 F.3d at 156–58. The Court rejected the claim that the Free Exercise Clause entitles a government-contracted agency to disregard a nondiscrimination requirement that is neutral and generally applicable to all contracted agencies. *Id.*

Similarly, in *Dumont v. Lyons*, No. 17-cv-13080, 2018 WL 4385667 (E.D. Mich. Sept. 14, 2018), a federal district court in Michigan rejected a claim asserted by a religiously affiliated child-placing agency that to prohibit it from using religious eligibility criteria in its state-contracted child welfare work would violate the agency's free exercise rights. *Id.* at *28–31; *see also Teen Ranch v. Udow*, 479 F.3d 403, 410–12 (6th Cir. 2007) (holding Free Exercise Clause does not give state-contracted youth services agency the right to provide religious instruction to youth in their care in contravention of State policy barring such activity).

The Department points only to litigation in *Buck v. Gordon*, over Michigan's policy prohibiting discrimination against same-sex couples by child-placing agencies, as supporting its claim that the Current Rule implicates free exercise rights. 84 Fed. Reg. 63,832. But the preliminary injunction in that case was not based on a holding that the Free Exercise Clause barred Michigan from enforcing its nondiscrimination requirements against agencies with religious objections to complying. Rather, the decision rested on specific facts of the case that the court determined showed hostility to the agency, including statements made by the Michigan Attorney General, which the court said, showed that "the State's real goal [was] not to promote non-discriminatory child placements, but to stamp out [the agency's] religious belief." 2019 WL 4686425 at *20–24. The Court distinguished *Fulton* on this basis. Thus, the case (which is currently being appealed) does not support a constitutional right to discriminate by faith-based agencies.

In other contexts as well, the Supreme Court has made clear that nondiscrimination policies, including those covering sexual orientation, and "all comers" policies are well within the government's authority to enact. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1727 (2019); *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 697 n.27 (2010); *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 572 (1995).

Nor does the Current Rule violate RFRA. Under RFRA, the "[g]overnment shall not substantially burden a person's exercise of religion," unless it "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(a)–(b). Even assuming arguendo that the Proposed Rule constitutes a burden, the Current Rule furthers the government's compelling interest in preventing discrimination.

The Supreme Court has long recognized that governments have a compelling interest in preventing discrimination. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984); *Bob Jones*, 461 U.S. at 604. That is because discrimination "deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life." *Roberts*, 468 U.S. at 625. A number of courts have recognized that government has the same compelling interest when the discrimination is based on sexual orientation discrimination. *See N. Coast Women's Care Med. Grp., Inc. v. Superior Court*, 44 Cal. 4th 1145, 1158–59 (Cal. 2008); *Barrett v. Fontbonne Acad.*, 33 Mass. L. Reptr. 287, at *9–10 (Mass. Super. Ct. 2000); *Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ.*, 536 A.2d 1, 38 (D.C. 1987); *cf. Masterpiece Cakeshop*, 138 S.Ct. at 1727 ("Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights.").

In addition, a request for an exemption pursuant to RFRA may not be granted where it would harm others. *See, e.g.*, *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 734–35 (2014); *id.* at 739 (Kennedy, J., concurring); *Cutter*, 544 U.S. at 720; *see also Estate of Thornton*, 472 U.S. at 709–10. As described above, *supra* Part II, when individuals and families in need of services are denied those services, or discouraged from seeking those services due to the fact that discrimination against them is now permitted, it causes significant harm. That includes the loss of greatly needed services and the humiliation and stigma of discrimination. *See Masterpiece Cakeshop*, 138 S. Ct. at 1727; *Roberts*, 468 U.S. at 625 (discrimination "deprives persons of their individual dignity"); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 292 (1964) (Goldberg, J., concurring).

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In sum, the Department has failed to show the required reasoned analysis for the Proposed Rule. Additionally, because the Proposed Rule is a reversal in policy the Department's burden is even greater to show why the change is needed. *Encino Motorcars*, 136 S. Ct. at 2126. The Department has not offered any basis for its decision that holds up to scrutiny, and certainly not the heightened standard that applies given its change in position.

