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Aysha E. Schomburg  
Associate Commissioner, Children's Bureau  
Administration on Children, Youth and Families  
Administration for Children and Families  
U.S. Department of Health and Human Services  
330 C Street, S.W.  
Washington, D.C. 20201

Submitted via <https://www.regulations.gov>

**Re: RIN 0970-AD03, Notice of Proposed Rulemaking, Safe and Appropriate Foster Care Placement Requirements for Titles IV-E and IV-B, 88 Fed. Reg. 66752 (Sept. 28, 2023).**

Dear Ms. Schomburg:

The Attorneys General of Alabama, Alaska, Arkansas, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, South Carolina, Tennessee, Texas, Virginia, and West Virginia submit these comments in opposition to the Department of Health and Human Services (HHS) Administration for Children and Families' (ACF) proposed rule, Safe and Appropriate Foster Care Placement Requirements for Titles IV-E and IV-B, 88 Fed. Reg. 66752 (Sept. 28, 2023).

This proposed rule seeks to accomplish indirectly what the Supreme Court found unconstitutional just two years ago: remove faith-based providers from the foster care system if they will not conform their religious beliefs on sexual orientation and gender identity. *See Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021) ("The refusal of Philadelphia to contract with [Catholic Social Services] for the provision of foster care services unless it agrees to certify same-sex couples as foster parents cannot survive strict scrutiny, and violates the First Amendment."). In addition to discriminating against religion, the proposed rule will harm children by limiting the number of available foster homes, harm families by risking kinship placements, and harm states by increasing costs and decreasing care options. These injuries will be suffered while HHS fails to solve a problem that the proposed rule does not even prove exists in foster care.

For these reasons, HHS should reject the proposed rule.

## I. Individuals and organizations of faith are a critical part of the foster care system.

The proposed rule reports that 391,000 children were in foster care in 2022. 88 Fed. Reg. at 66767. The number of children in foster care grew steadily from 392,000 on September 30, 2012 to 437,000 on September 30, 2017, before starting its decline to today's level. *Trends in Foster Care and Adoption: FY 2012 – 2021*, U.S. Department of Health and Human Services, Administration for Children and Families, 1 (June 28, 2022), available at <https://perma.cc/V7Y3-VBTM>. However, the proposed rule anticipates that the number of children in foster care will begin increasing again, with an estimated 416,500 in foster care by 2027. 88 Fed. Reg. at 66767.

Caring for children in need is a duty of the Christian faith. See, e.g., Mark 9:37; James 1:27. Since America's early days, people and organizations of faith have cared for orphans and children in foster care. See, e.g., *Fulton*, 141 S. Ct. at 1874; see also Mary Viatora Schuller, *A History of Catholic Orphan Homes in the United States, 1727 to 1884* (June 1954) (unpublished Ph.D. dissertation, Loyola University), available at [https://ecommons.luc.edu/cgi/viewcontent.cgi?article=1466&context=luc\\_diss](https://ecommons.luc.edu/cgi/viewcontent.cgi?article=1466&context=luc_diss). Individuals and organizations continue that faith-based service today.

The foster care system depends on individuals and organizations of faith. See *Fulton*, 141 S. Ct. at 1875 (“The Philadelphia foster care system depends on cooperation between the City and private foster agencies like [Catholic Social Services].”). An LGBT research organization reported that 40% of government-contracted child placement agencies are religiously affiliated. *What's at stake in Fulton: kids in the foster care system*, MOVEMENT ADVANCEMENT PROJECT (2020), 1, available at <https://perma.cc/BDH5-C5V2>. In New Mexico, every private placement agency is Christian. *Id.* In Arkansas, one faith-based group was credited with recruiting almost half of the foster homes in the state. Benjamin Hardy, *One faith-based group recruits almost half of foster homes in Arkansas*, ARKANSAS TIMES (Dec. 1, 2017), available at <https://perma.cc/43A4-TR8R>. Foster parents who are recruited through a church or other religious organization foster children for 2.6 years longer than the average foster parent. Mary Ellen Cox et al., *Recruitment and Foster Family Service*, J. OF SOCIOLOGY & SOCIAL WELFARE (Sept. 2002), 168 Table 6, available at <https://scholarworks.wmich.edu/cgi/viewcontent.cgi?article=2832&context=jssw>. And practicing Christians are three times more likely to seriously consider fostering than the general population. *5 Things You Need to Know About Adoption*, BARNA (Nov. 4, 2013), available at <https://perma.cc/53ZP-WQDV>.

