

December 1, 2023

Via Federal eRulemaking Portal

Xavier Becerra
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

RE: EPPC Comment on HHS Proposed Rule “Strengthening Temporary Assistance for Needy Families (TANF) as a Safety Net and Work Program,” RIN: 0970-AC97, Docket No. 2023-21169

Dear Secretary Becerra:

We write in response to the Department of Health and Human Services (HHS) Administration for Children and Families’ (ACF) proposed rule, “Strengthening Temporary Assistance for Needy Families (TANF) as a Safety Net and Work Program.”¹ We are scholars at the Ethics and Public Policy Center (EPPC). Rachel N. Morrison is an EPPC Fellow, Director of EPPC’s HHS Accountability Project, and a former attorney at the Equal Employment Opportunity Commission. 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. Patrick T. Brown is a fellow in EPPC’s Life and Family Initiative and a former manager of strategic initiatives at Catholic Charities USA.

HHS is proposing “to amend the [TANF] program regulations” with the stated goal of “strengthen[ing] the safety net and reduc[ing] administrative burdens and increase[ing] program effectiveness.”² With this stated goal in mind, the proposed rule sets out seven proposals.³ Our comment focuses on the second of these proposals: “clarify when an expenditure is ‘reasonably calculated to accomplish a TANF purpose.’”⁴ Under this proposal, HHS adds subsection (c) that would require states to show that TANF funding is “reasonably calculated” to accomplish a TANF purpose according to a reasonable person standard if does not appear so to HHS.

¹ 88 Fed. Reg. 67697 (Oct. 2, 2023), available at <https://www.federalregister.gov/documents/2023/10/02/2023-21169/strengthening-temporary-assistance-for-needy-families-tanf-as-a-safety-net-and-work-program>.

² *Id.* at 67697.

³ *Id.* at 67698.

⁴ *Id.*

However, HHS fails to demonstrate a need for proposed subsection (c) as it already has successful enforcement of funding misuse.

Within this proposal, HHS singles out pregnancy centers as an example of programs that likely do not meet the reasonable person standard for funding that is reasonably calculated to accomplish a TANF purpose. HHS's discussion betrays HHS's ignorance about the full range of services that pregnancy centers provide. Contrary to HHS's mischaracterization, pregnancy centers' services satisfy all four TANF purposes. In line with other politically-motivated attacks on pregnancy centers. HHS's unwarranted targeting of pregnancy centers in the proposed rule functions to encourage states to stop providing pregnancy centers TANF funding and discourage states from providing TANF funding to pregnancy centers in the future. HHS's proposal harms pregnancy centers and the women and families they serve.

We urge HHS to abandon its proposed subsection (c) and drop its discussion targeting pro-life pregnancy centers.

I. Overview of HHS' Second Proposal

A. Congress passed the TANF Program to give States more flexibility in helping needy families.

As the purpose of the proposed rule is “to amend the [TANF] program regulations,”⁵ our analysis begins with a brief overview of the statute and related HHS regulations. Congress created Temporary Assistance for Needy Families (TANF) through the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. It provided much-needed reform to federal welfare programs by empowering states to assist needy families through block grants that would provide a range of benefits and services. Under the Act, states may use TANF grant funding “in any manner that is reasonably calculated” to achieve one or more of TANF's four purposes.⁶ Those purposes are to:

- (1) provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives;
- (2) end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage;
- (3) prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies; and
- (4) encourage the formation and maintenance of two-parent families.⁷

The Act explicitly explains that its purpose is to “increase the flexibility of States” in their efforts to advance these purposes.⁸ HHS has repeatedly acknowledged this purpose in the

⁵ *Id.* at 67697.

⁶ 42 U.S.C. § 604.

⁷ 42 U.S.C. § 601(a).

⁸ *Id.*

proposed rule. As the proposed rule notes, HHS' first set of final TANF regulations, from 1999, explained that the Department ...