V. THE DEPARTMENT HAS UNDERMINED THE LEGITIMACY OF THE NOTICE AND COMMENT PERIOD.

The same day that the Proposed Rule was published, the Department issued a Nonenforcement Notice, stating that it would not enforce the Current Rule because it "raises significant concerns about compliance with the requirements of the Regulatory Flexibility Act." 84 Fed. Reg. 63,809. The Department maintains that the Current Rule does not meet the RFA's requirements because it did not sufficiently explain how the changes would impact small entities, as the Current Rule only provided that "[t]he additions provide enhanced direction for the public and will not have a significant economic impact beyond HHS's current regulations." *Id.* at 63,810 (quoting 81 Fed. Reg. 89,394). Whether or not the Current Rule satisfies the requirements of the RFA, the Department was under no obligation to take this action, particularly since it is in the public interest to continue enforcing the Current Rule. Further, the decision not to enforce the Current Rule undermines the effectiveness of the notice and comment process for the Proposed Rule, because the Department has placed a weight on the scale for the Proposed Rule.

The Department does not cite any pending legal challenge to the Current Rule on the basis that it violates the RFA. Nor does the Department cite complaints by any small entities. The Department only states, in the most general terms, that the nondiscrimination provisions of the Current Rule, "may impose compliance costs on recipients by subjecting the recipients to conflicting statutory and non-statutory requirements." *Id.* at 63,811. However, it is not a *conflict* to say that an entity cannot turn people away from services based on non-meritorious factors, in addition to those outlined in statute. For example, entities do not face a *conflict* in complying with a regulation that prohibits them from discriminating based on sex and religion, as well as a statute that prohibits discrimination based on age and race. And as discussed above, the Proposed Rule will make compliance more challenging for small entities as grantees have to navigate the diverse laws and regulations that apply to different programs.

Assuming the Current Rule does violate the RFA, which we do not concede, the Department did not need to cease enforcing the Rule. If a rule is subject to judicial review for violating the RFA, a court's ability to grant relief is limited to remanding the rule to the agency and "deferring the enforcement of the rule against

small entities." 5 U.S.C. § 611(a)(4)(B). The Department says it is not limiting the Nonenforcement Notice to small entities because then there would be additional compliance costs, but the Nonenforcement Notice itself will cause additional compliance costs for entities, as they must reevaluate their obligations.

More importantly, courts have the option to leave a rule in place, even when it violates the RFA, where "continued enforcement of the rule is in the public interest." *Id.* Courts have found that continued enforcement of rules is in the public interest where the rules concern such matters as aviation safety, the scheduling of controlled substances, and the fiscal integrity of the Medicaid program. *See, e.g.*, *Aeronautical Repair Station Ass'n, Inc. v. F.A.A.*, 494 F.3d 161, 178 n.10 (D.C. Cir. 2007); *United States v. Lane*, No. 12-cr-01419, 2013 WL 3199938, at *3 (D. Ariz. June 24, 2013); *Ashley Cty. Med. Ctr. v. Thompson*, 205 F. Supp. 2d 1026, 1068 (E.D. Ark. 2002). Undoubtedly, prohibiting discrimination in the administration of government-funded programs is in the public interest, as described above. *See supra* Part II–III, IV(B).

Given that the Department did not need to cease enforcement of the Current Rule, its decision is not only detrimental to the public interest, it undermines the notice and comment process for the Proposed Rule. Agencies are required to go through the notice and comment process "(1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review." *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005). The opportunity to comment must be meaningful, as "the very purpose of notice and comment [is] for agencies to maintain a flexible and open-minded attitude towards [their] own rules." *United States v. Reynolds*, 710 F.3d 498, 511 (3d Cir. 2013) (internal quotation marks and alterations omitted).