Without faith-based organizations and foster homes, the foster care system would face a critical lack of placement options. In March 2018, Philadelphia made an urgent request for 300 new foster care homes. Mark C. Psoras, *Philly puts out 'urgent' call – 300 families needed for fostering*, THE PHILADELPHIA INQUIRER (Mar. 8, 2018), available at <https://perma.cc/D9K5-5S7Q>. One week later, in the decision that reached the Supreme Court, the city strained the system further when it stopped placing children in foster care through two Christian agencies, which

had placed 233 children with families. Julia Terruso, *City halts foster care intakes at two agencies that discriminate against LGBTQ people*, THE PHILADELPHIA INQUIRER (Mar. 15, 2018), available at <https://perma.cc/X9D6-Y8YC>.

The same trend occurred on a state level. In 2011, Illinois ended its foster care placement contracts with faith-based organizations because of their religious beliefs. Manya Brachear, *State severs foster care ties with Catholic Charities*, CHICAGO TRIBUNE (July 11, 2011), available at <https://perma.cc/2RCJ-JAC7>. Over the next five years, Illinois lost 1,567 foster homes, a greater decrease than any other state. *The Foster Care Housing Crisis*, THE CHRONICLE OF SOCIAL CHANGE (Oct. 31, 2017), 8, 14, available at <https://perma.cc/5YUD-B843>. It is little wonder, then, that 41% of foster children in Illinois have moved at least four times while in foster care. Dave Savini et al., *Illinois foster children are being moved repeatedly from one place to another, and traumatized*, CBS CHICAGO (Mar. 10, 2023), available at <https://perma.cc/X34S-8H2E>. Incredibly, 320 Illinois foster children have moved at least 67 times. *Id.*

States need faith-based organizations in their foster care system. The proposed rule will drive individuals and organizations of faith away, which will increase the strain on the system by reducing the number of available foster homes. The federal government should be searching for ways to increase the number of foster homes, not decrease them.

## **II. The proposed rule discriminates against individuals and organizations of faith.**

The proposed rule is unconstitutional because it discriminates against individuals and organizations of faith who want to serve children in the foster care system. The proposed rule also unconstitutionally forces speech on foster providers. HHS should reject the proposed rule.

The proposed rule requires “safe and appropriate placement” for LGBTQI+ foster children. To be considered a “safe and appropriate placement,” the provider “will establish an environment free of hostility, mistreatment, or abuse based on the child’s LGBTQI+ status,” be “trained to be prepared with the appropriate knowledge and skills to provide for the needs of the child related to the child’s self-identified sexual orientation, gender identity, and gender expression,” and be willing to “facilitate the child’s access to age-appropriate resources, services, and activities that support their health and well-being ... if the child wishes to access those resources, services, and activities.” 88 Fed. Reg. at 66756. And the “provider is expected to utilize the child’s identified pronouns, chosen name, and allow the child to dress in an age-appropriate manner that the child believes reflects their self-identified gender identity and expression.” *Id.* at 66757.