... may not regulate State conduct or enforce any TANF provision except to the extent expressly provided by law. This limitation on Federal authority is consistent with the principle of State flexibility and the general State and congressional interest in shifting more responsibility for program policy and procedures to the States.⁹

The proposed rule also states, "We are mindful that the TANF statute sought to "increase the flexibility of states."¹⁰

B. HHS proposes to add subsection (c) to curb abuse of TANF funds.

One of the problems the proposed rule is intended to address is that states have sometimes played loose with their TANF funds. As the proposed rule explains, "It has become clear that, in some instances, states have indeed undercut statutory requirements by using TANF ... funds to pay for activities with, at best, tenuous connections to any TANF purpose."¹¹

Ensuring TANF dollars are spent to help low-income individuals and families effectively and according to the four TANF purposes is a goal that can be shared by many across the political spectrum. Recent media reports have found concerning examples of TANF funds being used to construct collegiate volleyball stadiums¹² or overreaching child protective services investigations that can punish the very parents those programs are intended to help.¹³ We agree that this is a problem that needs to be addressed.

We are less confident, however, about HHS's proposed solution to address this problem. HHS proposes to amend 45 CFR § 263.11 (What uses of Federal TANF funds are improper?) to add a new subsection (c) that establishes the "reasonable person" standard for assessing whether an expenditure is "reasonably calculated to accomplish the purpose of this part."¹⁴ Proposed subsection (c) states:

If an expenditure is identified that does not appear to HHS to be reasonably calculated to accomplish a purpose of TANF (as specified at § 260.20 of this chapter), the State must show that it used these funds for a purpose or purposes

⁹ 88 Fed. Reg. at 67701 (quoting 64 Fed. Reg. 17720, 17725 (April 12, 1999)).

¹⁰ *Id.* at 67703 (quoting 42 U.S.C. § 601(a)).

¹¹ *Id.*

¹² Ashton Pittman & William Pittman, *In-Depth: How Brett Favre Got \$6 Million In Welfare Funds For A Volleyball Stadium*, Mississippi Free Press (Sept. 16, 2022), <https://www.mississippifreepress.org/27465/in-depth-how-brett-favre-secured-6-million-in-welfare-funds-for-a-volleyball-stadium>.

¹³ Eli Hager, *A Mother Needed Welfare. Instead, the State Used Welfare Funds to Take her Son*, Pro Publica (Dec. 23, 2021, 5 AM), <https://www.propublica.org/article/a-mother-needed-welfare-instead-the-state-used-welfare-funds-to-take-her-son>.

¹⁴ 88 Fed. Reg. at 67702.

that a reasonable person would consider to be within one or more of the four purposes of the TANF program (as specified at § 260.20 of this chapter).¹⁵

In the preamble, HHS explains that proposed subsection (c) would establish the standard HHS “will apply to determine whether expenditures are not reasonably calculated under section 604(a)(1) and thus warrant a penalty under the misuse of funds penalty authority in section 609(a)(1).”¹⁶ According to HHS, improper use of TANF funds is especially problematic under purposes three and four.¹⁷

HHS says that its determination under subsection (c) is “fact-specific” and that it will consider several factors “as appropriate,” including:

- (1) evidence that the expenditure actually accomplished a TANF purpose;
- (2) evidence that prior expenditures by the state or another entity for the same or a substantially similar program or activity actually accomplished a TANF purpose;
- (3) academic or other research indicating that the expenditure could reasonably be expected to accomplish a TANF purpose;
- (4) whether the actual or expected contribution of the expenditure to accomplishing a TANF purpose is reasonable in light of the extent of that expenditure; and
- (5) the quality of the reasoning (as outlined below) underlying the state’s explanation that the expenditure accomplished or could be expected to accomplish a TANF purpose.¹⁸

The proposed rule further states that “if a state had concerns about whether an expenditure was reasonably calculated to accomplish a TANF purpose, it could, though need not, request the Department’s views before proceeding.”¹⁹ Indeed, HHS recognizes that merely stating that it will use the “reasonable person” standard and conduct a “fact-specific” inquiry does not give states much notice as to what HHS believes they can and cannot do with their TANF funds. As such HHS provides some examples of programs, it believes, are not reasonably calculated to accomplish a specific TANF purpose.

C. HHS cites funding to pregnancy centers as an example of programs that “likely do not meet the reasonable person standard.”

Unfortunately, when it comes to citing examples of problematic uses, HHS says nothing about documented abuses regarding volleyball stadiums or overreaching child protective services. Instead, HHS singles out pregnancy centers.

