

September 11, 2023

**Via Federal eRulemaking Portal**

Xavier Becerra  
Secretary of Health and Human Services  
U.S. Department of Health and Human Services  
200 Independence Ave SW,  
Washington, DC

**Re: EPPC Scholars Comment Opposing HHS OCR’s “Health and Human Services Grants Regulation,” RIN 0945-AA19**

Dear Secretary Becerra:

We are scholars at the Ethics and Public Policy Center (EPPC), and we write in strong opposition to the Department of Health and Human Service’s (HHS) notice of proposed rulemaking (NPRM) “Health and Human Services Grants Regulation.”<sup>1</sup>

Eric Kniffin is an EPPC Fellow, member of the HHS Accountability Project, and a former attorney in the U.S. Department of Justice’s Civil Rights Division. Natalie Dodson is a Policy Analyst and member of EPPC’s HHS Accountability Project.

The Proposed Rule would radically replace science-based understanding of human sexuality in grant programs with ideology-driven mandates. As proposed, the Rule disregards the limitations of *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020), and by exceeding statutory authority is arbitrary and capricious. Not only is the Proposed Rule unlawful and unconstitutional, but the primary proposed changes are unsupported by substantial evidence, especially scientific truths. The Proposed Rule contradicts long-standing scientific understandings of human biology and thereby endangers public health. The Proposed Rule turns the clock back on girls’ and women’s rights, tramples parental rights, harms children’s interests, dismantles sex-based protections, and violates religious freedom and conscience rights of grantees and religious institutions. While the Department claims to “take[] seriously its obligations to comply with Federal religious freedom laws, including the First Amendment and RFRA,”<sup>2</sup> the proposed religious exemption process is inadequate and not reflective of an agency “seriously” considering religious freedom laws. The Proposed Rule inverts our civil rights law and should be withdrawn and abandoned.

**I. The Ethics and Public Policy Center is actively involved in promoting human dignity and, in the face of gender ideology, promoting the truth of what it means to be human.**

At the outset, we state our general opposition to the Department’s efforts to promote and normalize gender ideology. All persons are made in the image and likeness of God, and as such, all

---

<sup>1</sup> 88 Fed. Reg. 44750.

<sup>2</sup> 88 Fed. Reg 44754.

people have immeasurable dignity. Recognizing the dignity in another, however, does not require that one endorse that person's choices. It does not require that one endorse what that person believes about himself or herself or that one gives another person what that person asks for.

Indeed, loving and respecting another person requires telling the truth, even when that truth may be hard to hear. In this context, it may be helpful for us to begin our public comment by sharing our understanding of the human person and what we believe the implications of these convictions are for pressing matters of public policy.

In short, we believe that a person's sex is defined as "male or female according to their reproductive organs and functions assigned by the chromosomal complement."<sup>3</sup> Sex is imprinted in every cell of the person's body and cannot change.<sup>4</sup> EPPC scholars have produced extensive materials and advocacy to support the fundamental biological truths of human sexuality in many different areas, especially law and policy.

The Ethics and Public Policy Center sponsors the Person and Identity Project, which "promot[es] the Catholic vision of the human person and respond[s] to the challenges of gender ideology."<sup>5</sup> The program defines sex as "the biological classification of an organism according to its reproductive role."<sup>6</sup> Unlike sex, which is an objective reality, gender identity is "a subjective feeling, sometimes linked to a person's sense of conformity to stereotypes or cultural norms; it cannot be tested, measured, or objectively validated."<sup>7</sup> The Project's scholars have written extensively on the human person, sexuality, and gender ideology. The program's "Basics of Gender Ideology" addresses the simple yet disputed truths of scientific reality.<sup>8</sup> The Project's website and materials provide resources for parents, schools, churches, and medical professionals.

EPPC's HHS Accountability Project is also actively involved in responding to the challenges of gender ideology. Its public comments on proposed regulations relevant to this topic are collected on the EPPC's website,<sup>9</sup> and many of these comments are referenced below.

Finally, EPPC scholars have written amicus briefs in important litigation regarding issues related to gender ideology. Those amicus briefs are also collected on EPPC's website.<sup>10</sup>

---

<sup>3</sup> Institute of Medicine 2001. Exploring the Biological Contributions to Human Health: Does Sex Matter?. Washington, DC: The National Academies Press, at p. 1. <https://doi.org/10.17226/10028>.

<sup>4</sup> Institute of Medicine 2001. Exploring the Biological Contributions to Human Health: Does Sex Matter?. Washington, DC: The National Academies Press. <https://doi.org/10.17226/10028>.

<sup>5</sup> Person & Identity Project, <https://personandidentity.com/>.

<sup>6</sup> *Ibid.*

<sup>7</sup> *Id.*

<sup>8</sup> The Basics, <https://personandidentity.com/the-basics/>.

<sup>9</sup> EPPC, *Engagement on Agency Actions*, <https://eppc.org/engagement-on-agency-actions/>.

<sup>10</sup> EPPC, *Amicus Briefs: "Gender Transition" Interventions*, <https://eppc.org/amicus-briefs/>.

## **II. The NPRM is procedurally deficient and is, therefore, illegal under the Administrative Procedure Act.**

### **A. HHS failed to consider Tribal governments.**

It does not appear from the NPRM that HHS has consulted and coordinated with Tribal governments concerning the impacts of this rule as required under Executive Order 13175. President Biden also required tribal consultation in his January 26, 2021, Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships. Prior to finalizing the rule, HHS should conduct a tribal consultation.

### **B. HHS fails to establish a need for the Grants NPRM**

EO 12866, section 1(b) establishes 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.” To justify amending the current HHS Grants regulation, which has been the standard for decades, HHS must provide specific evidence as to how the current standard causes harm or burdens. HHS has failed to meet that standard.

From day one, the Biden administration has made no secret of its desire to privilege the concept of “gender identity” over the reality of biological sex.<sup>11</sup> However, HHS has failed to demonstrate the need and a substantial evidentiary basis for broadening the scope of sex in the Proposed Rule. This is nothing more than arbitrary and capricious rulemaking by the Department.

### **C. HHS’ proposed regulatory standard does not provide clarity.**

For all the reasons stated below, the NPRM’s blanket approach to over a dozen federal statutes leaves far too many questions unanswered. For applying entities, for grant recipients, and for states administering these grants, the NPRM leaves them with too many questions and, therefore, exposed to too much uncertainty. The NPRM is thereby arbitrary and capricious.

## **III. The NPRM unlawfully and unconvincingly expands *Bostock* far beyond its stated limits.**

At the outset, we object to the Department’s interpretation of *Bostock*. Regardless of what one thinks about *Bostock*’s approach to interpreting the text of Title VII, the Supreme Court was clear that its decision was cabined to the hiring and firing context in Title VII and extends no further. The Department’s claim that *Bostock* compels or warrants dramatically rewriting over a dozen federal statutes, thus upsetting the rights and expectations of countless grant recipients under these statutes, is unwarranted.

---

<sup>11</sup> See Rachel N. Morrison, *Gender Identity Policy Under the Biden Administration*, 23 *Federalist Soc’y Rev.* 85 (May 2, 2022), <https://ssrn.com/abstract=4104566>.

