ETHICS AND PUBLIC POLICY CENTER

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EO 12866 Meeting
"Health and Human Services Grant Regulation"
RIN 0945-AA19

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Thank you for the opportunity[1] to provide comments on OIRA's review of the Department of Health and Human Services' (HHS) proposed rule, "Health and Human Services Grants Regulation," RIN 0945-AA19 ("Proposed Rule").[2] My name is Eric Kniffin. I am a fellow at the Ethics and Public Policy Center and a member of the HHS Accountability Project. I also served as an attorney in the DOJ Civil Rights Division under Presidents George W. Bush and Obama. I have also been involved in extensive civil rights litigation against HHS as counsel for the Becket Fund for Religious Liberty and in private practice, including successful lawsuits against HHS's contraception mandate and HHS's original Section 1557 transgender mandate.

This comment follows other comments that my colleagues in the EPPC HHS Accountability Project and I have submitted to the executive branch regarding this proposed rulemaking:

- On June 20, 2023, my colleague Natalie Dodson and I met with OIRA officials to discuss concerns with an anticipated proposed rule under 45 CFR Part 75;[3] and
- On September 1, 2023, Natalie and I submitted a public comment to HHS opposing the Proposed Rule at issue here.[4]

For the reasons set out below, and as set out in more detail in our public comment to HHS, the proposed rulemaking is contrary to law. To start, HHS's interpretation of *Bostock* is

[1] As OMB cancelled a previous EO 12866 meeting it scheduled with EPPC on another rule, we are glad you are willing to hear EPPC scholars' input on this rule. *See* Rachel N. Morrison, *Biden and Becerra Kill Democratic Norms in Rush to Fund Big Abortion*, National Review, Oct. 8, 2021, https://www.nationalreview.com/bench-memos/biden-and-becerra-kill-democratic-norms-in-rush-to-fund-big-abortion/.

[2] 88 Fed. Reg. 63392 (Sept. 14, 2023).

[3] EPPC HHS Accountability Project, Comments at EO 12866 Meeting on RIN 0945-AA19 (June 21, 2023), https://eppc.org/wp-content/uploads/2023/06/EPPC-Scholars-EO-12866-Comment-on-the-Health-and-Human-Service-Grants-Proposal-1.pdf.

[4] EPPC HHS Accountability Project, EPPC Scholars Comment Opposing HHS OCR's "Health and Human Services Grants Regulation," RIN 0945-AA19 (Sept. 11, 2023), https://eppc.org/wp-content/uploads/2023/09/EPPC-Comment-Opposing-HHS-Grants-NPRM.pdf (EPPC Public Comment).

implausible. The Supreme Court did not, as HHS claims, conclude that Title VII bars discrimination on the basis of gender identity. Moreover, the Supreme Court explicitly denied that its interpretation of Title VII applied to other statutes—not to Title IX and not to the thirteen statutes listed in the proposed rule. HHS has no mandate from Congress and no duty under *Bostock* to redefine what discrimination on the basis of sex means under these laws.

Moreover, 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 HHS claims to "take[] seriously its obligations to comply with Federal religious freedom laws, including the First Amendment and RFRA,"[5] the proposed religious exemption process is inadequate and not reflective of an agency "seriously" considering religious freedom laws.

I urge OIRA and HHS to take this final chance to reverse course, acknowledge the fundamental problems with this proposed rule, and abandon this attempt to rewrite more than a dozen federal statutes.

1. The NPRM is procedurally deficient under the Administrative Procedure Act.

- Our public comment details three significant deficiencies in the proposed rule, instances where we believe HHS has failed to meet its obligations under the APA:[6]
    - **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.
    - **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.
    - **HHS' proposed regulatory standard does not provide clarity.** For 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.

[5] 88 Fed. Reg 44754.

[6] EPPC Public Comment at 3.

2. HHS's treatment of caselaw interpreting *Bostock* is cursory, arbitrary, and capricious.

- The proposed rule relies in substantial part on HHS's assertion that the Supreme Court's interpretation of Title VII in *Bostock v. Clayton County*[7]—which held that discrimination on the basis of sex under that law encompasses discrimination based on sexual orientation and transgender status—applies first to sex discrimination under Title IX and more broadly to each of the federal laws listed in proposed 45 CFR 75.300(e).

- As we explained in our public comment, HHS'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.[8]

- To the contrary, Title IX was not amended by *Bostock*, and *Bostock* does not support the need for new rulemaking under Section 1557.