¹⁵ *Id.* at 67720.

¹⁶ *Id.* at 67702.

¹⁷ *Id.* at 67703.

¹⁸ *Id.*

¹⁹ *Id.* at 67704.

Under discussion of purpose three, the proposed rule states:

[J]urisdictions have sought to claim other expenditures under TANF purpose three where the connection to preventing and reducing out-of-wedlock pregnancies appears to be far more tenuous or even non-existent.... [P]rograms that only or primarily provide pregnancy counseling to women only after they become pregnant likely do not meet the reasonable person standard because the connection to preventing and reducing out-of-wedlock pregnancies is tenuous or non-existent, and therefore do not accomplish purpose three. States that provide funding for these types of programs, including through entities sometimes known as crisis pregnancy centers or pregnancy resource centers, must be able to show that the expenditure actually accomplishes the TANF purpose that prior expenditures by the state or another entity for the same or a substantially similar program or activity actually accomplished the TANF purpose, or that there is academic or other research indicating that the expenditure could reasonably be expected to accomplish the TANF purpose. If pregnancy prevention programming is a part of an ongoing program, such as year round after-school programming, only those costs associated with delivery of pregnancy prevention should be cost allocated and non-TANF funds used to fund other activities.²⁰

HHS provides no specific evidence or cites to any real-world examples of states that have wrongly provided pregnancy centers TANF funds.

The proposed rule further provides examples of activities it believes are “plainly reasonably calculated to prevent and reduce out-of-wedlock pregnancies” under purpose three.²¹ These activities include “programs that provide comprehensive sex education, family planning services, pregnancy prevention programs, and community mobilization services for at risk youth that increase access to pregnancy prevention programs for teens.”²²

II. The proposed rule’s focus on pregnancy centers is unwarranted and unacceptable.

A. The proposed rule betrays ignorance about the full range of services that pregnancy centers provide.

Our first objection to the proposed rule is that it appears to misunderstand the full range of services provided by pregnancy centers (sometimes called “crisis pregnancy centers,” “pregnancy help centers,” or “pregnancy resource centers”). The proposed rule suggests that, as far as HHS is concerned, pregnancy centers provide “programs that only or primarily provide pregnancy counseling to women only after they become pregnant.”²³ This materially

²⁰ *Id.* at 67705

²¹ *Id.*

²² *Id.*

²³ *Id.*

misrepresents what pregnancy centers do and the critical roles they play in the communities they serve.

To counter this error, we provide here background on the history of pregnancy centers and the services they offer. Pregnancy centers are “faith-based, community-based, not-for-profit organizations which first began to appear in the U.S. in the late 1960s, as abortion was becoming legal, to provide care and resources to assist women with immediate and ongoing needs related to unexpected pregnancy. Today, pregnancy centers provide an expanded range of essential and professional care encompassing support services, medical care, and resources.”²⁴ These services include:

- pregnancy testing;
- options consultation (including education on parenting and adoption, parenting and child raising, and abortion);
- medical services (early obstetrical ultrasounds, medical exams, STD testing and treatment, and increasingly other health services);
- prenatal and parenting education;
- material assistance;
- sexual risk avoidance education;
- after-abortion recovery support;
- referrals for medical care; and
- linkages to vital community and public health resources.²⁵

As Janet Durig, the clinic director of Capitol Hill Pregnancy Center in DC, recently explained, many “totally misunderstand the extensive services that we offer women in crisis pregnancies.”²⁶ She elaborated, “we offer pregnancy testing and we offer options, education, but we also go way beyond this with walking with them for months, if not sometimes years, and helping them with their child with material resources, emotional resources, and spiritual support.”²⁷

Pregnancy Centers offer their services usually for free or at low-cost.²⁸ This practical assistance helps improve outcomes for women, their children, and their families.

²⁴ Moira Gaul, *Fact Sheet: Pregnancy Centers – Serving Women and Saving Lives (2020 Study)*, Charlotte Lozier Inst. (updated July 2021), <https://lozierinstitute.org/fact-sheet-pregnancy-centers-serving-women-and-saving-lives-2020/>.