**A. *Bostock* explicitly said it was not deciding what “sex discrimination” means in other contexts.**

HHS bases its rationale for the NPRM on the Supreme Court’s *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).<sup>12</sup> The Department claims that it is “logical in this context to apply *Bostock*’s reasoning . . . to each of” the 13 statutes listed in the NPRM.<sup>13</sup> But as HHS notes, Executive Order 13988 merely directed HHS to “determine” if its interpretation and implementation of statutes under its purview was “inconsistent with *Bostock*’s reasoning.”<sup>14</sup> Because *Bostock* did not involve the grants at issue in the NPRM, there is no inconsistency.

The Supreme Court specifically cabined the scope of its holding in *Bostock*. First, the Court noted that it was not purporting to interpret every application of Title VII. The decision was limited to the “only question before us”: “whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual ‘because of such individual’s sex.’”<sup>15</sup> The Court explicitly denied that *Bostock* “prejudge[d]” questions of sexual orientation or gender identity discrimination in other Title VII contexts. The Court acknowledged concerns that “sex-segregated bathroom, locker rooms, and dress codes [would] prove unstainable after our decision to day” and addressed those concerns by limiting the scope of its holding:

Under Title VII, . . . we do not purport to address bathrooms, locker rooms, or anything else of the kind. . . . Whether other policies and practices might or might not qualify as unlawful discrimination or find justifications under other provisions of Title VII are questions for future cases, not these.<sup>16</sup>

The Court likewise denied that *Bostock* should be read as deciding what might count as “discrimination on the basis of sex” in other statutes:

[N]one of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today.<sup>17</sup>

In brief, the Supreme Court was clear that *Bostock* did not decide any issue beyond hiring and firing under Title VII, which includes the statutes at issue here. As the Sixth Circuit put it, “*Bostock* extends no further than Title VII.”<sup>18</sup> It is arbitrary and capricious for HHS to ignore *Bostock*’s limitations and to claim *Bostock* requires its regulatory action when it did no such thing.

To the extent HHS is relying on *Bostock* as the legal impetus for its definition, that basis is deficient. *Bostock* requires no such regulatory action. It is arbitrary and capricious, and contrary to law for

---

<sup>12</sup> See 88 Fed. Reg. 44752-54 (citing *Bostock* as justification for the NPRM).

<sup>13</sup> 88 Fed. Reg. 44754.

<sup>14</sup> *Id.* at 44752.

<sup>15</sup> *Bostock*, 140 S. Ct. at 1753.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021).

HHS to claim *Bostock* requires reinterpreting and expanding 13 federal statutes. Congress tasked HHS with overseeing grants made under these statutes. It has no congressional or constitutional warrant to substantively rewrite them. Nothing in *Bostock* and nothing outside *Bostock* justifies this action.

**B. Contrary to the Department’s representation, *Bostock* did not hold that any federal law (let alone the thirteen at issue here) prohibits discrimination on the basis of gender identity.**

The NPRM claims that the Supreme Court held in *Bostock* that Title VII “prohibits discrimination on the basis of . . . gender identity.”<sup>19</sup> This is incorrect. The Court’s opinion uses the phrase “gender identity” only once, as follows:

The employees . . . submit[] that, even in 1964, the term [sex] . . . captur[ed] more than anatomy and reaching at least some norms concerning gender identity and sexual orientation. But because nothing in our approach to these cases turns on the outcome of the parties’ debate, and because the employees concede the point for argument’s sake, we proceed on the assumption that “sex” signified what the employers suggest, referring only to biological distinctions between male and female.<sup>20</sup>

The Supreme Court in *Bostock* plainly did not adopt “gender identity” as a protected class. As such, HHS cannot rely on *Bostock* to support the inclusion of the term “gender identity” within the definition of “sex discrimination.” As noted in this block quote, *Bostock* premised its decision on the assumption that “sex” refers only to the “biological distinctions between male and female.”<sup>21</sup> To be consistent with *Bostock*, HHS must assume “sex” refers to “biological distinctions between male and female” (which it does not do) and that “sex” is incompatible with a gender spectrum or fluidity.

**C. The NPRM’s treatment of caselaw interpreting *Bostock* is arbitrary and capricious.**

Given that the NPRM rests entirely on HHS’ expansive interpretation of *Bostock*, it is surprising that HHS spends *only one sentence* discussing how courts have treated that decision in the three years since the case was decided:

After *Bostock*, circuit courts concluded that the plain language of the Title IX of the Education amendments of 1972, 20 U.S.C. 1681(a), prohibition on sex discrimination must be read similarly. *See Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020), *cert. denied*, 141 S. Ct. 2878 (2021); *see also Doe v. Snyder*, 28 F.4th 103, 114 (9th Cir. 2022) (applying *Bostock*’s reasoning to the prohibitions on sex discrimination in Title IX and Section 1557 of the Affordable Care Act, 42 U.S.C. 18116). *But cf. Adams v. School Bd. of St. Johns Co.*, 57 F.4th 791, 811– 15 (11th Cir. 2022) (en banc) (recognizing that *Bostock* instructs that the exclusion of a transgender student from the bathroom consistent with his gender identity was exclusion on the basis of “sex,” but that

---

<sup>19</sup> 88 Fed. Reg. at 44752.

<sup>20</sup> *Bostock*, 140 S. Ct. at 1739.

<sup>21</sup> *Id.* at 1739.

such exclusion was permitted by Title IX’s “express statutory and regulatory carve-outs” for living and bathroom facilities).<sup>22</sup>

Given that HHS purports to expand one Supreme Court decision beyond its stated limits and apply it to more than a dozen federal statutes, this cursory treatment is wholly inadequate. Below are a few of the cases that HHS must consider in interpreting and applying *Bostock*.

Since *Bostock*, several circuit courts have held that one cannot simply extend *Bostock* into other statutory frameworks. The Sixth Circuit has rejected HHS’s broad interpretation of *Bostock* here on at least three separate occasions. Shortly after the Court’s decision, the Sixth Circuit reaffirmed that “Title VII differs from and Title IX in important respects. . . . [I]t does not follow that principles announced in the Title VII context automatically apply in the Title IX contest.”<sup>23</sup> Some months later, the Sixth Circuit declined to apply *Bostock* to the ADEA:

[T]he Court in *Bostock* was clear on the narrow reach of its decision and how it was limited only to Title VII itself. The Court noted that “none of” the many laws that might be touched by their decision were before them and that they “do not prejudice any such question today.” *Id.* at 1753. Thus, the rule in *Bostock* extends no further than Title VII and does not stretch to the ADEA.<sup>24</sup>

Similarly, five days before HHS published its NPRM, the Sixth Circuit again affirmed that *Bostock*’s “reasoning applies only to Title VII, as *Bostock* itself and our subsequent cases make clear.”<sup>25</sup>

The Eleventh Circuit has issued two major decisions in the past year that have likewise rejected HHS’s theory that *Bostock* applies wholesale in other statutory contexts. *Adams v. School Board of St. Johns County* is the most recent federal appellate decision, and the only en banc federal appellate decision, to consider the attempt to use Title IX to secure the right for some students to be classified not according to their biological sex but according to their gender identity.<sup>26</sup> The NPRM does not address the *Adams* decision on the merits; it only mentions *Adams* in a parenthetical, cited above, where HHS claims the Eleventh Circuit granted the force of *Bostock*’s logic but felt constrained by “Title IX’s ‘express statutory and regulatory carve-outs; for living and bathroom facilities.’”<sup>27</sup>

A fuller account of *Adams* would acknowledge that the en banc Eleventh Circuit interpreted the word “sex” in the context of Title IX and its implementing regulations.<sup>28</sup> It found that the “plain meaning

---

<sup>22</sup> 88 Fed. Reg. at 44752.

