ETHICS AND PUBLIC POLICY CENTER

June 21, 2023

**EO 12866 Meeting**
**Health and Human Services Grants Regulation**
**RIN 0945-AA19**
**Comments by: Eric Kniffin and Natalie Dodson**

Thank you for the opportunity to provide comments on OIRA's review of the "Health and Human Services Grants Regulation" ("Proposal") by the Office for Civil Rights (OCR) for the Department of Health and Human Services (HHS).

Our names are Eric Kniffin and Natalie Dodson. Kniffin is an attorney and Fellow at the Ethics and Public Policy Center (EPPC). He also served in DOJ's Civil Rights Division under Presidents George W. Bush and Obama, and he has been involved in extensive civil rights litigation against HHS as counsel for the Becket Fund for Religious Liberty and in private practice. Dodson is a Policy Analyst and Member of the HHS Accountability Project at EPPC.

OMB cancelled a previous EO 12866 meeting we had scheduled for a different rule,[1] so we are glad you are willing to hear EPPC's input on this rule.

Today, there are six points we want to share with OIRA and HHS.

## I. The agencies must identify a need for rulemaking and show how the Proposal meets that need.

- *Purported need.* For all rulemaking, agencies must identify a need and demonstrate how the rule meets that need. Federal administrative agencies are required to engage in "reasoned decision making."[2] This obligation requires a federal agency to identify the problem it intends to address.[3] To justify replacing current regulations, an agency must provide specific evidence as to how the current regulations are causing harm or burdens and how the Proposal would remedy the alleged defects without causing equal or greater harms and burdens.[4]

[1] Rachel Morrison, *Biden and Becerra Kill Democratic Norms in Rush to Fund Big Abortion, National Review*, (Oct. 8, 2021), https://www.nationalreview.com/bench-memos/biden-and-becerra-kill-democratic-norms-in-rush-tofund-big-abortion/.
[2] *Michigan v. E.P.A.*, 576 U.S. 743, 750 (2015).
[3] EO 12866 § 1(b) (establishing the principles of regulation, including that "Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem.").
[4] Michigan, 576 U.S. at 779 (regulation is irrational if it disregards the relationship between its costs and benefits); *Alltelcorp v. FCC*, 838 F.2d 551, 561 (D.C. Cir. 1988) ("a regulation perfectly reasonable and appropriate in the face of a given problem is highly capricious if that problem does not exist").

- The agency's amendments to §75.300, paragraphs (c) and (d) (collectively, "rules"), are perfunctory and otherwise otiose additions to how HHS conducts grant regulations. The Proposal offers no supplemental regulation in which the supposedly essential effects are not already realized by agency actions and contra revocation of any personal exemptions under the current Secretary.
- Furthermore, the rules as expressed provide textual questions without thorough or clear answers with respect to promulgation. In paragraph (c), several bases are provided for which the agency is able to deny awards, e.g., age, sex, or religion; yet this rule provides external consistency concerns in application. Certain types of discrimination enumerated in paragraph (c), viz., religion and gender identity or sexual orientation, are often held in tension in the current atmosphere. Should a legal entity in use of HHS funds discriminate on one such basis out of concern for the other, i.e., a private adoption group does not allow a parent to adopt out of religious concerns for his or her gender identity or sexual orientation, then does HHS itself possess the obligation or mandate (according to this supplied rule in paragraph (c)) to then exclude (discriminate against) that legal entity on the basis of religion? HHS is, after all, an administrator of HHS awards, and is actively involved in the uses thereof. If the agency is required to exclude on the basis of religion or sexual orientation or another such non-merit factor to preempt an exclusion on the basis of a non-merit factor, the agency is in violation of their own rules, and it is unclear if the parties involved have a means of appropriate recourse.
- Therefore, the agency must provide that the administration of the rules does not become an arbitrary extension of the zeitgeist. Merely citing general discrimination concerns would be insufficient given the complexity of constitutional concerns. The agency must explain, consequently, how the application of the rules to particular private groups with religious concerns is not only necessary to achieve the agency's stated policy goals, but additionally how religious concerns can be duly accommodated by the agency, in keeping with current statutory law and Supreme Court precedent.
- In this case, it is not clear to us why HHS believes there is need for additional rulemaking under 45 CFR Part 75. The 2016 rule issued by the Obama Administration is still in place. The 2018 Trump proposed rule was never finalized, and even it had been, is had been effectively repealed. This was confirmed by a federal court decision, *Holston United Methodist Home for Children v. Becerra*, issued by the Eastern District of Tenn. on November 18, 2022, available at 2022 WL 17084266.[5] The Court recognized that, in the context of another case, HHS "concluded that the challenged portions of the rule were not promulgated in compliance with the Administrative Procedure Act." And voluntarily moved the court to vacate and remand the challenged portions of the 2021 Grants Rule.
- We encourage HHS to take these developments into account as it considers whether there is a need for new rulemaking under this part.