²⁵ *Id.*

²⁶ Mary Margaret Olohan, *Google Maps Removed DC Pregnancy Center*, Daily Signal, Nov. 28, 2023, <https://www.dailysignal.com/2023/11/28/google-maps-removed-dc-pregnancy-center-offered-planned-parenthood-instead/>.

²⁷ *Id.*

²⁸ Moira Gaul, *Fact Sheet: Pregnancy Centers – Serving Women and Saving Lives (2020 Study)*, Charlotte Lozier Inst. (updated July 2021), <https://lozierinstitute.org/fact-sheet-pregnancy-centers-serving-women-and-saving-lives-2020/>.

There are over 2,700 pregnancy centers in the United States.²⁹ While pregnancy centers receive some state and federal funding, such as through TANF, the vast majority of their funding (at least 90%) is raised at the community level at the large majority of pregnancy centers (over 80%) do not receive any government funding.³⁰ In 2019, pregnancy centers served nearly 2 million people and their services and material assistance was valued at over \$266 million.³¹

Pregnancy centers and federally funded health clinics outnumber Planned Parenthood locations 14 to 1.³² As our EPPC colleague Alexandra DeSanctis explains,

[T]hough health clinics and pregnancy centers offer a much greater variety of actual health-care services to a much higher number of people, the funding they receive pales in comparison to the government money funneled to Planned Parenthood:

Federally Qualified Health Centers (FQHC) receive funds from the HRSA Health Center Program to provide primary care services to vulnerable and underserved populations on a sliding scale. Pregnancy centers are typically privately funded and focused on supporting pregnant women facing difficult circumstances with medical care and referrals, education, mentoring, and material support at virtually no cost to the client. Planned Parenthood meanwhile received over \$600 million in government funding in 2019 and focuses on abortion, reaching its highest-ever number of over 350,000 U.S. abortions in 2019—96.4% of its pregnancy resolution services reported in its latest service data.³³

Pregnancy centers are arguably more important now than ever. As HHS is aware, last year the Supreme Court overruled *Roe v. Wade* and returned “the issue of abortion to the people’s elected representatives.”³⁴ In the wake of the Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization*, services that provide material support, mentorship, health care, and community-based resources to women facing an unexpected pregnancy are needed more than ever before. Most surveys of women who choose to seek out abortion suggest many are

²⁹ Alexandra DeSanctis, *Health Clinics and Pregnancy Centers Outnumber Planned Parenthood Facilities 14 to 1*, National Review (July 21, 2022, 10:15 AM), <https://www.nationalreview.com/corner/health-clinics-and-pregnancy-centers-outnumber-planned-parenthood-14-to-1/>.

³⁰ Moira Gaul, *Fact Sheet: Pregnancy Centers – Serving Women and Saving Lives (2020 Study)*, Charlotte Lozier Inst. (updated July 2021), <https://lozierinstitute.org/fact-sheet-pregnancy-centers-serving-women-and-saving-lives-2020/>.

³¹ *Id.*

³² Alexandra DeSanctis, *Health Clinics and Pregnancy Centers Outnumber Planned Parenthood Facilities 14 to 1*, National Review (July 21, 2022, 10:15 AM), <https://www.nationalreview.com/corner/health-clinics-and-pregnancy-centers-outnumber-planned-parenthood-14-to-1/>.

³³ *Id.*

³⁴ *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2243 (2022).

driven by financial concerns or a lack of support from their partner.³⁵ Pregnancy centers can help provide low-income women and families with resources, such as childcare assistance referrals, that can make it easier to stay connected to the workforce. The medical care they provide can help women avoid complications from pregnancy and ensure a healthy start for moms and babies. Pregnancies that have begun as out-of-wedlock have led to marriage when mothers and fathers are given the support they need. Thus, the purposes of the TANF program—of reducing poverty, reducing dependence, and encouraging the formation of two-parent families—are expressly and materially advanced by these important services provided by pregnancy centers.

Unless HHS understands the full range of services that pregnancy centers provide it cannot begin to appreciate (and honor) why so many states have used the “flexibility” Congress gave them to allocate TANF funding to pro-life pregnancy centers.³⁶

B. Contrary to HHS’s mischaracterization, pregnancy centers’ services satisfy all four TANF purposes.

HHS should be embarrassed that it issued a proposed rule that called out states for extending TANF funds to pregnancy centers without giving any effort to comprehend and fairly represent the full scope of the work pregnancy centers do. In the discussion under purpose four, HHS explains “Only the programming that is reasonably calculated to meet purpose four or met another TANF purpose could be funded with TANF.”³⁷ Yet under purpose three HHS failed to even consider how pregnancy centers work not only can fulfill purpose three, but *all* four purposes.