<sup>23</sup> *Meriwether v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021).

<sup>24</sup> *Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir.), *cert. denied sub nom. Pelcha v. Watch Hill Bank*, 142 S. Ct. 461 (2021).

<sup>25</sup> *L. W. by & through Williams v. Skrmetti*, 73 F.4th 408, 420 (6th Cir. 2023) (citing *Bostock*, 140 S. Ct. at 1753).

<sup>26</sup> 57 F.4th 791 (11th Cir. 2002) (en banc).

<sup>27</sup> 88 Fed. Reg. at 44752. HHS’s cursory treatment of *Adams* closely resembles the Department of Education’s treatment of *Adams* in its Athletics NPRM, where attempts to minimize its significance by pointing out that the claims in that case “did not involve athletics or the athletics regulation that is the subject of this Athletics NPRM.” 88 Fed. Reg. 22,869, n.10.

<sup>28</sup> *Id.* at 811.

of ‘sex’ at the time of Title IX’s enactment” meant “biological sex” and did not include “gender identity.”<sup>29</sup>

HHS’s arbitrary and capricious hypocrisy is evident in its treatment of *G.G. ex rel. Grimm v. Gloucester Cnty. Sch. Bd.*,<sup>30</sup> which is cited favorably three times in the Athletics NPRM.<sup>31</sup> *Grimm*, like *Adams*, involved a transgender plaintiff challenging separate-sex bathroom policies. The difference, of course, is that the Fourth Circuit’s decision in *Grimm* ruled in favor of the plaintiff, while the Eleventh Circuit’s en banc decision in *Adams* ruled in favor of the school district. It is arbitrary and capricious for the Department to cite one bathroom case favorably and dismiss the other simply because it persuasively held that “sex” in Title IX means “biological sex” and not “gender identity.”

The Eleventh Circuit most recently rejected HHS’s approach to *Bostock* in *Eknes-Tucker v. Governor of Alabama*.<sup>32</sup> This case involved a challenge to an Alabama law that prohibits anyone from prescribing or administering puberty-blocking medication or cross-sex hormone treatment to a minor “for the purpose of attempting to alter the appearance of or affirm the minor’s perception of his or her gender or sex if that appearance or perception is inconsistent with the minor’s sex.”<sup>33</sup>

The *Eknes-Tucker* court rejected the plaintiffs’ “direct sex-classification” argument, as the challenged law “establishes a rule that applies equally to both sexes.”<sup>34</sup> The court also rejected the plaintiffs’ and the district court’s claim that *Bostock* applies to Equal Protection claims because that constitutional provision has been interpreted to bar discrimination on the basis of sex. The Eleventh Circuit stressed that the Supreme Court in *Bostock* “relied exclusively on the specific text of Title VII.”<sup>35</sup>

The Equal Protection Clause contains none of the text that the Court interpreted in *Bostock*. . . . Because *Bostock* therefore concerned a different law (with materially different language) and a different factual context, it bears minimal relevance to the instant case.<sup>36</sup>

*Id.* The Eleventh Circuit also cited with approval a dissent from Judge Stras of the Eighth Circuit and Justice Gorsuch, both stating that *Bostock* cannot be exported to other provisions with different wording.<sup>37</sup>

---

<sup>29</sup> *Id.* at 814-15.

<sup>30</sup> 822 F.3d 709, 723 (4th Cir. 2016).

<sup>31</sup> 88 Fed. Reg. at 44752, 44753 n.11, and 44754 n.21.

<sup>32</sup> No. 22-11707, 2023 WL 5344981 (11th Cir. Aug. 21, 2023).

<sup>33</sup> *Id.* at \*1.

<sup>34</sup> *Id.* at 16.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* (citing *Brandt ex rel. Brandt v. Rutledge*, No. 21-2875, 2022 WL 16957734, at \*1 n.1 (8th Cir. Nov. 16, 2022) (Stras, J., dissenting from denial of rehearing en banc) (expressing skepticism that *Bostock*’s reasoning applies to the Equal Protection Clause of the Fourteenth Amendment because the Fourteenth Amendment “predates Title VII by nearly a century” and contains language that is “not similar in any way” to Title VII’s) and *Students for Fair*

HHS cannot, consistent with its obligations under the APA, assert that *Bostock* applies to more than a dozen congressional statutes without dealing with the full range of case law wrestling with where and under what conditions *Bostock* can be applied to situations outside the narrow Title VII context at issue in that decision. HHS' cursory, selective, and biased discussion of these cases in the NPRM falls far short of its statutory duty.

#### **IV. The NPRM's proposed conscience and religious objection process is an empty gesture.**

We are glad that HHS states in the NPRM that it “takes seriously its obligations to comply with Federal religious freedom laws, including the First Amendment and RFRA.”<sup>38</sup> We are likewise glad that HHS pledges to “comply with these legal obligations.”<sup>39</sup> We do not agree, however, that the procedures described in this NPRM are consistent with the above statements or with the Department's constitutional and legal obligations.

##### **A. As we noted in the Section 1557 context, the proposed procedures do not meet the Department's statutory and constitutional duty to respect religious exercise.**

We concur with the Department's assessment that the proposal laid out here is “similar to the process laid out in the Section 1557 NPRM,” RIN 0945-AA17, published at 87 Fed. Reg. 47824. We incorporate by reference our public comment in response to HHS's Section 1557 NPRM, which the Department has in its possession and is also available on our website.<sup>40</sup>

In short, the Department's proposal, as we understand it, is as follows:

- As an initial matter, *is not offering any exemptions or accommodations* for religious entities that receive or may in the future apply for grants under one of the 13 statutes listed in this NPRM.
- If a recipient believes it is “exempt from, or requires modified application of, certain provisions of this part due to the application of a federal religious freedom law, including [RFRA] and the First Amendment,” it “may notify” HHS.
- Once HHS “receives such notification,” “they shall promptly consider those views in responding to any complaints.” HHS does not define “promptly.”

---

*Admissions, Inc., v. President & Fellows of Harvard Coll.*, 143 S. Ct. 2141, 2220 (2023) (Gorsuch, J., concurring) (noting the different language in Title VI and the Equal Protection Clause and explaining “[t]hat such differently worded provisions should mean the same thing is implausible on its face.”).

<sup>38</sup> 88 Fed. Reg. 44754.

<sup>39</sup> *Id.*

<sup>40</sup> See EPPC, EPPC Scholars Submit Public Comment Opposing HHS Section 1557 Proposed Transgender Mandate in Healthcare (Oct. 3, 2022), available at <https://eppc.org/publication/eppc-scholars-submit-public-comment-opposing-hhs-section-1557-proposed-transgender-mandate-in-healthcare/>. Pages 35-38 of the HHS Accountability Project's public comment address the NPRM's proposed procedures for addressing religious liberty concerns.