## II. The Department has an obligation to conform any new rulemaking with recent developments in Supreme Court nondiscrimination law.

- We bring to the Department's attention a recent Proposed Rule, "Partnerships With

[5] *Holston United Methodist Home for Child., Inc. v. Becerra*, No. 2:21-CV-185, 2022 WL 17084226, at *3 (E.D. Tenn. Nov. 18, 2022).

Faith-Based and Neighborhood Organizations," 88 Fed. Reg. 2395 (Jan 13, 2023). This publication was proposed by nine federal agencies, one of which was HHS.

- In that Proposed Rule, HHS acknowledged what it called a "Nondiscrimination Principle" that has emerged from a number of recent Supreme Court decisions, most significantly *Trinity Lutheran Church of Columbia, Inc. v. Comer*[6] and *Espinoza v. Montana Department of Revenue*.[7] Under these cases, the agencies note, "disqualifying otherwise eligible recipients from a public benefit 'solely because of their religious character' imposes 'a penalty on the free exercise of religion that triggers the most exacting scrutiny.'"[8]
- Starting with *Trinity Lutheran Church of Columbia, Inc. v. Comer*,[9] the Court has focused less on what kinds of government funding was permitted by the Establishment Clause and more on what sort of equal access to government funds is required by the Free Exercise Clause. In *Trinity Lutheran*, the Court held that under the First Amendment's Free Exercise Clause, an applicant could not be excluded from a state grant program simply because of the applicant's religious nature.
- Three years later, *Espinoza v. Montana Department of Revenue*,[10] the Court held that the Free Exercise Clause required that a state program using state income tax credits aid benefit K-12 schools could not be denied to certain private schools based on their religious status.
- In 2021, the Supreme Court held in *Fulton v. City of Philadelphia*,[11] Pennsylvania, that the Free Exercise Clause required government to provide regulatory accommodation to a funded, faith-based foster care placement agency.
- Last term, the Court held in *Kennedy v. Bremerton School Distric*t,[12] that concerns about violating the Establishment Clause did not justify a public school taking actions against a football coach that violated his right to neutral treatment under the Free Exercise and Free Speech Clauses.
- Also, last term, in *Carson v. Makin*,[13] the Court held that the principle of Free Exercise neutrality required state aid to be provided on equal terms to public and private high school students, including students attending "sectarian" schools.
- The bottom line from these recent cases is that "A government policy will not qualify as neutral if it is specifically directed at ... religious practice."[14] In other words, when selecting service providers for government programs, the government must treat religious and secular providers the same. This neutral approach respects religious groups' Free Exercise rights and respecting Free Exercise rights does not violate the Establishment Clause. The school district in *Kennedy* contended that though Coach Kennedy's prayers "might have been protected by the Free Exercise and Free Speech

[6] 137 S. Ct. 2012 (2017).
[7] 140 S. Ct. 2246 (2020).
[8] 88 Fed. Reg. 2401 (quoting *Espinoza*, 140 S. Ct. at 2244 (quoting *Trinity Lutheran*, 137 S. Ct. at 2021)).
[9] 137 S. Ct. 2012 (2017).
[10] 140 S. Ct. 2246 (2020).
[11] 141 S. Ct. 1868 (2021).
[12] 142 S. Ct. 2407 (2022).
[13] 142 S. Ct. 1987 (2022).
[14] *Kennedy*, 142 Sup. Ct. at 2422 (cleaned up).

