AMERICAN CENTER
for LAW & JUSTICE

201 Maryland Avenue, NE
Washington, DC 20002

September 11, 2023

U.S. Department of Health and Human Services,
Office for Civil Rights,
Attention: HHS Grants Rulemaking (RIN-0945-AA19),
Washington, DC 20201

RE: Comments of the American Center for Law and Justice Concerning HHS Grants Rulemaking (RIN) 0945–AA19 – Notice of Proposed Rulemaking

To Whom It May Concern:

The American Center for Law and Justice ("ACLJ") submits the following comment regarding the Notice of Proposed Rulemaking issued by the Department of Health and Human Services, as published in the Federal Register on July 13, 2023 (hereafter, the "NPRM").

The ACLJ is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States in several significant cases involving the freedoms of speech and religion and have submitted formal comments regarding proposed rulemaking on a wide variety of issues.

The ACLJ urges the Department of Health and Human Services to reconsider its proposed revision to 45 C.F.R. § 75.300. The NPRM's application of *Bostock v. Clayton County* to Department authorities misinterprets the Supreme Court's decision and may open the door to potential constitutional abuses. Additionally, as written, it is unclear how this NPRM will protect religious liberty through religious accommodations.

The Department's NPRM proposes adding a new § 75.300(e) to Title 45. Section 75.300(e) provides,

> In statutes that HHS administers which prohibit discrimination on the basis of sex, the Department interprets those provisions to include a prohibition against discrimination on the basis of sexual orientation and gender identity, consistent with the Supreme Court's decision in *Bostock* v. *Clayton County,* 140 S. Ct. 1731 (2020), and other federal court

precedent applying *Bostock'* s reasoning that sex discrimination includes discrimination based on sexual orientation and gender identity.

§ 75.300(e).

In other words, the Department redefines unlawful "discrimination on the basis of sex" to include disparate treatment on the basis of sexual orientation and gender identity in all contexts, far beyond the specific contours of Title VII discussed in *Bostock*. The Department's prohibition would extend to schools, and the students themselves, which creates a dilemma for its practical application.

Section 75.300(e) raises serious questions concerning the impact of Department grants on public and private schools. For example, public and/or private schools may receive grants from the Department through 42 U.S.C. 290ff–1, Children with Serious Emotional Disturbances; 42 U.S.C. 300x–57, Substance Abuse Treatment and Prevention Block Grant; Community Mental Health Services Block Grant; and 42 U.S.C. 9849, Head Start. All of these programs provide critical support to school-based communities and will be subject to the NPRM. It must be assumed that the Department will condition grant awards to schools upon compliance with the Department's definition of "discrimination on the basis of sex."

Will compliance with the new prohibition on discrimination on the basis of sex in exchange for grant awards require schools to adopt strict gender neutral or gender affirming policies? Will compliance force schools to allow boys in girls' restrooms, locker rooms and overnight accommodations, and vice versa? Will schools be required to mandate student and teacher use of preferred names and pronouns and punishment for failure to do so? Will noncompliance result in the revocation of Department grant awards? If the Department's answer to any of these questions is "yes," the NPRM opens itself to Constitutional abuses.

The Department's reliance on *Bostock* v. *Clayton County,* 140 S. Ct. 1731 (2020) is misguided for three reasons. First, that case did not hold that sexual orientation or gender identity are categorically included within discrimination law, whether under Title VII or any other statute. The Court gave "sex" the biological definition relied upon by the defendants and did not argue that its definition should be broadened to sexual orientation. *Id.* at 1738. Instead, the Court held that Title VII's explicit prohibition of terminating an individual "because of" that individual's sex includes all situations where sex is the basis for a distinction. The decision assumed explicitly that "sex" refers "only to biological distinctions between male and female." *Id.* at 1739. Accordingly, the NPRM is fundamentally inconsistent with itself. *Bostock* explicitly did not alter the definition of sex. Instead, it made clear that in some circumstances under the specific language of Title VII, a distinction that appears to be a distinction based on sexual orientation or gender identity is in actuality a distinction based on sex. But it is sexual discrimination and sexual discrimination alone that the statute prohibits. Relying on *Bostock* to change the definition of sex utilizes *Bostock* to do the very thing *Bostock* repeatedly rejects. In other words, *Bostock*'s holding is actually about the specific meaning of the "because of" language of Title VII. That "because of" language is not contained in other statutes; accordingly, *Bostock* does not apply to those statutes.