This blatant oversight appears to be a result of the Biden administration’s zeal to promote its radical pro-abortion policies. The discussion in the rule’s preamble creates a presumption that funding pregnancy centers is impermissible. The burden then shifts to states to *prove* that such funding is “reasonably calculated to accomplish a purpose of TANF.

Below are a few obvious ways in which services pregnancy centers provide can satisfy the TANF purposes.

³⁵ See M Antonia Biggs, Heather Gould, & Diana Greene Foster, *Understanding Why Women Seek Abortions in the US*, 13 BMC Women’s Health 29 (2013), available at <https://bmcmwomenshealth.biomedcentral.com/articles/10.1186/1472-6874-13-29>; *Id.* at 5 (“A financial reason (40%) was the most frequently mentioned . . . reason for seeking abortion.”), 6 (“Nearly one-third (31%) of respondents gave partner-related reasons for seeking an abortion.”).

³⁶ See Jeanneane Maxon, *Fact Sheet: State Alternatives to Abortion Funding*, Charlotte Lozier Inst. (updated Oct. 13, 2023), <https://lozierinstitute.org/fact-sheet-state-alternatives-to-abortion-funding/> (“At least five (5) states distribute a portion of their TANF (Temporary Assistance for Needy Families) funding to [Pregnancy Help Organizations]. . . . These states include Indiana, Louisiana, Missouri, Ohio, and Pennsylvania.”); see also Rachel Wormer, *Mapping Deception: A Closer Look at How States’ Anti-Abortion Center Programs Operate*, Equity Forward (updated Sept. 2021), <https://equityfwd.org/research/mapping-deception-closer-look-how-states-anti-abortion-center-programs-operate> (explaining that several states have provided TANF funding to “alternatives for abortion programs,” including Indiana, Louisiana, Michigan, Missouri, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, and Texas).

³⁷ 88 Fed. Reg. at 67705-06

- HHS summarily concludes that “pregnancy counseling to women only after they become pregnant likely ... do not accomplish purpose three.” We think this is plainly wrong. Pregnancy counseling encourages women and their partners to understand the humanity of their unborn child and welcome that child as part of their lives and their family. This satisfies **purpose three** because, as noted above, pregnancies that have begun out of wedlock often lead to marriage (and the elimination of out of wedlock pregnancies) when mothers and fathers are given the encouragement and support they are longing for. For the same reasons, such counseling satisfies **purpose four** by encouraging the formation and maintenance of two-parent families by making the unborn child part of the family.
- Pregnancy centers provide prenatal and parenting education satisfy **purpose one** by providing assistance so that children (i.e., the unborn child) can be cared for in their own homes during and after birth.
- Options consultation, such as parenting and adoption by family members, satisfies **purpose one** by providing assistance so that children (i.e., the unborn child) can be cared for in their own homes or in the homes of relatives after birth.
- Material assistance satisfy **purpose one** by providing assistance to needy families so that children may be cared for in their own homes or in the homes of relatives and can help prevent the dependence on government benefits (**purpose two**).
- Linkages to vital community and public health resources, including job supports and marriage supports satisfies **purpose two** by helping end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage, and **purpose four** by encouraging the formation and maintenance of two-parent families.

By HHS’s own account, “programmatically evidence” that pregnancy centers’ programs have contributed to one or more of the statutory purposes “could be sufficient for a reasonable person to find that an activity is reasonably calculated to accomplish a TANF purpose.”³⁸

C. HHS’s scrutiny fits with other politically-motivated attacks on pregnancy centers.

HHS’s unfortunate to decision to overlook obvious abuse of TANF funds and threaten states that allocate TANF funds to pregnancy centers is consistent with a growing trend of individuals, states, and elected officials unjustly targeting pro-life pregnancy centers because of their pro-life views.