### **A. The proposed rule violates the freedom of religion.**

HHS recognizes the religious liberty issues posed by the proposed rule: “As the Supreme Court has recently made clear, the First Amendment protects faith-based entities that provide foster care services.” 88 Fed. Reg. at 66761 (citing *Fulton*, 141 S. Ct. 1868). And ACF purportedly “was cognizant” “[w]hen drafting

the proposed text” “that a foster care requirement that precludes a child welfare provider from participating in the program while adhering to its religious beliefs might substantially burden religious exercise.” *Id.*

Yet the proposed rule still substantially burdens religious exercise. In a failed attempt to avoid the clear holding of *Fulton*, the proposed rule would apply most of its requirements on States instead of on individual providers. *Id.* The proposed rule claims that individual religious providers could decline to seek designation as a “safe and appropriate placement for LGBTQI+ children” and thus not receive any such placements. *Id.* at 66761-62, 66756 n.40, 66757 n.44. But this approach continues to unconstitutionally discriminate against religion in multiple ways.

Forcing individuals and organizations of faith to limit their work in the foster care system to follow their beliefs is unconstitutional. As the Supreme Court explained, Philadelphia unlawfully burdened the religious exercise of Catholic Social Services by putting the organization “to the choice of curtailing its mission or approving relationships inconsistent with its beliefs.” *Fulton*, 141 S. Ct. at 1876. Like the policy in *Fulton*, the proposed rule is neither neutral nor generally applicable. *See id.* at 1876-79.

The proposed rule will indirectly accomplish what *Fulton* prohibited the City of Philadelphia from accomplishing directly. Under the proposed rule, each State must “ensure that the totality of their child welfare system includes sufficient placements for LGBTQI+ children that meet” the proposed standards. 88 Fed. Reg. at 66756. If the proposed rule’s statistics are accurate (which they likely are not, *see* Section VI below), individuals and organizations of faith would be excluded from providing care to as many as one-third of foster children ages 12-21. *Id.* at 66753. States would be forced to recruit non-religious providers to meet these needs. And individuals and organizations of faith will be discouraged from beginning or continuing to provide foster care services because they will be penalized for their beliefs and excluded from helping large numbers of foster children. Excluding individuals and organizations of faith from providing care for potentially one-third of older foster children unconstitutionally burdens individuals and organizations of faith.

The proposed rule also materially and directly impacts providers: “The only requirement that would be imposed on private providers by the proposed rule is the requirement to be informed of the procedural requirements to comply with the proposed rule (including the required non-retaliation provisions outlined in paragraph (a)(4)).” 88 Fed. Reg. at 66761. “Retaliation” is defined as “imposing negative consequences on the child because of the child’s disclosure of their LGBTQI+ identity, perceived LGBTQI+ identity, request, or report.” *Id.* at 66759. Examples of “retaliation” include “unwarranted placement changes (including unwarranted placement in congregate care rather than in family-like settings), restriction of access to LGBTQI+ peers or age appropriate materials, required participation in efforts to degrade, disparage or change the child’s sexual orientation or gender identity, disclosing the child’s LGBTQI+ identity in ways that cause

harm or risk the privacy of the child, or other activities that stigmatize a child’s LGBTQI+ identity.” *Id.* As written, these “retaliation” provisions are applicable to individuals or organizations of faith who have a foster child in their care who later discloses, or is perceived to have, a LGBTQI+ identity.

Through this “retaliation” provision, the proposed rule directly endangers the religious freedom of individuals and organizations of faith. The “Free Exercise Clause provides an absolute right to hold religious beliefs.” *Lasche v. New Jersey*, No. 20-2325, 2022 WL 604025, at \*4 (3d Cir. Mar. 1, 2022). In *Lasche*, the Third Circuit held that foster parents stated First Amendment retaliation and § 1985 claims when a foster child was removed from their care in retaliation for “sharing their views on same-sex marriage” with the foster child. *Id.* at \*5. For decades, the Supreme Court has “made clear that the government, if it is to respect the Constitution’s guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices.” *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm’n*, 138 S. Ct. 1719, 1731 (2018) (citing *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993)). Under standards like “perceived identity” and “degrade,” “disparage,” or “stigmatize” a child’s identity, the proposed rule places individuals and organizations of faith at risk of being accused of “retaliation” when they have done no more than live and profess their beliefs. This unconstitutionally infringes on their First Amendment rights. *See also* Comment Letter of Tennessee *et al.* on Placement Rule 5-6 (Nov. 27, 2023).