Clauses," those rights had to "yield" where they were in "direct tension" with the "competing demands of the Establishment Clause.[15] But the Supreme Court squarely rejected this approach as inconsistent with the "natural reading" of the First Amendment, which indicates that its enumerated rights are "complementary," not competing.[16]

- As this Department has already recognized, the "Nondiscrimination Principle" captures the Supreme Court's clear and consistent message that the government funding programs that discriminate on the basis of religion are subject to strict scrutiny.[17] This principle requires the Department to ask itself, as it establishes and administers funding programs, whether its rules force faith-based social service providers "to choose between participation in a public program and their right to free exercise of religion."[18] When government puts religious groups to this choice, it violates the Free Exercise Clause. Furthermore, the government does not violate the Establishment Clause when it respects Americans' Free Exercise rights.
- *The "Adequate Secular Alternatives" from the Nine-Agency Rule*. To the extent that the Department is considering adopting an "adequate secular alternatives" standard, as was opposed in the Nine Agency Rule, we reiterate our concern that that this standard is fundamentally problematic.[19] The standard is fraught with unanswered questions. What criteria will be used to make such a determination? Who will make it? How far away does an alternative have to be before it is not considered an "adequate" alternative? How "secular" does an alternative have to be before it is considered an "adequate" alternative? What does "adequate" mean? Is this determined by number of providers, location of providers, size of providers, etc.?
- These undefined parameters render this standard arbitrary and capricious. The standard should be abandoned. To the extent HHS intends to propose such a standard, it is incumbent on the Department to commit itself to concrete, workable answers to these important questions.
- Furthermore, even if the Department could provide adequate answers to these questions, it is important for the Department to be aware their efforts to reach "adequate" numbers of "secular alternatives" would also be subject to First Amendment scrutiny. Creating new incentive programs, new funding streams, or recruiting programs that are intentionally limited to secular social service providers would violate the nondiscrimination principle no less than the programs struck down in *Trinity Lutheran* and *Espinoza*.
- *Available Non-Discriminatory Alternatives.* Instead of judging service providers based on their religiosity, the agencies should instead develop neutral metrics to determine whether an area has adequate social services available—regardless of whether the existing providers are faith-based or secular. The agencies have at their disposal many

[15] *Id*. at 2426.
[16] *Id*.
[17] 137 S. Ct. 2012 (2017) and 140 S. Ct. 2246 (2020).
[18] *Trinity Lutheran*, 137 S. Ct. at 2026.
[19] EPPC Scholars Submit Comment Opposing Proposed Rule for Faith-Based Organizations Partnering with Nine Agencies, https://eppc.org/wp-content/uploads/2023/03/EPPC-Scholars-Comment-Opposing-Nine-Agency-Faith-Based-Partnership-Proposed-Rule.pdf.

constitutional, nondiscriminatory means to address such situations and should consider the following alternatives. First, the agencies could create incentives to draw new service providers into the area, or to prompt existing providers to add needed services or service areas. This approach would likely result in new secular service providers, without the government taking any steps that would discriminate against faith-based providers on the basis of religion. Second, the government is always free to establish new government-run programs that would provide the needed services. The availability of such alternative non-discriminatory solutions makes clear that any government efforts to selectively recruit secular providers would fail strict scrutiny.

## III. The Department must consider the market and societal costs of this Proposal.

- The agency needs to consider each of a host of alternative approaches that could be utilized instead of the chosen one. If any of those approaches mitigate the costs sufficiently or magnify any potential benefits, this particular adoption of rules would not be necessary to avoid those excessive costs. The agency must account for the disparate costs both immediate and future upon the implementation of these rules. The agency should especially consider the costs that the implementation of these rules should impose upon the adoption and fostering system.
- The first cost to consider is the comparative cost of placing children through private entities rather than public services, and how these additional regulations impact those private entities, i.e., what barriers to entry or the like are incurred by the adoption of these rules. This analysis should consider both the effective costs per annum per child within any adoptive or foster system, both also effective relief caused by adoption. This analysis should also factor inflation into aggregated costs, as well as economic fluxes (both growth and decline) which would affect living costs. Living costs should include food consumption, clothing and other material expenses, and education costs associated with children at the age of adoption. The individual fibers of both state and federal programs should be held distinct, although not separate, in full public costs. The effective rates of placement and adoption should also be considered in comparative cost analysis, accounting for variances in geography and season both across both private and public funds. Additionally, the cost borne by private entities and public services should account for growth of some significant sum in the population of those children within adoptive and foster systems, both public and private. The agency needs to determine how the implementation of these rules affects the cost-effectiveness of both public and private entities, as well as provide a benefit cost analysis in both conditions. Finally, the agency should consider what additional costs may result from public placement with a qualified candidate versus private placement with a qualified candidate – what are the externalities that arise from different types of placements, e.g., single-parent (father vs mother), divorced household, or other such conditions?[20] For children who remain in the system without placement and eventually outgrow it, a comparative cost should be provided for those children to indicate the additional costs to society once an individual is no longer in the system either by placement or outgrowing.[21] These costs should in the very least consider