Since the Supreme Court’s draft *Dobbs* opinion overturning *Roe v. Wade* was leaked in early May 2022, there have been at least 88 attacks and acts of vandalism on pregnancy centers

³⁸ *Id.* at 67704.

and pro-life groups.³⁹ These attacks, many of which are organized by domestic terror groups Jane’s Revenge and Ruth Sent Us, include “arson and firebombing; smashed windows; graffiti with threatening messages; destruction of signage; gluing of locks to prevent staff from entering; keying of staff members’ cars; and other acts of violence and vandalism. In at least one case, the home of a board member of a pregnancy resource center was attacked.”⁴⁰

Despite the wave of violent protests and vandalism against pregnancy centers, Vice President Kamala Harris told the Democratic Attorneys General Association Conference, “You are taking on rightly, the crisis pregnancy centers.”⁴¹ As if pregnancy centers helping women and families in need is a public crisis that needs to be dealt with.

Former Democrat presidential candidate and Senator Elizabeth Warren introduced a bill in 2022 targeting pregnancy centers, purporting to “prohibit disinformation in the advertising of abortion services.”⁴² As the editors of *National Review* aptly explained:

Under Warren’s bill, charities could be fined \$100,000 or “50 percent of the revenues earned by the ultimate parent entity” of the charity for violating the act’s “prohibition on disinformation” related to abortion. But the legislation itself does not define prohibited speech. Warren’s bill directs the Federal Trade Commission to “promulgate rules to prohibit a person from advertising with the use of misleading statements related to the provision of abortion services.” Warren’s bill would thus turn the Federal Trade Commission into a national abortion disinformation board.⁴³

This is reminiscent other attempts by governments to use the law to target pregnancy centers. For example, in 2015, California passed a law that forced California pro-life pregnancy centers to post signs advertising free abortions.⁴⁴ The Supreme Court ultimately struck down the law for violating the First Amendment free speech rights of the pro-life pregnancy centers.⁴⁵

In June 2022, twenty-one Members of Congress sent a letter to Google, asking it to suppress search results for pregnancy centers, falsely claiming the pregnancy centers are “fake

³⁹ *Tracking Attacks on Pregnancy Centers & Pro-Life Groups*, CatholicVote (last updated Sept. 28, 2023), <https://catholicvote.org/pregnancy-center-attack-tracker/> (listing known attacks).

⁴⁰ *Id.*

⁴¹ Max Thornberry, Kamala Harris praises Dem AGs for ‘taking on’ crisis pregnancy centers rocked by violence, Fox News (Sept. 22, 2022, 10:37 PM), <https://www.foxnews.com/politics/kamala-harris-praises-dem-ags-taking-crisis-pregnancy-centers-rocked-violence>; see also Denise Harle, *No, Kamala Harris, Pregnancy Centers Aren’t the Enemy*, National Review (Oct. 20, 2022, 2:57 PM), <https://www.nationalreview.com/2022/10/no-kamala-harris-pregnancy-centers-arent-the-enemy/>.

⁴² The Editors, Elizabeth Warren’s War on Pregnancy Resource Centers, National Review (July 7, 2022, 6:30 AM), <https://www.nationalreview.com/2022/07/elizabeth-warrens-war-on-pregnancy-resource-centers/>.

⁴³ *Id.*

⁴⁴ Alexandra DeSanctis, *California’s War on Crisis Pregnancy Centers*, National Review (Oct. 20, 2016, 8:00 AM), <https://www.nationalreview.com/2016/10/california-fact-act-abortion-advertisements-pro-life-crisis-pregnancy-centers/>.

⁴⁵ *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018).

clinics” because they do not provide or promote abortion.⁴⁶ The office of New York Attorney General Letitia James sent a similar letter a week and a half later.⁴⁷

Just this week, DC’s pregnancy center was “incorrectly” removed from Google Maps; Planned Parenthood was recommended in its place.⁴⁸ When *The Daily Signal* reached out to Google for comment, Google confirmed that the pregnancy center’s location had been removed. But shortly after the call the pregnancy center was available once again on Google Maps.⁴⁹ While the removal may have been accidental, the center was vandalized last year and its 2022 December banquet celebrating women and children helped by the center was rudely interrupted by pro-abortion protestors.⁵⁰

All of these statements and acts unjustly target pregnancy centers who are serving women and families in need. HHS should not repeat those mistakes in this rule.