For similar reasons, the proposed rule would also violate the requirements of the Religious Freedom Restoration Act (RFRA), 42. U.S.C. § 2000bb *et seq.* Here again, the proposed rule acknowledges RFRA’s requirements and promises that “ACF will continue to operate the title IV-E and IV-B programs in compliance with” RFRA. 88 Fed. Reg. at 66761. And here again, the promise is empty. Despite assuring that “ACF has taken the[] RFRA principles into account,” *id.*, the proposed rule does not explain *how* the “RFRA principles” have been accounted for. Naked assurance is not reasoned rulemaking. And the one time the proposed rule *does* purport to show its work, it comes up short: the “[m]ost important[]” way ACF has purported to comply with RFRA, the proposed rule states, is by “impos[ing]” the new requirements “directly on state and tribal IV-E/IV-B agencies, as opposed to on any private foster care agency, foster parent, kinship caregiver or other provider.” *Id.* But RFRA cannot be so easily circumvented merely by making States do the agency’s dirty work—to say nothing of state-level RFRA laws that States must also comply with. As explained throughout this letter, foster families of faith—individuals, not just States—will be negatively affected by the proposed rule. The rule does not comply with RFRA by hiding who is politically responsible for those effects.

## **B. The proposed rule violates the freedom of speech.**

Nor can the government force speech on foster parents. *See 303 Creative LLC v. Elenis*, 600 U.S. 570, 586 (2023); *Meriwether v. Hartop*, 992 F.3d 492, 503 (6th Cir. 2021). As the Supreme Court recently explained:

the First Amendment protects an individual’s right to speak his mind regardless of whether the government considers his speech sensible and well intentioned or deeply “misguided,” and likely to cause “anguish” or “incalculable grief.” . . . Generally, too, the government may not compel a person to speak its own preferred messages.

*303 Creative LLC*, 600 U.S. at 586. As the Court recognized—and “has long held”—“the opportunity to think for ourselves and to express those thoughts freely is among our most cherished liberties and part of what keeps our Republic strong.” *Id.* at 603.

So it is that “[g]overnment officials violate the First Amendment whenever they try to ‘prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion,’ and when they ‘force citizens to confess by word or act their faith therein.’” *Meriwether*, 992 F.3d at 503 (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)). That includes, as it did in *Meriwether*, forcing an individual to use another’s preferred pronouns by government fiat. *See id.* at 518; *see also see also Green v. Miss United States of Am., LLC*, 52 F.4th 773, 802-03 (9th Cir. 2022) (rejecting bid “to use the power of the state to force Miss United States of America to express a message contrary to what it desires to express”).

HHS’s attempt to force speech on individuals and organizations of faith thus violates the First Amendment’s protection of foster parents’ freedom of speech. *See, e.g., 303 Creative LLC*, 600 U.S. at 603 (“The First Amendment envisions the United States as a rich and complex place where all persons are free to think and speak as they wish, not as the government demands.”). Accordingly, HHS should reject the proposed rule.

## **III. The proposed rule threatens discrimination against family members.**

There is another constitutional infirmity lurking in the proposed rule: it threatens discrimination against family members of children in the foster care system.

Relatives have long been given preference when determining a foster child’s placement. According to the governing statute, a State is required to “consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant State child protection standards.” 42 U.S.C. § 671(a)(19). ACF itself has underscored the importance of kinship placement: “When children cannot remain

safely with their parents, placement with kin is preferred over placement in foster care with nonrelatives. Placement with kin—or kinship care—may provide permanency for children and helps them maintain family connections.” Children’s Bureau, *Kinship Care and the Child Welfare System*, Administration for Children and Families (May 2022), available at [https://www.childwelfare.gov/pub-pdfs/f\\_kinshi.pdf](https://www.childwelfare.gov/pub-pdfs/f_kinshi.pdf). As HHS reports, “A significant body of evidence demonstrates that when children in the foster care system are placed with kinship caregivers that they have better outcomes.” 88 Fed. Reg. at 66762.