[20] Cf. Marianne E. Page and Ann Huff Stevens, "The Economic Consequences of Absent Parents," *The Journal of Human Resources* 39 (1) (2004): 80-107.
[21] Amanda Fixsen, "Children in Foster Care: Societal and Financial Costs," *A Family for Every Child*, 2011, 5, https://www.afamilyforeverychild.org/wp-content/uploads/2018/04/children_in_foster_care.pdf. William Nielsen and

additional welfare costs and any potential imprisonment costs, among others. The agency should consider these externalities that arise from rule implementation from both a Pigouvian analysis and from a Cosian perspective. It seems implausible that these rules do not function as some barrier for firms and public alike.

- The second cost for the agency to consider is the cost incurred by the reduction of both private entities and persons who adopt children as a result of the implementation of these rules. For instance, Christians (who generally hold to religious views on gender and sexuality at odds with the propagated rules) are twice as a likely to adopt than the general population, and significantly more likely to foster,[22] stand a significant chance of being denied on the basis of these rules being applied. This analysis should consider state-by-state demographics on adoption, and should appropriately estimate the amount of private entities affected by these rules. (This analysis should also consider the number of states that would likely seek exemptions against the application of the rule within their jurisdiction, and the associated costs and benefits with state-wide exemptions.) For decades, the government has relied on private child-welfare providers, especially faith-based agencies – if, in 2016, there were 670,000 children in the foster system (a number that has surely grown since),[23] and each child per annum costs an average of $40,136,[24] the agency must determine the cost that the further regulation of private religious entities will potentially cause. There are more than 8,000 "faith-based" child placing agencies,[25] not to mention any agency that is religiously affiliated. It is reasonable to conclude that most of these agencies, provided RFRA and *Fulton*, will be impacted by these rules and the economic barriers that they create. Because of this, the agency should not only determine how much money currently is allocated to private religious entities, but also how much these firms save the public. Then the agency should determine the aggregate cost of these firms closing. Many of these firms help a few hundred children each year – the additional cost of moving the children to non-religious entities should also be considered in aggregate costs.

- Yet we find it curious that the agency was able to determine that these rules are not Section 3(f)(1) Significant, even after EO 14094; given the express cost per child per annum, only 4,984 children produce a singular economic cost of over $200 million, not to mention additional social costs per child in future considerations that the agency must account for. Given that a benchmark metric of 54,200 children are adopted annually from the foster system,[26] not to mention how many are just fostered, it seems implausible that less than 9.2% of these adoptions took place through private religious entities. Indeed, the data indicate that the plurality of adoptions are done through private firms,[27] the agency must

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Timothy Roman, "The Unseen Costs of Foster Care: A Social Return on Investment Study," *The Therapeutic Care Journal* (2019), https://www.thetcj.org/wp-content/uploads/2019/10/Alia-unseen-costs-of-FC.pdf.

[22] *5 Things You Need to Know About Adoption*, Barna Group, https://www.barna.com/research/5-things-you-need-to-know-about-adoption/.

[23] Nielsen and Roman, "The Unseen Costs," 9.

[24] *Ibid* (adjusted for current dollars).

[25] *Bills supporting religion-based rejection turning parents away from adoption agencies*, USA Today, https://www.usatoday.com/story/news/investigations/2019/06/10/adoption-agencies-latest-front-religious-freedom-fight/1359072001/.

[26] US Adoption Statistics, Adoption Network, https://adoptionnetwork.com/adoption-myths-facts/domestic-us-statistics/.

[27] Important Adoption Statistics to Know, Combatting Common Misconceptions About Adoption, https://www.americanadoptions.com/adoption/adoption_stats. Compare with variance data, Trends in U.S. Adoptions: 2010–2019, https://www.childwelfare.gov/pubPDFs/adopted2010_19.pdf (indicating that

reconsider the economic significance. On top of this, the agency should consider the search costs inherent in this plan – if the rules go into effect and delimit the amount of private religious firms in the market for adoption, there will be a more limited number of firms for demanders to go and find and utilize – the agency should factor these costs into economic significance, as well. The agency's claim that these rules are not economically significant therefore should immediately be revised just based on these simple factors, not accounting for additional externalities (viz., potential substance abuse treatment, average medical and mental health care, etc.) and asymmetric information costs.