- If HHS has already initiated “compliance activity” against a religious entity for adhering to its religious convictions, that “compliance activity” “shall be held in abeyance until a determination has been made on whether” HHS will grant the religious entity an exemption or “modified application” of a provision.
- At some point thereafter (again, HHS makes no representations), “[t]he awarding agency” will make a decision in response to the religious entity’s notification and “will communicate their determination to the recipient in writing. The written notification will clearly set forth the scope, applicable issues, duration, and all other relevant terms of the exemption request.”
- HHS will make any such exemption as narrow as it possibly can. As to the recipient in question, the “determination does not otherwise limit the application of any other provision of this part to the recipient or to other contexts, procedures, or services.”
- No other religious recipient would benefit from HHS’ determination that it was acting unlawfully in this context, regardless of the circumstances. HHS insists on this “case-by-case” approach to “minimize any harm an exemption could have on third parties.”

That’s it.

As we had stated in response to this same proposal in the Section 1557 context, though we applaud the Department’s explicit recognition of federal conscience and religious freedom rights and the need for a formal process for people’s rights to be vindicated, ***the proposed process is meaningless because all that matters is who makes the final determinations and on what basis.*** While we agree that any investigation should be paused until a final determination has been made, based on the Department’s past acts, ***we have every reason to believe that the process will lead to religious and conscience objectors losing and “harmed third parties” winning every time.***

If an entity or individual believes the Department is violating its federal conscience protection rights (be it with respect to sexual orientation, gender identity, or abortion), they must, in most cases, submit an objection or complaint to OCR—the very entity tasked with evaluating sexual orientation, gender identity, and “termination of pregnancy” discrimination claims.

Current leadership at HHS have never disavowed statements from OCR’s former chief of staff and political appointee Laura Durso under the Biden Administration, who said:

The new HHS religious liberty police sends shivers down my spine. I trained as a psychologist to help those who were struggling, no matter who they were. This new office – and any policies that come from it – will only enable discrimination and pain.<sup>41</sup>

In the regulatory context, in litigation, and in public statements by Secretary Becerra and others in leadership, the Department has made clear that it does not respect or recognize conscience and religious rights. It is apparent that HHS does not believe there should be conscience and religious exemptions to

---

<sup>41</sup> Laura E. Durso (@TheDursoIsIn) January 18, 2018, <https://t.co/v62IALBrNa>.

this NPRM, as in the Section 1557 context, and it is doubtful that OCR would seriously give effect to those legal protections through the proposed notification process when its litigation positions say otherwise. The statements of HHS leadership and acts by the Department to disregard conscience and religious freedom rights speak volumes.

To the extent that entities and professionals notify HHS of their conscience or religious objections to requirements under the Proposed Rule, HHS should not make publicly accessible a list of religious objectors. This would open the door for those who do not agree to single out, target, or harass those institutions and professionals of conscience and faith. HHS should also issue a guarantee that if an entity or professional notifies the Agency of a possible or actual objection, that HHS will not abuse its authority by then investigating or targeting that entity or professional for possible violations of law. To do so would chill the benefits of seeking guidance or technical assistance in good faith.

**B. HHS should consult with and follow the recommendations of the Career Experts in the Former Conscience and Religious Freedom Division and protect conscience and religious freedom rights.**

Our nation’s social services network relies in substantial part on faith-based organizations, who live out their faith-based vocation to love and care for the sick and suffering in countless ways each day across our nation. These entities care for the people in front of them based on the biological scientific reality of the human person and the human body.

Regulations that fail to uphold federal protections for conscience and religious liberty will lead to decreasing access to care for poor communities and racial minority communities throughout much of the country. At a minimum, federal regulations should commit to upholding existing conscience and religious freedom protections under federal law, not through broad platitudes such as those offered in this NPRM but in concrete proposals gleaned from HHS’ experience interacting with faith-based service providers and—where necessary—from the many losses that HHS has suffered in court in religious liberty litigation.

HHS acknowledges that its aggressive efforts to bypass Congress and inject allegedly “*Bostock*-type” non-discrimination provisions into more than a dozen federal laws will implicate conscience and religious freedom concerns: that is why it proposing a process in §75.300(f). Anemic though that proposal is, it is a tacit admission that rewriting the terms under which faith-based entities cooperate with the federal government is going to cause some ripples.

Since the proposed rule would implicate conscience and religious freedom concerns, the Departments should consult with religious freedom experts, including the career professionals in the (former) Conscience and Religious Freedom Division. We ask the Departments to clarify how they will evaluate requests for religious and moral exemptions. We also ask for clarity over how complaints of violations of the contraceptive mandate will be handled, especially when it comes to an entity claiming a religious or moral exemption. Specifically, which offices will be involved, and will the staff in those offices have particular expertise with religious freedom obligations?

Under Secretary Becerra, the Conscience and Religious Freedom Division in the Office for Civil Rights of HHS, which was dedicated to protecting conscience and religious freedom rights, was sidelined, and the career professionals with expertise in conscience protection laws were prohibited from investigating complaints under those laws or from advising on conscience and religious freedom related matters. Indeed, after this rule was proposed, HHS announced a restructuring of OCR, officially eliminating the Conscience and Religious Freedom Division.<sup>42</sup> This move suggests that HHS does not take protections for conscience and religious freedom rights seriously and intends to treat them as second-class.

Unfortunately, there has been a concerning trend by HHS to cut the career CRFD professionals out of the review process for proposed rules that implicate conscience and religious freedom rights. Indeed, HHS has only made it more difficult across the board for the agency to enforce vital conscience and religious protections. For example, Secretary Becerra removed from the HHS Office for Civil Rights (of which the CRFD is part) the delegation of authority to enforce RFRA. Further, HHS and specifically Secretary Becerra have shown a disdain for conscience and religious rights, even going so far as to not enforce statutory protections for those who have conscience and religious objections to providing abortion.<sup>43</sup>

We urge HHS to utilize the expertise of the career professionals of the former Conscience and Religious Freedom Division in not just evaluating this proposal but also in investigating complaints alleging violations of the contraceptive mandate against an entity claiming a religious or moral exemption.

The removal of the delegation of authority from OCR to enforce RFRA and the First Amendment said that “Department components, in consultation with OGC, have the responsibility, and are best positioned, to evaluate RFRA-based requests for exemptions, waivers, and modifications of program requirements in the programs they operate or oversee. Department components, further, are best situated to craft exemptions or other modifications when required under RFRA and to monitor the impact of such exemptions or modifications on programs and those they serve. Moreover, they are best positioned to evaluate how their programs must be run to comply with the Free Exercise Clause and the Establishment Clause of the First Amendment.”<sup>44</sup>

But OCR is the “department component” for this rule. Despite its withdrawn authority, HHS must explain whether OCR has RFRA and First Amendment authority to evaluate any violations and receive complaints under this OCR rule. In the proposed rule, the Agency must explain how it will fulfill its

---

<sup>42</sup> 88 Fed. Reg. 12,955 (Feb. 25, 2023) (Statement of Organization), <https://www.federalregister.gov/documents/2023/03/01/2023-03892/statement-of-organization>.

<sup>43</sup> See, e.g., Rachel N. Morrison, In Its First Year, Biden’s HHS Relentlessly Attacked Christians and Unborn Babies, *Federalist* (Mar. 18, 2022), <https://thefederalist.com/2022/03/18/in-its-first-year-bidens-hhs-relentlesslyattacked-christians-and-unborn-babies/>.