Second, *Bostock* was expressly premised on a hearty maintenance of religious liberty in future cases, not relevant to *Bostock* where no religious liberty claims were brought. "We are also

deeply concerned with preserving the promise of the free exercise of religion enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society." *Id.* at 1753-54. Attempting to utilize some of the results of *Bostock* without its emphasis on the importance of religious freedom is to misunderstand the decision; redefining "sex," as well as being directly contradictory with the *Bostock* holding, is also in fundamental conflict with the protections for religious freedom the Court emphasized.

Third, *Bostock* was expressly limited to Title VII. "Under Title VII, . . . we do not purport to address bathrooms, locker rooms, or anything else of the kind. The only question before us is 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.'" *Id.* at 1753. Applying *Bostock* to bathrooms, locker rooms, and the like is directly contradictory with the Court's explicit limitation of its holding.

Further, conditioning Department grant awards to schools upon adoption of gender neutral or gender affirming restroom policies is inconsistent with *Adams v. School Board of St. Johns County*, 57 F.4th 791 (11th Cir. 2022). In *Adams*, the 11th Circuit determined that it was constitutionally permissible to separate school bathrooms based upon biological sex. The Court explained that although *Bostock* holds that discrimination based on transgender status or homosexuality entails discrimination based on sex, classification based on sex does not necessarily entail illegal discrimination based on transgender status. *Id.* Separating bathrooms based on biological sex is a legitimate and appropriate classification based on sex, not gender identity. Although *Adams* specifically focused on separation of the sexes in bathrooms, the decision broadly determined that classification based on biological sex does not necessarily entail discrimination based on transgender status. *Id.* This line of reasoning can be applied to locker rooms and overnight accommodations, as well. Therefore, rules that qualify segregation of bathrooms, locker rooms, and overnight accommodations on the basis of sex also as discrimination on the basis of sexual orientation or gender identity is inconsistent with the interpretative principles established in *Adams*.

In addition, conditioning Department grant awards on compliance with HHS' revision of sex discrimination will infringe on First Amendment rights. Presumably, the implementation of this NPRM will require the adoption of various policies concerning preferred names and pronouns for students that must be followed by other students and faculty members. Yet it is clear that mandating student and teacher use of preferred names and pronouns constitutes compelled speech. This compelled speech is constitutionally impermissible according to *West Virginia School Board of Education v. Barnette*, 319 U.S. 624 (1943). In *Barnette*, students refused to participate in the mandatory school activity of saluting the American flag due to their religious convictions. The Supreme Court held that requiring students to salute the flag is a violation of the First Amendment. The Court explained that,

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion, or force citizens to confess by word or act their faith therein.

Id. at 642. Furthermore, *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) held that "the right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." Thus, if the Department conditions grants upon schools implementing mandatory preferred name and pronoun usage, it will have unconstitutionally compelled the speech of students and teachers.

It is both unconscionable and unreasonable that Department grants purportedly established in support of vulnerable children in school-based communities are now held hostage unless certain policies compelling speech are adopted. Schools should not be forced to adopt unconstitutional policies in order to access federal grant funds.