III. HHS must abandon its attacks on pregnancy centers in its final rule.

A. HHS has failed to demonstrate that its proposal would help fix an existing problem.

As noted above, we agree with HHS that there have been instances where states abused the flexibility that Congress gave them and misallocated TANF funds. But HHS needs to do more than just cite a problem to justify its rulemaking. An agency’s rule is “arbitrary and capricious” if its “explanation for its decision ... runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”⁵¹ An agency must “articulate a satisfactory explanation for its action,” including a “rational connection between the facts found and the choice made.”⁵²

Here, HHS already has enforcement power to impose penalties for misuse of TANF funds. In fact, its website currently touts “enforcement success stories involving TANF programs.”⁵³ These “success stories” indicate that no lack of “clarity” precludes HHS from

⁴⁶ Letter from 21 Members of Congress to Sundar Pichai, Chief executive Officer, Alphabet Inc. (June 17, 2022), <https://reason.com/wp-content/uploads/2022/06/26F26BB28841042A7931EEC58AC80E08.anti-abortion-letter-to-google-final.pdf>.

⁴⁷ Letter from Darsana Srinivasan, Chief, Health Care, Bureau, Office of the Attorney General of New York, to Halimah DeLaine Prado, General Counsel, Google (June 28, 2022), https://ag.ny.gov/sites/default/files/2022.06.28_letter_to_google_re_cpcs.pdf.

⁴⁸ Mary Margaret Olohan, *Google Maps Removed DC Pregnancy Center*, Daily Signal (Nov. 28, 2023), <https://www.dailysignal.com/2023/11/28/google-maps-removed-dc-pregnancy-center-offered-planned-parenthood-instead/>.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

⁵² *Id.*

⁵³ HHS, *Enforcement Success Stories Involving TANF Programs: Summary of Selected OCR Compliance Reviews and Complaint Investigations*, <https://www.hhs.gov/civil-rights/for-providers/compliance-enforcement/examples/needy-families/index.html>.

acting now—under existing regulations—to address obvious TANF abuses. In short, HHS fails to demonstrate a problem that proposed subsection (c) is actually calibrated to solve, making its proposal arbitrary and capricious.

Further, subsection (c) opens the door for abuse by HHS and undermines the flexibility states are guaranteed under TANF. As will all misuse of TANF funds, HHS already has means at its disposal to pursue enforcement via a penalty without creating an onerous burden on states to preemptively *prove* its use because someone at HHS does not think it is “reasonably calculated to accomplish a purpose of TANF.”

In its final rule, HHS should abandon proposed subsection (c). If, however, HHS chooses to keep subsection (c), we ask that HHS address the following concerns.

- Who at HHS will make the determination under subsection (c) whether TANF funding does not appear to accomplish a TANF purpose?
- How will HHS ensure that such determinations under subsection (c) are not ideological or partisan?
- How will HHS ensure that staff making these determinations will not target “disfavored” organizations, such as pro-life pregnancy centers, and states that provide funds to such disfavored organizations?
- Is there an appeal process for any determinations that states disagree with?
- Why does HHS believe that it is in a good position to assess whether a “reasonable person” would think that a pregnancy center would advance TANF purposes, given that HHS’s political leadership advocates for a radical pro-abortion agenda that does reflect Congress’ priorities or the American people’s convictions,⁵⁴ and given that HHS staff overwhelming support the Democratic Party?⁵⁵
- 42 U.S.C. § 617 states “No officer or employee of the Federal Government may regulate the conduct of States under this part or enforce any provision of this part, except to the extent expressly provided in this part.” Does HHS view subsection (c) as subject to this limitation on federal authority? If not, why not. If yes, how is HHS’s reasonable person determination under subsection (c) not an officer or employee of the federal government regulating the

⁵⁴ See Rachel N. Morrison, *The Biden Administration’s Post-Dobbs, Post-Roe Response*, FedSoc Blog, July 13, 2022, <https://fedsoc.org/commentary/fedsoc-blog/the-biden-administration-s-post-dobbs-post-ro-e-response>; see also 88 Fed. Reg 23506, 23420 and n.178 (HHS citing favorably a report from a “reproductive justice” group that laments that states are using reports from “designated mandatory reporters” and “police recovery of fetal remains” to enforce laws against second and third trimester “self-managed” chemical abortions).