- 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."[9] 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. It is arbitrary and capricious and contrary to law for HHS to claim *Bostock* requires reinterpreting and expanding thirteen 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.
- ***Bostock* did not hold that any federal law prohibits discrimination on the basis of gender identity.** HHS claims in the NPRM that the Supreme Court held in *Bostock* that Title VII "prohibits discrimination on the basis of . . . gender identity."[10] 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.[11]

- 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 quote, *Bostock*

[7] 140 S. Ct. 1731 (2020).

[8] EPPC Public Comment at 3-8.

[9] *Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021).

[10] 88 Fed. Reg. at 44752.

[11] *Bostock*, 140 S. Ct. at 1739.

premised its decision on the assumption that "sex" refers only to the "biological distinctions between male and female." [12]

- Given that HHS contends that it is bound by *Bostock*, HHS must assume in this rulemaking that "sex" refers to "biological distinctions between male and female" and that "sex" is incompatible with a gender spectrum or fluidity. It would be arbitrary and capricious for HHS to base a new grants rule on an interpretation of *Bostock* that is at odds with the opinion itself.
- **The NPRM's treatment of caselaw interpreting *Bostock* is arbitrary and capricious.** Given that the NPRM rests entirely on HHS's 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 such exclusion was permitted by Title IX's "express statutory and regulatory carve-outs" for living and bathroom facilities). [13]

- 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.
- Our public comments lists a few of the cases that HHS must consider in interpreting and applying *Bostock.* [14] HHS cannot, consistent with its obligations under the APA, assert that *Bostock* applies to more than a dozen statutes without dealing with the full range of caselaw 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.

3. The NPRM's proposed conscience and religious objection process is an empty gesture.

- HHS states in the NPRM that it "takes seriously its obligations to comply with Federal religious freedom laws, including the First Amendment and RFRA." I applaud HHS for affirming its legal obligations and pledging to "comply with these legal obligations." I do

[12] *Id.* at 1739.

[13] 88 Fed. Reg. at 44752.

[14] EPPC Public Comment at 5-8.

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.

- I 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. I 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.[15] I also incorporate our public comment on the HHS Grants proposed rule, which outlines our critique of the proposed procedures to respond to religious liberty protections.[16]
- 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***. Unfortunately, the proposed rule makes no commitment and offers the public no clarity on these critical issues.
- While I agree that any investigation should be paused until a final determination has been made, based on the Department's past acts, ***I 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.
- 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 has proposed § 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.
- As HHS is aware, 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

[15] *See* EPPC HHS Accountability Project, EPPC Scholars Comment Opposing "Nondiscrimination in Health Programs and Activities," RIN 0945–AA17 (Oct. 3, 2022), https://eppc.org/wp-content/uploads/2022/10/EPPC-Scholars-Comment-Opposing-1557-Proposed-Rule.pdf. Pages 35-38 of the HHS Accountability Project's public comment address the NPRM's proposed procedures for addressing religious liberty concerns.

[16] *Id*. at 8-15.

law, not through broad platitudes such as those offered in this NPRM but in concrete proposals gleaned from HHS's experience interacting with faith-based service providers and—where necessary—from the many losses that HHS has suffered in court in religious liberty litigation.

- Since the proposed rule would implicate conscience and religious freedom concerns, HHS should consult with religious freedom experts, including the career professionals in the (former) Conscience and Religious Freedom Division ("CRFD"). We ask HHS to clarify how it will evaluate requests for religious and moral exemptions. I 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. These career professionals, who have 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.[17] 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.[18]
- I 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.
- HHS states that "OCR would also consider the application of Federal conscience and religious freedom laws, where relevant."[19] But since HHS recently withdrew the

[17] 88 Fed. Reg. 12,955 (Feb. 25, 2023) (Statement of Organization), https://www.federalregister.gov/documents/2023/03/01/2023-03892/statement-of-organization.

[18] *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/.

[19] 87 Fed. Reg. 47867.

delegation of authority from OCR to enforce RFRA,[20] any perfunctory statement that HHS will comply with and follow RFRA and other conscience protection laws is suspect.

- Accordingly, I call on HHS to *explain in detail* how it intends to uphold its duty to enforce conscience and religious freedom protection laws in relation to its proposed regulations.
- **HHS 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."[21] The Court flagged three doctrines protecting religious liberty it thought relevant to claims of sex discrimination:

    1. Title VII's religious organization exemption, which allows religious organizations to employ individuals "of a particular religion"[22];

    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'"[23]; 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."[24]

- 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"[25] 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.