HHS suggests this important preference may be undermined by the proposed rule. In the proposed rule, “HHS invites public comment on how agencies can best comply with the requirements of this proposed rule and prioritize placements with kinship caregivers. In particular, HHS invites public comment on what resources agencies may need from HHS to support kinship caregivers in caring for an LGBTQI+ child.” *Id.* at 66762-63. In other words, HHS appears to be contemplating how individuals of faith who are relatives of LGBTQI+ children in foster care can be trained or managed to “best comply with the requirements of this proposed rule”—which would include the requirements regarding pronouns, views on sexual orientation and gender identity, and training. For the reasons previously explained, any attempt to violate the religious beliefs of kinship caregivers would be unconstitutional.

The proposed rule thus risks infringing on the First Amendment rights of kinship caregivers who hold religious beliefs. HHS should reject the proposed rule.

#### **IV. The proposed rule will endanger and harm foster children.**

The proposed rule is arbitrary and capricious because of its impact on foster children. An agency rule is arbitrary and capricious if “the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that 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.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

Family homes are the best option for foster children in care. ACF itself recognizes that “there is consensus across multiple stakeholders that most children and youth, but especially young children, are best served in a family setting.” *A National Look at the Use of Congregate Care in Child Welfare*, ACF Children’s Bureau (July 13, 2015), I, available at <https://perma.cc/LRP4-JZRX>. Congregate care, ACF cautions, “should be used only for as long as is needed to stabilize the child or youth so they can return to a family-like setting.” *Id.*

The proposed rule will harm LGBTQI+ foster children by limiting their family setting options. According to the proposed rule’s estimates, as many as one-third of children may not be placed with individuals or organizations of faith.

This increases the likelihood that these children will be placed in congregate settings that will not support them as much as a family setting provided by a family of faith.

The proposed rule will harm all foster children by reducing their family setting options. As already mentioned, 40% of government-contracted child placement agencies are religiously affiliated. *What's at stake in Fulton, supra*, at 1. In New Mexico, every private placement agency is Christian. *Id.* Many foster homes are recruited by these organizations of faith. Almost half of foster homes in Arkansas were recruited by a single faith-based group. Hardy, *One faith-based group recruits almost half of foster homes in Arkansas, supra*.

By discouraging individuals and organizations of faith from joining or continuing in foster care, the proposed rule will reduce family setting options. Again, Illinois lost more foster homes than any state in the country over a five-year period after it ended its foster care placement contracts with faith-based organizations. *The Foster Care Housing Crisis, supra*, at 8, 14. The proposed rule increases the likelihood that foster children, regardless of sexual orientation or gender identity, will be placed in congregate settings that will not support them as much as a family setting provided by a family of faith.

The proposed rule also will harm children by increasing the likelihood that they must make multiple moves during their time in foster care, which can increase trauma already suffered by foster care children. *See, e.g., Savini et al., Illinois foster children are being moved repeatedly from one place to another, and traumatized, supra*. Foster parents recruited through churches or religious organizations foster children for an average of 2.6 years longer than the average foster parent, thus reducing the number of times a foster child must move. Cox, *Recruitment and Foster Family Service, supra*, at 168 Table 6. Yet by limiting placement options for LGBTQI+ children and forcing religious organizations and families from the foster care system, the proposed rule will not only harm the very children the rule is purportedly designed to protect, but other children as well.

Finally, the proposed rule will endanger children through its provisions relating to transgender foster children. According to the proposed rule, “[w]hen considering placing a transgender, gender non-conforming or intersex child in sex segregated child-care institutions, the title IV-E/IV-B agency must place the child consistent with their gender identity.” 88 Fed. Reg. at 66768. This requirement would mean that a biologically male foster child could be placed in a child-care facility exclusively for girls and that a biologically female foster child could be placed in a child-care facility exclusively for boys. Either scenario would needlessly create potentially dangerous situations for children.