<sup>44</sup> 86 Fed. Reg. 67,067 (Nov. 24, 2021) (Delegation of Authority); *see also* Letter from Lisa J. Pino, Director, Office for Civil Rights, to Xavier Becerra, Secretary, on Decision—Sign Delegation of Authority on the Religious Freedom Restoration Act and the Religion Clause of the First Amendment to the U.S. Constitution (Nov. XX, 2021), <https://www.lankford.senate.gov/imo/media/doc/HHS%20RFRA%20Memo.pdf>.

statutory duty to protect and enforce conscience protection laws within its HHS Grants regulations while at the same time proposing to rescind the Conscience Rule, giving effect to those protections.

**C. Above and beyond procedures for addressing specific issues raised by recipients, HHS must apply RFRA to its regulations at the outset.**

In proposing this Rule, HHS must analyze its regulatory action under the Religious Freedom Restoration Act (RFRA) and refrain from imposing a substantial burden on religious exercise absent a compelling interest imposed by the least restrictive means. The Department’s long experience administering the statutes cited in the NPRM, as well as its extensive experience losing religious liberty cases in court, gives the Department plenty of notice as to what RFRA and the First Amendment require. HHS can—and must—do much better than throwing up its hands and offering to set up a circular file to hear religious liberty complaints.

As the Supreme Court made clear in *Fulton v. City of Philadelphia*,<sup>45</sup> the government does not have a compelling interest in enforcing its nondiscrimination policies generally. Rather, any interest must reference the specific application of the requirements to those specifically affected. Indeed, the Court in *Fulton* stated: “So long as the government can achieve its interests in a manner that does not burden religion, it must do so.”

HHS states that “OCR would also consider the application of Federal conscience and religious freedom laws, where relevant.”<sup>46</sup> But since HHS recently withdrew the delegation of authority from OCR to enforce RFRA,<sup>47</sup> any perfunctory statement that HHS will comply with and follow RFRA and other conscience protection laws is suspect. HHS must explain *specifically* how it intends to uphold its duty to enforce conscience and religious freedom protection laws in relation to its proposed regulations.

**D. The Departments should begin by developing concrete means for faith-based grant recipients to claim and exercise their rights under the religious liberty provisions highlighted in *Bostock* itself.**

Given that the NPRM takes *Bostock* as its starting point, it is concerning that HHS does not acknowledge what that same decision had to say about religious liberty. Just as HHS ignores the Supreme Court’s explicit and repeated statements limiting its holding to a specific factual context under Title VII, HHS fails to acknowledge what *Bostock* says about religious liberty.

As *Bostock* affirms, the Supreme Court is “deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution”—a “guarantee” that “lies at the heart of our pluralistic society.”<sup>48</sup> The Court flagged three doctrines protecting religious liberty it thought relevant to claims of sex discrimination:

---

<sup>45</sup> 141 S. Ct. 585 (2021).

<sup>46</sup> 87 Fed. Reg. 47867.

<sup>47</sup> 86 Fed. Reg. 67067.

<sup>48</sup> *Bostock*, 140 S. Ct. at 1754.

1. Title VII's religious organization exemption, which allows religious organizations to employ individuals "of a particular religion"<sup>49</sup>;
2. The ministerial exception under the First Amendment, which "can bar the application of employment discrimination laws 'to claims concerning the employment relationship between a religious institution and its ministers'"<sup>50</sup>; and
3. The Religious Freedom Restoration Act (RFRA), which the Court described as a "super statute" that "might supersede Title VII's commands in appropriate cases."<sup>51</sup>

The latter two are relevant here. If HHS wishes to reassure Americans that it sincerely wants to follow the law, implement *Bostock*, and honor its statutory and constitutional obligations to respect religious liberty, it can begin by repeating what *Bostock* says about religious liberty, and by developing concrete proposals to anticipate and address the predictable ways in which the NPRM would substantially burden recipients' religious exercise. The Department does not show that it is "fully committed" to "respecting religious freedom laws"<sup>52</sup> by forcing Americans—as HHS has done so often in recent memory—to marshal the courage, resources, and stamina to bring and endure years of litigation to secure in practice the rights HHS now only acknowledges in theory.

**E. The Department should acknowledge that RFRA requires exemptions from certain applications of non-discrimination laws.**

The Department also ought to take into account the Fifth Circuit's recent decision in *Braidwood Mgmt., Inc. v. Equal Emp. Opportunity Comm'n.*<sup>53</sup> In that case, two Texas employers—Bear Creek Bible Church, a religious non-profit employer, and Braidwood Management, Inc., a religious for-profit employer—brought suit against the EEOC, seeking declaratory judgments as to their religious liberty rights post-*Bostock*.<sup>54</sup>

The Fifth Circuit's analysis on the merits<sup>55</sup> began by pointing back to *Bostock*, where "the Supreme Court noted that the free exercise of religion 'lies at the heart of our pluralistic society.'"<sup>56</sup> "Nowhere was that commitment made more evident than with the passage of RFRA, which 'was designed to provide very broad protection for religious liberty.'"<sup>57</sup>

---

<sup>49</sup> 42 U.S.C. § 2000e-1(a). Title VII defines "religion" as "all aspects of religious observance and practice, as well as belief." *Id.* § 2000e(j).

<sup>50</sup> *Bostock*, 140 S. Ct. at 1754 (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012)).

<sup>51</sup> *Id.* (citing 42 U.S.C. § 2000bb-3).

<sup>52</sup> 88 Fed. Reg. at 44754.

<sup>53</sup> 70 F.4th 914, 918 (5th Cir. 2023).

<sup>54</sup> *Id.* at 921 (listing statements presented for declaratory judgment).

<sup>55</sup> *Id.* at 937-40.

<sup>56</sup> *Id.* at 937 (quoting *Bostock*, 140 S. Ct. at 1754).

<sup>57</sup> *Burwell v. Hobby Lobby*, 573 U.S. 682, 706 (2014).

The court had little trouble finding that the plaintiff-employers were sincere and that the EEOC's guidance burdened their religious exercise. As the court noted, "a law that operates so as to make the practice of ... religious beliefs more expensive in the context of business activities imposes a burden on the exercise of religion."<sup>58</sup> Here, EEOC's heavy-handed declaration about *Bostock*'s implications forces religious organizations to choose "between two untenable alternatives: either (1) violate Title VII and obey their convictions or (2) obey Title VII and violate their convictions. Being forced to employ someone to represent the company who behaves in a manner directly violative of the company's convictions is a substantial burden and inhibits the practice of Braidwood's beliefs."<sup>59</sup>

Having found that the religious plaintiffs had met their burden, the Fifth Circuit looked to see whether EEOC could pass strict scrutiny, "the most demanding test known to constitutional law."<sup>60</sup> The Fifth Circuit found that the Commission failed this test. It credited the EEOC's statement that "it is beyond dispute that the government has a compelling interest in eradicating workplace discrimination," and RFRA does not "protect[ ] . . . discrimination in hiring . . . cloaked as religious practice."<sup>61</sup> However, the Fifth Circuit recognized that such broad statements did not answer the question at hand:

Although the Supreme Court may some day determine that preventing commercial businesses from discriminating on factors specific to sexual orientation or gender identity is such a compelling government interest that it overrides religious liberty in all cases, it has never so far held that. The Court expressly did not extend the holding that far; instead, it noted that RFRA "might supersede Title VII's commands in appropriate cases." That qualification would be a nullity if the government's compelling interest in purportedly eradicating sex discrimination were a trump card against every RFRA claim.