In addition to § 75.300(e), the NPRM proposes adding a new § 75.300(f) to Title 45, as well. Section 75.300(f) provides the following procedure for entities receiving grants from the Department and seeking a religious exemption from the sexual orientation or gender identity inclusion requirements:

> (1) The recipient may notify the HHS awarding agency, the Office of the Assistant Secretary for Financial Resources (ASFR), or the Office of Civil Rights (OCR) of the recipients view that 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 the Religious Freedom Restoration Act (RFRA) and the First Amendment.
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> (2) Once the awarding agency, working jointly with ASFR or OCR, receives such notification from a particular recipient, they shall promptly consider those views in responding to any complaints, determining whether to proceed with any investigation or enforcement activity regarding that recipient's compliance with the relevant provisions of this part, or in responding to a claim raised by the recipient in the first instance, in legal consultation with the HHS Office of the General Counsel (OGC). Any relevant ongoing compliance activity regarding the recipient shall be held in abeyance until a determination has been made on whether the recipient is exempt from the application of certain provisions of this part, or whether modified application of the provision is required as applied to specific contexts, procedures, or services, based on a federal religious freedom law.
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> (3) The awarding agency, working jointly with ASFR or OCR, will, in legal consultation with OGC, assess whether there is a sufficient, concrete factual basis for making a determination and will apply the applicable legal standards of the relevant law, 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.
>
> (4) If the awarding agency, working jointly with ASFR or OCR, and in legal consultation with OGC, determines that a recipient is exempt from the application of certain provisions of this part or that modified application of certain provisions is required as applied to specific contexts, procedures, or services, that determination does not otherwise limit the application of any other provision of this part to the recipient or to other contexts, procedures, or services.

§ 75.300(f).

Furthermore, the Department of Health and Human Services alleges that

the Department also maintains a strong interest in taking a case-by-case approach to such determinations that will allow it to account for and minimize any harm an exemption could have on third parties and, in the context of RFRA, to consider whether the application of any substantial burden imposed on a person's exercise of religion is in furtherance of a compelling interest and is the least restrictive means of advancing that compelling interest.

Despite its pledge to uphold religious freedom, the Department fails to explain how the case-by-case RFRA treatment to religious exemption requests will guarantee protection of grant recipients' First Amendment rights. What is the religious accommodation process, and what is the standard by which the Department will analyze these requests? What does it mean to "consider the views" and how long will views be considered before a determination of whether to act or proceed is made? The peremptory treatment of religious accommodations includes significant ambiguity, casting doubt on the sincerity of the NPRM's concerns for the religious rights of concerned parties. It also unfairly places the burden on religious organizations to determine whether they can operate according to their conscience or not, rather than beginning with a position of religious accommodation. Indeed, the burdensome compliance requirements may discourage otherwise eligible entities from applying for or receiving certain federal grant funds.

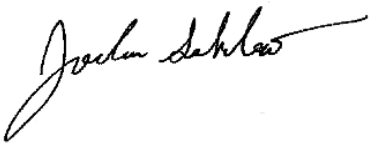
Furthermore, with the Department's application of *Bostock* to statutes authorizing Department grants, it is unclear how RFRA and the First Amendment will be balanced against this broad reading of *Bostock*. The Department must clarify that despite its reading of *Bostock*, it will not "compel affirmance of a belief" with which an individual disagrees. *Meriwether v. Hartop*, 992 F.3d 492, 503 (6th Cir. 2021) (quoting *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 573, 115 S. Ct. 2338, 132 L. Ed. 2d 487 (1995). Additionally, "where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message." *Wooley v. Maynard*, 430 U.S. at 717. The Department must clarify that individuals will not be compelled to advance the government's ideology and that *Bostock*'s alleged principles will not outweigh the First Amendment rights of individuals benefitting from the grant.

CONCLUSION

For the foregoing reasons, the ACLJ respectfully requests that HHS reject the proposed changes to 45 C.F.R. § 75.300. The changes HHS proposes misinterpret *Bostock* and violate fundamental First Amendment rights.

Very truly yours,

AMERICAN CENTER FOR
LAW & JUSTICE



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