⁵⁵ See Brian D. Feinstein and Abby K. Wood, *Divided Agencies*, 95 S. Cal. L. Rev. 731, 759 (2022) (data collected during the 2013-2014 election cycle shows that the average HHS career was 1.27 standard deviations to the left ideologically of the average campaign donor that cycle—more liberal than 90 percent of donors in that campaign cycle, and more liberal than Secretary Burrell, who was (only) 1.14 standard deviations to the left of the average campaign donor.); see also Ralph R. Smith, *Tallying Political Donations from Federal Employees and Unions*, FedSmith, Dec. 27, 2016, <https://www.fedsmith.com/2016/12/21/tallying-political-donations-from-federal-employees-and-unions> (during 2016 election cycle, 94.8% of political donations from HHS employees went to support Democratic candidates).

conduct of states or conducting enforcement except as expressly provided statutorily?

B. HHS should abandon its inappropriate and uninformed attack on pregnancy centers.

Finally, HHS should abandon this latest attempt to abuse its regulatory authority to advance pro-abortion policy interests that Congress does not share. As shown above, HHS is intentionally targeting pregnancy centers while seeking to encourage funding of Planned Parenthood and other clinics that provide “family planning” services.

In this proposal, HHS singles out a disfavored grantee (pro-life pregnancy centers) not merely alleged impermissible services (pregnancy counseling under purpose three), demonstrating its bias and overt hostility towards the pro-life viewpoint and pregnancy centers.

The proposed rule fails to provide any evidence or citation to instances where pregnancy centers have impermissibly received TANF funding. Rather the discussion targeting pregnancy centers and suggesting such funding will require justification by research and evidence appears to be calculated to remove TANF funding from to pregnancy centers even without a showing of misuse. Indeed, that appears to be the very point.

As proposed, this rule will not only encourage states to remove TANF funding from pregnancy centers to avoid any onerous evidence gathering, but also discourage states from providing TANF funding for pregnancy centers in the future. This rule will also give cover for states to remove even longstanding TANF funding from pregnancy centers as Pennsylvania just did,⁵⁶ further harming pregnancy centers and the women and families they serve.

We urge HHS to drop the unwarranted discussion of pregnancy centers from its final rule. If HHS declines to do so, we ask that HHS acknowledge the full range of services pregnancy centers provide and the multitude of reasons why states have or might correctly determine that pregnancy centers qualify for TANF funds. Specifically, HHS should incorporate the examples we have provides as to why a state might reasonably determine that a pregnancy center satisfies any of the four purposes Congress designated for TANF funds.

If HHS disagrees with our assessment, HHS should make that disagreement transparent and declare that it does not believe that pregnancy centers provide *any* services that would satisfy any of the four TANF purposes.

We also ask that HHS clarify the following points:

- Does HHS consider abortion counseling or abortion procedures activities that satisfy any of the four TANF purposes? If so, which one(s).

⁵⁶ See Kristin Hunt, *Pennsylvania Ends State Funding of Anti-Abortion Group Real Alternatives*, Philly Voice (Aug. 4, 2023), <https://www.phillyvoice.com/pennsylvania-stops-funding-anti-abortion-real-alternatives-crisis-pregnancy-centers/> (ending TANF funding of Real Alternatives which had received millions in TANF funds since the 1990s).

- Under which TANF purpose(s) have states provided pregnancy centers TANF funding?
- Does HHS have any evidence that states have impermissibly provided pregnancy centers TANF funding? If so, what evidence? If not, why does HHS single out pregnancy centers for discussion in its proposed rule?
- Does HHS believe that pregnancy centers can never, or rarely, qualify for TANF funding?
- Will HHS ask all states that provide TANF funding to pregnancy center to provide research or evidence that such funding supports TANF purposes?
- Would a relevant report from the Charlotte Lozier Institute qualify as “academic or other research indicating that the expenditure could reasonably be expected to accomplish the TANF purpose”?

Conclusion

In finalizing its TANF Rule, HHS should not adopt proposed subsection (c) and, at a minimum, drop its discussion targeting pro-life pregnancy centers.

Sincerely,

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