The proposed rule is arbitrary and capricious because of its impact on foster children. HHS should reject the proposed rule.



## V. The proposed rule will harm States.

The proposed rule is also arbitrary and capricious because of its impact on States.

State foster care systems already are stretched to capacity. In North Carolina, foster children are sleeping in jails, social services offices, and emergency rooms because there are not enough foster homes to accommodate them. Daniel Pierce, *Foster children sleeping in jails, emergency rooms, and DSS offices amid a foster family shortage*, QUEEN CITY NEWS (Mar. 1, 2023), available at <https://perma.cc/XA8R-JCS4>. In Missouri, 52 children were housed in medical facilities and 258 were housed in mental health facilities. Rudi Keller, *'Truly a crisis': Missouri hospitals house children in foster care with no place to go*, MISSOURI INDEPENDENT (June 20, 2023), available at <https://www.qcnews.com/news/u-s/north-carolina/foster-children-sleeping-in-jails-emergency-rooms-and-dss-offices-amid-a-foster-family-shortage/>. Five healthy foster children lived in a Missouri hospital for an average of 56 days. *Id.*

Reducing the number of individuals and organizations of faith in the foster care system will only exacerbate these problems. As Illinois learned, cutting ties with faith-based organizations led to the largest drop in the country in foster homes. See *The Foster Care Housing Crisis*, *supra*, at 8, 14. The proposed rule will harm state foster care systems by reducing foster care providers and thus harm those children who end up living out of jails and hospitals.

Despite the already existing shortage of foster care providers, the proposed rule recognizes that States will need to recruit *new*, non-religious providers just to comply with the rule: “In order to comply with the requirements in this proposed rule, we anticipate that a majority of states would need to expand their efforts to recruit and identify providers and foster families that the state or tribe could designate as safe and appropriate placements for a LGBTQI+ child to ensure that the totality of their child welfare system includes enough safe and appropriate placements to meet the needs of LGBTQI+ children in care.” 88 Fed. Reg. at 66763.

The proposed rule underestimates the recruitment costs to States at \$13.2 million. *Id.* at 66766. HHS apparently believes that recruitment dollars will be just as effective recruiting non-religious foster care providers as they have been recruiting current providers, which include many religious providers. But given the significant number of individuals and organizations of faith currently supporting the foster care system, and the proactive work that organizations of faith do in independently recruiting foster homes, HHS’s estimate is unrealistic. The cost will almost certainly be much higher to recruit non-religious foster care providers.

HHS’s recruitment cost estimate is also an underestimate because it does not include the costs to replace the individuals and organizations of faith that will leave the foster care system as a result of the proposed rule. Again, Illinois lost more than 1,500 foster homes after the State cut ties with religious organizations. *The Foster Care Housing Crisis*, *supra*, at 8, 14. Replacing foster homes will be

costly to States, and with a smaller, less receptive pool of prospective foster homes to draw from, it will cost more to recruit after the proposed rule than it does now. Regardless of any costs that the federal government ultimately shares, 88 Fed. Reg. at 66763, recruitment costs will impose burdens on States.

HHS could have known about these serious concerns before it proposed the rule had it consulted with the States in advance. Executive Order 13132, signed by President Clinton, “requires Federal agencies to consult with state and local government officials if they develop regulatory policies with federalism implications.” *Id.* at 66764. In fact, Executive Order 13132 provides that “[t]o the extent practicable and permitted by law, no agency shall promulgate any regulation that has federalism implications and that preempts State law, unless the agency, prior to the formal promulgation of the regulation (1) consulted with State and local officials early in the process of developing the proposal regulation.” E.O. 13132 § 6(c). HHS admitted that the proposed rule “may have federalism implications due to the substantial direct financial impact on state or local governments.” 88 Fed. Reg. at 66764. Despite this, “ACF has not consulted directly with state or local governments prior to issuing this NPRM.” *Id.* Thus, HHS has admitted to not following Executive Order 13132.