## IV. The Department must consider analytical approaches when rulemaking.

- Both a benefit-cost analysis and a cost-effectiveness analysis must be provided for these rules, given that this is major rulemaking for which issues of otherwise strict scrutiny are subject. Furthermore, this has a significant import for federal-state regulations. The civil rights goals of these rules make it particularly apposite to perform a cost-effectiveness analysis.
- A valid effectiveness measure must be identified apriori to represent the expected social, legal, and economic outcomes. The agency needs to identify what measure of its goals are and how reasonable they are. The need to identify the need for the rule to prevent civil rights abuses also presumes the need and possibility of identifying such an effectiveness measure. That is to say, if an effective measure is not identified and an explanation given of how the rules are tailored to achieve that measure, the rules will fail to establish a clear need for the rules.
- The cost-effectiveness analysis needs to explain how the civil rights goals will be achieved based on likely behavior in response to the regulation. For example, if imposition of the requirements causes private religious firms to vacate the markets where they are imposed to other non-covered markets or to unemployed status, rather than to stay in that market and change their behavior, the agency needs to explain how the rule still meets its civil rights effectiveness measure.
- Distributional effects are especially likely from this rule, since they are likely to cascade into effects on whole regions, such as where more concentrated firm population is prevalent and private individuals looking to adopt or foster are impacted.
- The agency must further identify metrics by which religious entities can qualify for exemption. Otherwise, the agency must justify imposing the rule for a set period without exemption, given the current state of statutory and case law.

## V. The Department must identify and measure the benefits and costs.

- The agency should assess the baseline properly. The agency should consider the anticipatory costs that covered entities have incurred since the June 8 announcement. The agency should calculate various costs on covered entities for complying with the final rule, including but not limited to the following:
    - Costs for time spent reading and understanding how to comply with the rule need to be calculated.

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while sizable, private adoptions only account for a minority of 44% nationally).

- Costs for companies to obtain legal advice on how to comply with the rule must be factored in.
- Costs for time spent developing a compliance policy and plan must be calculated.
- Costs for training employees to implement and maintain the compliance policy.
- Implementing a regime of ongoing compliance with rule requirements including both the costs of carrying out the information collection, retention, and security to protect the information, and costs on morale for the employees.
- The costs of severance packages or retirements, including a calculation of the number of employees who decide to retire rather than comply with the rules.
- The agency must calculate the stresses that will be placed on the nation's infrastructure of testing because of the likely decline in private firms' participation in adoption and fostering programs across all 50 states.
- The cost of the rule in exacerbating existing labor shortages, and the negative effects on the economy overall, should also be calculated.

## VI. Other specialized analytical requirements the Department must consider when proposing this rulemaking.

- *Small businesses and non-profits.* The agency needs to assess the impact on small businesses. For the most part, firms with 100 employees are small businesses under the Regulatory Flexibility Act ("RFA"). Moreover, nonprofit entities are small businesses under the RFA, even if they have more than 100 employees. Non-profit religious entities have rights under the Religious Freedom Restoration Act ("RFRA"). Any substantial burden on their religious exercise cannot be imposed absent a compelling interest imposed by the least restrictive means of regulation. 42 U.S.C. § 2000bb-1. Failure to exempt non-profit religious entities as entities needs to be justified under RFRA specifically. The RFRA and Title VII implications of imposing the rule in violation of employees' sincerely held religious beliefs also need to be considered. Both laws apply to employee objections. RFRA imposes a separate and distinct standard from Title VII as applied to this mandate because the mandate is being imposed by the federal government; RFRA cannot be assumed to impose no greater standard than Title VII. Under the Small Business Regulatory Enforcement Fairness Act, OSHA is required to convene a SBREFA panel before publishing the rule. The panel should arrange meetings with small businesses, distinctly including nonprofit entities and religious organizations, to give them an opportunity to provide advice and recommendations to minimize the rule's burdens.
- *Federalism.* The rule has significant impacts on federalism and preemption of state and local law.
- *Tribal Consultation.* The agency should consult and coordinate with Tribal governments concerning the impacts of this rule under Executive Order 13,175. President Biden also required tribal consultation in his January 26, 2021, Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships.

**Conclusion** We urge OIRA to ensure that the statutory and regulatory process is upheld and that the Proposal has sufficient legal and economic analysis that is rational, reasoned, and sufficiently supported by actual need, and not political, rushed, or prejudged.

Sincerely,

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