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[20] 86 Fed. Reg. 67067.

[21] *Bostock*, 140 S. Ct. at 1754.

[22] 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).

[23] *Bostock*, 140 S. Ct. at 1754 (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188 (2012)).

[24] *Id.* (citing 42 U.S.C. § 2000bb-3).

[25] 88 Fed. Reg. at 44754.

- **HHS 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*.[26] 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.[27]
- The Fifth Circuit's analysis on the merits[28] 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.'"[29] "Nowhere was that commitment made more evident than with the passage of RFRA, which 'was designed to provide very broad protection for religious liberty.'"[30]
- 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.[31]
- Though courts are split as to whether RFRA applies to a lawsuit between only private parties,[32] 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.
- If HHS believes *Braidwood* was wrongly decided, it should explain in detail the errors it finds in the Fifth Circuit's analysis.

4. 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 HHS has correctly acknowledged in other rulemaking.
- In January 2023, HHS was one of nine federal agencies that developed the Proposed Rule, "Partnerships With Faith-Based and Neighborhood Organizations." 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* and *Espinoza v. Montana Department of Revenue*. 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.'"

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[26] 70 F.4th 914, 918 (5th Cir. 2023).

[27] *Id*. at 921 (listing statements presented for declaratory judgment).

[28] *Id*. at 937-40.

[29] *Id*. at 937 (quoting *Bostock*, 140 S. Ct. at 1754).

[30] *Burwell v. Hobby Lobby*, 573 U.S. 682, 706 (2014).

[31] *Id*. at 940.

[32] *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/.

- Our public comment summarizes what HHS said about this "Nondiscrimination Principal" in the Nine Agency proposed rule.[33]
- 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. 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." 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.
- It is arbitrary and capricious for HHS to acknowledge the Supreme Court's Nondiscrimination Principle in a proposed rule last year and fail to acknowledge the implications of this same principle in the present proposed rule.

5. 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."[34] As noted above, 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, I 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;
    - 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;

[33] EPPC Public Comment at 15-17.

[34] 88 Fed. Reg. at 44754.

- 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.

- **Some, but not all, 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, I 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.[35]
- 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."[36]
- Section 1557 prohibits discrimination on "the ground prohibited under" Title IX, specifically "20 U.S.C. § 1681 et seq."[37] 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

[35] *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/.

[36] 20 U.S.C. § 1681(a)(3).

[37] 42 U.S.C. § 18116 (emphasis added).

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 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. [38]

- 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."[39] Nor can HHS 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. As detailed below, HHS should wait to issue this final rule until after those regulations are finalized and the anticipated court challenges are concluded.

[38] 227 F. Supp. 3d 660, 690-91 (N.D. Tex. 2016).

[39] 87 Fed. Reg. 47840.

- **Some of the statutes explicitly approve segregation by sex.** Similarly, some of these thirteen statutes—like Title IX—explicitly approve segregation by sex.[40] 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."[41] 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.

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.*:

  - 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.
- **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

[40] *See, e.g.*, 42 U.S.C. 295m(1).

[41] 42 U.S.C. 10406(c)(2)(B)(i).

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 are also relevant to state agencies that are responsible for administering these HHS 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.

6. 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."[42]

This principle, known as the "*Pennhurst* clear statement rule," reflects the system of "dual sovereignty" enshrined in our Constitution.[43] 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

[42] *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

[43] *Murphy v. Nat'l Collegiate Athletics Ass'n*, 138 S. Ct. 1461, 1475 (2018).

with federally imposed conditions."[44] 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.'"[45] 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."[46] 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."[47]

- 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*.
- 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.

7. 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.[48]
- I 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.

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[44] *Pennhurst*, 451 U.S. at 17.

[45] *Id*. (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 585-86 (1937)).

[46] *South Dakota v. Dole*, 483 U.S. 203, 217 (1987) (O'Connor, J., dissenting).

[47] *Id*. (quoting *United States v. Butler*, 297 U.S. 1, 78 (1936)).

[48] *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/.

- 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 given—as noted above—many of the thirteen statutes cited in this NPRM incorporate Title IX's standards by reference.
- As such, I 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.

8. 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 include:
    - 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.

9. 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.

10. 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

I urge OIRA to ensure that the statutory and regulatory process is upheld and that HHS's proposed rule has sufficient legal and economic analysis that reflects its obligations under the Constitution, the Administrative Procedure Act, federal laws protecting rights of conscience and religious liberty, and all other relevant legal authority.