By declining to enforce the Current Rule on a flimsy basis, the Department has already signaled its position as to the Proposed Rule. Based on how the Department described its concerns, the Department could have repromulgated the Current Rule with the same regulatory language, and simply added a new RFA analysis that meets the Department's standards. By declining to enforce the Current Rule, the Department has "impaired the rulemaking process by altering the [Department's] starting point in considering" the Proposed Rule. *Pennsylvania v. President United States*, 930 F.3d 543, 569 (3d Cir. 2019), *as amended* (July 18, 2019). By first rolling back nondiscrimination protections, the Department "changed the question presented" from whether they should remove protections for beneficiaries, to whether they should depart from the current arrangement. "This starting position is impermissible under the APA." *Id.*

Additionally, the Department has demonstrated that "[t]he notice and comment exercise surrounding the [Proposed Rule] does not reflect any real open-mindedness." *Id.* at 568. This is particularly true where the impact of not enforcing the Current Rule is "virtually identical" to as the impact of finalizing the Proposed Rule, since both roll back explicit nondiscrimination protections for beneficiaries of the Departments programs and services. *Id.* at 569. "Agencies have never been able to avoid notice and comment simply by mislabeling their substantive pronouncements." *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019). The Department's behavior is not cured by subjecting the Proposed Rule to the notice and comment process now. "[P]ost-promulgation notice and comment procedures cannot cure the failure to provide such procedures prior to the promulgation of the rule." *Nat. Res. Def. Council, Inc. v. E.P.A.*, 683 F.2d 752, 768 (3d Cir. 1982); *see also Pennsylvania*, 930 F.3d at 568. The Department's "desire to address the purported harm [by the Current Rule] does not ameliorate the need to follow appropriate procedures." *Pennsylvania*, 930 F.3d at 567.

The comment period has been curtailed in other ways that undermine its sufficiency. Despite its national impact and the fact that the Proposed Rule will affect billions of dollars in grant funds, the Department has given interested parties only 30-days to comment on the Proposed Rule. The Department has failed to provide any justification for such an unusually short comment period. Given that the Proposed Rule represents a substantial shift in the Department's enforcement approach, the comment period on the Proposed Rule should be extended to a minimum of 60 days to provide adequate time to comment on the potential harms the Proposed Rule will cause. The Department has also required that comments be submitted electronically, precluding parties from submitting comments by mail, due to "staff and resource limitations." 84 Fed. Reg. 63,831. The Department has not set such a broad limitation for any other Proposed Rule within the past year, calling into question what staff and resource limitations are at play that impact this rule, but not others.

Taken together, the Department has undermined the notice and comment process by de facto putting in place the Proposed Rule after unnecessarily declining to enforce the Current Rule. As a result, the Department has changed the starting point for evaluating the Proposed Rule. And by giving parties a shortened period of time to comment, and fewer means to do so, it has further signaled that it is not interested in fully evaluating the impact of the Proposed Rule.

VI. THE DEPARTMENT FAILED TO CONDUCT THE REQUIRED COST-BENEFIT ANALYSIS UNDER EXECUTIVE ORDER 12866 AND THE RFA.

The Department itself argues that a "majority of the Department's grantees are small entities." 84 Fed. Reg. 63,811. Yet the Department alleges that the

Proposed Rule will not have any economic impact on small grantees. 84 Fed. Reg. 63,835. It defies logic to state that the Current Rule's nondiscrimination provisions have a profound effect on small grantees when regulations on the same behavior will have no such effect under the Proposed Rule. Even if the net effect of the Proposed Rule is beneficial for small entities, the Department is required under Executive Orders 12866 and 13563 to "assess all costs *and benefits*" and "select those approaches that maximize *net* benefits." [24]

But the Proposed Rule will not benefit grantees. As discussed above, *see supra* Part IV(A), instead of adhering to a single umbrella provision, grantees must sift through many different statutes. Relatedly, they may be in competition for grants with entities that are discriminating against certain beneficiaries, as those potential grantees could be emboldened by the Proposed Rule. Small entities will certainly be impacted by the Proposed Rule, and the Department must acknowledge these costs.

VII. Conclusion: Abandon the Proposed Rule.

For all of these reasons, the Department should abandon the Proposed Rule's changes to the Current Rule's nondiscrimination provisions. Specifically, the Department should not amend or delete 45 C.F.R. § 75.300(c) or (d).

Please contact Lindsey Kaley, lkaley@aclu.org, with any questions.

Sincerely,

Louise Melling
Deputy Legal Director

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[24] Exec. Order 12866 § 1(b)(11), 58 Fed. Reg. 51735 (Oct. 4, 1993) (emphasis added); *see also* Exec. Order 13563 § 1(b)(2), 76 Fed. Reg. 3821 (Jan. 21, 2011).