Instead, in RFRA cases, the courts must "scrutinize[ ] the asserted harm of granting specific exemptions to particular religious claimants." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021) (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006)). Under RFRA, the government cannot rely on generalized interests but, instead, must demonstrate a compelling interest in applying its challenged rule to "the particular claimant whose sincere exercise of religion is being substantially burdened." *O Centro Espirita*, 546 U.S. at 430–31. Even if there is a compelling interest as a categorical matter, there may not be a compelling interest in prohibiting all instances of discrimination.

But we need not go so far, because the EEOC fails to carry its burden. It does not show a compelling interest in denying Braidwood, individually, an exemption. The agency does not even attempt to argue the point outside of gesturing to a generalized interest in prohibiting all forms of sex discrimination in every potential case. Moreover, even if we accepted the EEOC's formulation of its compelling interest, refusing to exempt

---

<sup>58</sup> *Braidwood*, F.4th at 937 (quoting *Hobby Lobby*, 573 U.S. at 710 (cleaned up)).

<sup>59</sup> *Id.* at 937-38.

<sup>60</sup> *Id.* at 939 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997)).

<sup>61</sup> *Id.* at 938.

Braidwood, and forcing it to hire and endorse the views of employees with opposing religious and moral views is not the least restrictive means of promoting that interest.<sup>62</sup>

Based on this analysis, the Fifth Circuit affirmed the district court’s holding that RFRA required EEOC to grant religious employers an exemption from its attempt to apply *Bostock* against all employers.<sup>63</sup>

Though courts are split as to whether RFRA applies to a lawsuit between only private parties,<sup>64</sup> that debate is not at issue here. As such, HHS must take *Braidwood* into account when determining the scope of its legal duty toward religious grant recipients.

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

The Department’s religious liberty analysis also fails to take into account the “Nondiscrimination Principal,” which the Department has correctly acknowledged in other rulemaking. In January, HHS was one of nine federal agencies that developed the Proposed Rule, “Partnerships With Faith-Based and Neighborhood Organizations.”<sup>65</sup> 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*<sup>66</sup> and *Espinoza v. Montana Department of Revenue*.<sup>67</sup> 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.”<sup>68</sup>

Starting with *Trinity Lutheran Church of Columbia, Inc. v. Comer*,<sup>69</sup> the Court has focused less on what kinds of government funding are 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.

As HHS has acknowledged, in the years since *Trinity Lutheran*, the Supreme Court has confirmed and further developed this Nondiscrimination Principle. In *Espinoza v. Montana Department of Revenue*,<sup>70</sup> 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

---

<sup>62</sup> *Id.* at 939-40 (cleaned up).

<sup>63</sup> *Id.* at 940.

<sup>64</sup> See Rachel N. Morrison, *Does the EEOC Really Get to Decide Whether RFRA Applies in Employment-Discrimination Lawsuits?*, National Review Online, Sept. 21, 2021, <https://www.nationalreview.com/bench-memos/does-the-eeoc-really-get-to-decide-whether-rfra-applies-in-employment-discrimination-lawsuits/>.

<sup>65</sup> 88 Fed. Reg. 2395 (Jan 13, 2023).

<sup>66</sup> 137 S. Ct. 2012 (2017).

<sup>67</sup> 140 S. Ct. 2246 (2020).

<sup>68</sup> 88 Fed. Reg. 2401 (quoting *Espinoza*, 140 S. Ct. at 2244, *Trinity Lutheran*, 137 S. Ct. at 2021).

<sup>69</sup> 137 S. Ct. 2012 (2017).

<sup>70</sup> 140 S. Ct. 2246 (2020).

status. In 2021, the Supreme Court held in *Fulton v. City of Philadelphia*,<sup>71</sup> 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 District*,<sup>72</sup> 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. Finally, in *Carson v. Makin*,<sup>73</sup> 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.”<sup>74</sup> 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 Clauses,” those rights had to “yield” where they were in “direct tension” with the “competing demands of the Establishment Clause.”<sup>75</sup> 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.<sup>76</sup>

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.<sup>77</sup> 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.”<sup>78</sup> 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.

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 this standard is fundamentally problematic.<sup>79</sup> 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

---

<sup>71</sup> 141 S. Ct. 1868 (2021).

<sup>72</sup> 142 S. Ct. 2407 (2022).

<sup>73</sup> 142 S. Ct. 1987 (2022).

<sup>74</sup> *Kennedy*, 142 Sup. Ct. at 2422 (cleaned up).

<sup>75</sup> *Id.* at 2426.

<sup>76</sup> *Id.*

<sup>77</sup> 137 S. Ct. 2012 (2017) and 140 S. Ct. 2246 (2020).

<sup>78</sup> *Trinity Lutheran*, 137 S. Ct. at 2026.

<sup>79</sup> *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>.



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.

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*.

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 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.

#### **VI. The NPRM’s one-size-fits-all approach overlooks important differences between the listed statutes.**

The Department “seeks comment on whether there is anything about any of the statutes referenced in proposed § 75.300(e), such as their language, legislative history, or purpose, that would provide a legal basis for distinguishing them from *Bostock*’s interpretation of Title VII.”<sup>80</sup> As noted above, we submit that the basic premise of this request is flawed: *Bostock* doesn’t mean what the Department claims it says, the Supreme Court specifically cabined its holding to a certain application of Title VII, and there is a substantial and growing body of caselaw that rejects the Department’s and this administration’s ongoing effort to rewrite federal law to advance a radical agenda that the American people do not want.

Leaving these objections aside, we offer here a brief overview of some of the most important distinctions between the cited statutes and Title VII, and between these statutes themselves.

To begin, the thirteen statutes listed in the proposed § 75.300(e) are as follows:

- 8 U.S.C. 1522, Authorization for programs for domestic resettlement of and assistance to refugees;

---

<sup>80</sup> 88 Fed. Reg. at 44754.

- 42 U.S.C. 290cc– 33, Projects for Assistance in Transition from Homelessness;
- 42 U.S.C. 290ff–1, Children with Serious Emotional Disturbances;
- 42 U.S.C. 295m, Title VII Health Workforce Programs;
- 42 U.S.C. 296g. Nursing Workforce Development;
- 42 U.S.C. 300w–7, Preventive Health Services Block Grant;
- 42 U.S.C. 300x–57, Substance Abuse Treatment and Prevention Block Grant; Community Mental Health Services Block Grant;
- 42 U.S.C. 708, Maternal and Child Health Block Grant;
- 42 U.S.C. 5151, Disaster relief;
- 42 U.S.C. 8625, Low Income Home Energy Assistance Program;
- 42 U.S.C. 9849, Head Start;
- 42 U.S.C. 9918, Community Services Block Grant Program; and
- 42 U.S.C. 10406, Family Violence Prevention and Services.

**A. Some of these statutes incorporate Title IX by reference.**

At least five of the thirteen statutes incorporate Title IX by reference:

- 42 U.S.C. 290cc– 33, Projects for Assistance in Transition from Homelessness (*see* §§ 290cc-33(a)(1), (b)(1)(B));
- 42 U.S.C. 300w–7, Preventive Health Services Block Grant (*see* § 300w-7(a)(1));
- 42 U.S.C. 300x–57, Substance Abuse Treatment and Prevention Block Grant; Community Mental Health Services Block Grant (*see* § 300x-57(a)(1));
- 42 U.S.C. 708, Maternal and Child Health Block Grant (*see* § 708(a)(1)); and
- 42 U.S.C. 10406, Family Violence Prevention and Services (*see* §§ 10406(c)(2)(A), (c)(2)(C)(ii)).