The proposed rule is arbitrary and capricious because of its impact on States and HHS’s failure to follow Executive Order 13132. HHS should reject the proposed rule.

## **VI. The proposed rule fails to solve a problem that it does not prove exists in foster care.**

Last, the proposed rule is arbitrary and capricious because it does not solve a problem that it does not demonstrate exists in foster care.

The proposed rule claims that LGBTQI+ children are overrepresented in foster care. 88 Fed. Reg. at 66753. To make this claim, HHS relies on a single study of a single county in Maryland. *Id.* at 66753 n.1. This study surveyed just 251 children—less than 30% of the foster children in the county—to reach its conclusions, which HHS now extrapolates to every county in the United States. *The Cuyahoga Youth Count: A Report on LGBTQ+ Youth Experience in Foster Care*, University of Maryland School of Social Work (2021), 5, available at <https://perma.cc/CES7-LQ8W>. The only other study cited by HHS, from Los Angeles County, put the LGBTQI+ rate at 19%, yet HHS still estimated the percentage at 30%. 88 Fed. Reg. at 66766. Thus, HHS has used the responses of 81 children in one Maryland county to make judgments about the 391,000 children in foster care. This is arbitrary and capricious.

The proposed rule also presents no evidence of mistreatment or harm to LGBTQI+ children in foster care. For example, the proposed rule states, “A 2020 survey found that LGBTQI+ youth in foster care were 2.6 times more likely to report a past year suicide attempt than LGBTQI+ youth who were not in foster care, with 35 percent of LGBTQI+ foster youth reporting such an attempt.” *Id.* at 66754. But the cited survey by an advocacy organization asked if LGBTQI+ youth had “*ever* been in foster care (even if only for a short period of time),” which

means that the survey’s positive results would include a 17-year-old who was in foster care for a month as a newborn and had a suicide attempt at age 16. *See The Trevor Project Research Brief: LGBTQ Youth with a History of Foster Care*, THE TREVOR PROJECT (May 2021), 3 (emphasis added), available at <https://perma.cc/P3L2-2X9T>. In addition, all children in foster care have an increased risk of suicidality because of the often traumatic reasons that they have been taken into care. *See Groups with Increased Risk*, YOUTH.GOV, at <https://youth.gov/youth-topics/youth-suicide-prevention/increased-risk-groups> (“children in foster care were almost four times more likely to have considered suicide and almost four times more likely to have attempted suicide than those who had never been in foster care”). If HHS’s primary concern is reducing the risk of suicide, further efforts could be made to educate foster parents about how to deal with suicidality rather than mandate sexual orientation and gender identity speech and training that will drive away providers of faith. This is arbitrary and capricious.

Nor is there any evidence of mistreatment since ACF issued guidance in March 2022. According to the proposed rule, “ACF has already provided extensive resources and sub-regulatory guidance to agencies about improving the health and wellbeing of LGBTQI+ children in foster care, but those resources alone have not been sufficient to ensure that LGBTQI+ youth are protected from mistreatment in foster care.” 88 Fed. Reg. at 66763. The proposed rule provides no evidence that its guidance has not been followed or has failed to be effective. In fact, the proposed rule does not cite a single study, journal article, or news article post-dating its March 2022 guidance. This is arbitrary and capricious.

\* \* \*

The proposed rule infringes on the freedom of religion and the freedom of speech, fundamental rights preserved by the First Amendment. The Supreme Court has repeatedly rejected attempts by the government to exclude foster care providers based on religious beliefs or to mandate speech on private actors. The proposed rule also will harm children, harm families, and harm States, all to advance an ideology. HHS should reject the proposed rule.

Respectfully submitted,



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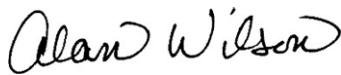
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