As these statutes incorporate Title IX by reference, we likewise incorporate by reference all the objections we have made previously as to why *Bostock* does apply to Title IX and why, when Congress

incorporates by reference Title IX (for example, in Section 1557 of the Affordable Care Act), that includes the statute as a whole, including its religious liberty exemption.<sup>81</sup>

Title IX contains a religious exemption, which states that Title IX’s prohibition against sex discrimination “shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization.”<sup>82</sup>

Section 1557 prohibits discrimination on “the ground prohibited under” Title IX, specifically “20 U.S.C. § 1681 *et seq.*”<sup>83</sup> Section 1557 citation of Title IX’s entire statutory scheme demonstrates that the “more natural understanding” is that all of Title IX’s provisions, including its exemptions are incorporated. Congress didn’t need to expressly incorporate Title IX’s exemptions, because it did so by reference to the statutory provisions (20 U.S.C. § 1681 *et seq.*). If Congress just wanted to prohibit discrimination based on sex generally, it could have said so explicitly. Rather, Congress incorporated the four civil rights statutes because those discrimination prohibitions reflected the careful balance of various concerns and competing interests by Congress. Contrary to HHS’s assertion, the proposed regulations do not reflect Section 1557’s statutory language or Congressional intent.

As a textual manner, applying sex discrimination prohibitions to a religious institution to the extent it “would not be consistent with the religious tenets of such organization” is not a ground prohibited under Title IX. Further, Title IX’s prohibition against sex discrimination is in 20 U.S.C. § 1681(a), as is the religious exemption (§ 1681(a)(3)). Title IX’s sex discrimination prohibition cannot be read separately and apart from the exemptions—especially those in the same section! To say otherwise would be arbitrary and capricious, and contrary to law.

As the court held in *Franciscan All., Inc. v. Burwell*,

The text of Section 1557 prohibits discrimination “on the ground prohibited under . . . [T]itle IX of the Education Amendments of 1972 (20 U.S.C. 1681 *et seq.*) . . .” 42 U.S.C. § 18116(a). Congress specifically included in the text of Section 1557 “20 U.S.C. 1681 *et seq.*” That Congress included the signal “*et seq.*,” which means “and the following,” after the citation to Title IX can only mean Congress intended to incorporate the entire statutory structure, including the abortion and religious exemptions. Title IX prohibits discrimination on the basis of sex but exempts from this prohibition entities controlled by a religious organization when the proscription would be inconsistent with its religious tenets. 20 U.S.C. § 1681(a)(3). ***Title IX also categorically exempts any***

---

<sup>81</sup> See EPPC, HHS Accountability Project, *EPPC Scholars Submit Comment Opposing Proposed Title IX Rule*, <https://eppc.org/publication/eppc-scholars-submit-comments-opposing-proposed-department-of-education-title-ix-rules/>; *EPPC Scholars Submit Public Comment Opposing HHS Section 1557 Proposed Transgender Mandate in Healthcare*, <https://eppc.org/publication/eppc-scholars-submit-public-comment-opposing-hhs-section-1557-proposed-transgender-mandate-in-healthcare/>; and *EPPC Scholars Submit Comments Opposing ED’s Proposed Gender Identity Mandate in Athletics*, <https://eppc.org/publication/eppc-scholars-submit-comments-opposing-eds-proposed-gender-identity-mandate-in-athletics/>.

<sup>82</sup> 20 U.S.C. § 1681(a)(3).

<sup>83</sup> 42 U.S.C. § 18116 (emphasis added).

***application that would require a covered entity to provide abortion or abortion-related services. 20 U.S.C. § 1688. Therefore, a religious organization refusing to act inconsistent with its religious tenets on the basis of sex does not discriminate on the grounds prohibited by Title IX. Failure to incorporate Title IX’s religious and abortion exemptions nullifies Congress’s specific direction to prohibit only the ground proscribed by Title IX. That is not permitted. Corley, 556 U.S. at 314.*** By not including these exemptions, HHS expanded the “ground prohibited under” Title IX that Section 1557 explicitly incorporated. *See id.* The Rule’s failure to include Title IX’s religious exemptions renders the Rule contrary to law under the APA.<sup>84</sup>

As we stated in opposition to the Department’s Proposed Rule under Section 1557 of the ACA, HHS cannot disregard the statutory contours of Section 1557 of the ACA and its obligations under the First Amendment, RFRA, and federal conscience and religious freedom protection laws, to promote the ACA’s general principal objection of “increasing access to health care.”<sup>85</sup> Nor can it justify selectively enforcing Title IX’s provisions to advance Congress’ interests in passing the statutes listed above.

Further, there are pending proposed regulations on Title IX and Section 1557. We ask that the Department wait to issue these final rules until after those regulations are finalized and the anticipated court challenges are concluded. *See* Section VIII below.

**B. Some of the statutes explicitly approve segregation by sex.**

Similarly, some of these thirteen statutes—like Title IX—explicitly approve segregation by sex.<sup>86</sup> A statute wherein Congress explicitly countenanced segregation by sex stands is fundamentally different from Title VII, which made no such judgment. The Department cannot simply apply *Bostock* to any such statute without considering such provisions in detail and what each says about Congress’ intent.

Consider, for example, the Family Violence Prevention and Services Act, which permits an entity administering programs or activities to determine that, in a given instance, “sex is a bona fide occupational qualification or programmatic factor reasonably necessary to the normal or safe operation of that particular program or activity.” 42 U.S.C. 10406(c)(2)(B)(i). The Department must make note of all such distinctions and provisions in each of the § 75.300(e) statutes and make individualized assessments as to how each provision should be honored.

**C. Most of the statutes also prohibit discrimination on the basis of religion.**

Many of the statutes listed in the proposed § 75.300(e) also prohibit discrimination on the basis of religion. *See, e.g.:*

---

<sup>84</sup> 227 F. Supp. 3d 660, 690-91 (N.D. Tex. 2016).

<sup>85</sup> 87 Fed. Reg. 47840.

<sup>86</sup> *See, e.g.*, 42 U.S.C. 295m(1).

- 8 U.S.C. 1522, Authorization for programs for domestic resettlement of and assistance to refugees (*see* § 1522(5));
- 42 U.S.C. 290cc– 33, Projects for Assistance in Transition from Homelessness (*see* 290cc-33(a)(2));
- 42 U.S.C. 290ff–1, Children with Serious Emotional Disturbances (*see* § 290ff-1(e)(2)(C));
- 42 U.S.C. 300w–7, Preventive Health Services Block Grant (*see* § 300w-7(a)(1));
- 42 U.S.C. 300x–57, Substance Abuse Treatment and Prevention Block Grant; Community Mental Health Services Block Grant (*see* § 300x–57(a)(2));
- 42 U.S.C. 708, Maternal and Child Health Block Grant (*see* § 708(a)(2));
- 42 U.S.C. 5151, Disaster relief (*see* § 5151(a));
- 42 U.S.C. 9849, Head Start (*see* § 9849(a)); and
- 42 U.S.C. 10406, Family Violence Prevention and Services (*see* § 10406(c)(2)(B)).

The Department must examine each of these statutes and the broader acts in which they are situated and explain in each case the Department’s understanding of why Congress prohibited discrimination on the basis of religion, how that provision is to be interpreted and applied, how that provision is similar to or different from the same law’s prohibition on discrimination on the basis of sex, and how to apply each in each statute’s unique context.

**D. These statutes place different obligations on participating entities and on the states that administer grants.**

The NPRM also gives inadequate thought to the untenable position it is placing states who are responsible for awarding grants and administering programs that operate under § 75.300(e). These responsibilities also vary from statute to statute.

To cite but one example, at least three of these statutes require applicants to make affirmative representations about their compliance with the relevant law’s nondiscrimination provisions:

- 42 U.S.C. 295m, Title VII Health Workforce Programs (*see* § 295m);
- 42 U.S.C. 296g, Nursing Workforce Development (*see* § 296g); and
- 42 U.S.C. 9849, Head Start (*see* § 9849(a)).

The NPRM does not give applying entities any guidance as to how HHS will interpret a religious entity’s obligations under these provisions. Is it HHS’s position that an entity must pledge not to discriminate,

notwithstanding its constitutional and statutory religious liberty rights? Can an entity make an adequate affirmation if it has a good faith belief that any actions HHS might consider discriminatory are protected under a religious liberty provision? Must an entity indicate that it is reserving the right to exercise its religious liberty rights to protect itself against enforcement under the False Claims Act or a comparable statute? How can an entity get clear about these questions, in general, and as applied to its specific convictions and activities, before applying for a grant?

All of these and more questions can also be posed from the perspective of a state responsible for administering these grants. How are these states supposed to balance their obligations under HHS regulations against their obligations under the First Amendment, under RFRA, and under state-specific protections for religious liberty?

It is incumbent on HHS to consider all of these questions before issuing its final rule.

## **VII. The NPRM implicates Spending Clause statutes and is, therefore, subject to the *Pennhurst* clear-statement rule.**

The NPRM implicates statutes passed under Congress' spending clause authority. As the Supreme Court has long made clear, "if Congress intends to impose a condition on the grant of federal moneys [under its Spending Clause authority], it must do so unambiguously."<sup>87</sup>

This principle, known as the "*Pennhurst* clear statement rule," reflects the system of "dual sovereignty" enshrined in our Constitution.<sup>88</sup> The principle states that Congress cannot impose conditions on state funding without providing them with a clear statement as to what these conditions entail. "[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions."<sup>89</sup> Thus, the "legitimacy of Congress' power to legislate under the [S]pending [Clause] ... rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.'"<sup>90</sup> The Supreme Court has discerned that this rule is constitutionally required because, without it, Congress's spending authority would be "limited only by Congress' notion of the general welfare."<sup>91</sup> Given "the vast financial resources of the Federal Government," Congress would have power "to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed."<sup>92</sup>

The fact that statutes in the NPRM are an exercise of the federal government's Spending Clause and are thus subject to the *Pennhurst* clear statement rule, makes these laws constitutionally distinct from Title VII. This is yet another reason why the Department cannot simply import the Supreme Court's interpretation of Title VII in *Bostock*.

---

<sup>87</sup> *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

<sup>88</sup> *Murphy v. Nat'l Collegiate Athletics Ass'n*, 138 S. Ct. 1461, 1475 (2018).

<sup>89</sup> *Pennhurst*, 451 U.S. at 17.

<sup>90</sup> *Id.* (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 585-86 (1937)).

<sup>91</sup> *South Dakota v. Dole*, 483 U.S. 203, 217 (1987) (O'Connor, J., dissenting).

<sup>92</sup> *Id.* (quoting *United States v. Butler*, 297 U.S. 1, 78 (1936)).

Though the NPRM repeatedly points to *Bostock*, it never even mentions the Spending Clause, let alone offer an account of why the Department would be constitutionally permitted to impose its proposed regulatory standard on grantees consistent with *Pennhurst*.

**VIII. HHS should hold off finalizing this NPRM until it and the Department of Education complete their review of pending rules that interpret and apply Title IX, and until courts resolve outstanding challenges against the administration’s attempts to expand *Bostock*.**

There is substantial overlap between the NPRM and pending regulations from the Department of Education (its Title IX Proposed Rule and its Athletics NPRM) and also this Department’s pending Section 1557 regulation. Each of these proposals purports to apply *Bostock* to new federal laws, and each does so without adequate religious liberty protections. EPPC’s HHS Accountability Project has already filed public comments on these proposals and incorporates those comments by reference here.<sup>93</sup>

We also note that there is substantial ongoing litigation under Title IX and Section 1557 brought against the administration over its aggressive attempts to advance gender ideology through these statutes. Some of these lawsuits are brought by people and entities who believe that the administration’s actions coerce them into violating their considered best judgment, their conscience, and their religious convictions. Some of these lawsuits are brought by individuals (for example, female athletes) who have been harmed as a result of the administration’s actions.

It would be arbitrary and capricious for this administration to finalize the current HHS Grants NPRM without taking into account what HHS and the Department of Education have learned through processing public comments on related proposals. It would likewise be arbitrary and capricious to finalize this regulation while challenges to this administration’s expansive treatment of *Bostock* are being litigated in court. This is especially the case as many of the statutes cited in this NPRM incorporate Title IX’s standards by reference. As such, we ask that HHS hold off finalizing this rule until after the Department of Education finalizes these proposed rules until courts have reached a consensus regarding the administration’s efforts to use *Bostock* to advance gender ideology, and until HHS has an opportunity to take into account those rules’ and courts’ interpretation of Title IX. Otherwise, HHS will introduce even more chaos and confusion regarding the administration’s position on Title IX.

**IX. 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.

Alternatives the Agency must consider and evaluate are:

---

<sup>93</sup> See EPPC, HHS Accountability Project, *EPPC Scholars Submit Comment Opposing Proposed Title IX Rule*, Sept. 12, 2022, <https://eppc.org/publication/eppc-scholars-submit-comments-opposing-proposed-department-of-education-title-ix-rules/>; and *EPPC Scholars Submit Comments Opposing ED’s Proposed Gender Identity Mandate in Athletics*, May 15, 2023, <https://eppc.org/publication/eppc-scholars-submit-comments-opposing-eds-proposed-gender-identity-mandate-in-athletics/>.

- Issuing similar regulations to the 2020 Rule.
- Modifying the 2020 regulations.
- Rescinding only portions of the 2016 Rule, while leaving other portions in place.

The agency must account for the disparate costs, both immediate and future, upon the implementation of these rules.

**X. 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 as apriori to represent the expected social, legal, and economic outcomes. The agency needs to identify what measures 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 effective 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 a 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.

**XI. 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.
- 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.

### **Conclusion**

For all the reasons stated, we strongly oppose the harms that the NPRM would cause, both by applying *Bostock* well beyond its stated limits and by seeking to rewrite more than a dozen federal laws without congressional warrant and without adequate religious liberty protections.

Sincerely,

Eric Kniffin, J.D.  
Fellow  
HHS Accountability Project  
Ethics & Public Policy Center

Natalie Dodson  
Policy Analyst  
HHS Accountability Project  
Ethics & Public Policy Center