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May 12, 2021

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

Dear Secretary Becerra:

I write regarding the harmful policies implemented by the previous Administration that allowed religious entities to discriminate in federal programs. The Trump Administration aggressively misused the *Religious Freedom Restoration Act* (RFRA) to justify many of these harmful policies.<sup>1</sup> In one of the most egregious misuses of RFRA, the U.S. Department of Health and Human Services (Department or HHS) granted requests from the states of South Carolina and Texas to waive nondiscrimination requirements for their state-contracted agencies that provide child welfare services using federal funding.<sup>2</sup> Indeed, these private agencies have turned away families because they are the wrong religion<sup>3</sup> or because of religious objections to their family members' sexual orientation or gender identity, notwithstanding a federal regulation prohibition on exactly this kind of discrimination in this federally funded program.<sup>4</sup> Regrettably, the Trump Administration issued a midnight rule at the end of its term to roll back the uniform nondiscrimination rules that applied to HHS funded programs, including foster care.<sup>5</sup> In

<sup>1</sup> 42 U.S.C. §§2000bb-2000bb-4,

<sup>2</sup> U.S. Dep't of Health and Human Services, Office for Civil Rights, Opinion Letter to Attorney General of Texas (March 5, 2020) (on file with the Committee) and U.S. Dep't of Health and Human Services, Administration for Children and Families, Opinion Letter to South Carolina Governor Henry McMaster (Jan. 23, 2019) (on file with the Committee).

<sup>3</sup> Meg Kinnard, *In lawsuit, a Catholic mother from Simpsonville alleges discrimination by Miracle Hill*, Greenville News (South Carolina) (Feb. 15, 2019), <https://www.greenvilleonline.com/story/news/2019/02/15/greenville-miracle-hills-ministries-foster-agency-lawsuit/2881913002/>.

<sup>4</sup> 45 C.F.R. 75.300(2016).

<sup>5</sup> Health and Human Services Grants Regulation, 86 Fed. Reg. 2257 (Jan. 12, 2021) (to be codified at 45 CFR Part 75). I strongly opposed the final rule to roll back these nondiscrimination requirements for HHS funded programs.

February 2021, a court delayed the effective date for this final rule as part of *Facing Foster Care in Alaska, et al. v. U.S. Department of Health and Human Services*. I urge the Department to expeditiously re-regulate this rule to restore the full nondiscrimination protections for HHS programs.<sup>6</sup>

Many faith-based organizations play a vital role in providing social services to communities and have done so without discriminating against individuals participating in the programs. In fact, one of the largest Christian adoption agencies, Bethany Christian Services, recently announced that it will provide services to LGBTQ and same-sex families “with the love and compassion of Jesus to the many types of families who exist in our world today.”<sup>7</sup> Faith-based agencies that receive federal funding are bound by the legal and constitutional framework that prohibits religion from being used to override other significant interests, such as nondiscrimination protections for children and parents.<sup>8</sup> That is why it is very troubling that the Department contravened these protections in granting RFRA-based exemptions to some states to allow child welfare agencies to engage in discriminatory practices using federal dollars. Apart from the legal and constitutional questions raised, a waiver also threatens the health and wellbeing of children—by denying them access to loving, stable homes at a time when nearly all states have a severe shortage of willing, qualified foster parents. There is simply no reason to deny otherwise qualified prospective parents the opportunity to care for children because of their religion or status in a same-sex relationship.

It is important to note that the legislative history behind RFRA does not support its current misapplication to override anti-discrimination protections. When Congress passed RFRA in 1993, it did so in response to a Supreme Court case focused on religious minorities’ exercise of their faith.<sup>9</sup> The law was never intended to be a tool to violate constitutional and statutory or regulatory protections against discrimination under the guise of religious freedom. In fact, RFRA *allows* the government to substantially burden religious exercise when it is necessary to achieve a compelling government interest, such as the enforcement of anti-discrimination requirements at issue here, since there is no alternative means to enforce nondiscrimination requirements to achieve the compelling government interest that there is equal opportunity in accessing federally funded services. Moreover, RFRA explicitly states that it does not affect in any way the Establishment Clause of the First Amendment,<sup>10</sup> which specifically prohibits granting religious exemptions that would detrimentally affect any third party.<sup>11</sup> Therefore, its application remains limited and bound by these constitutional considerations. As a result, I believe the Trump Administration’s approval of RFRA waivers for South Carolina and Texas

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<sup>6</sup> *Facing Foster Care in Alaska, et al. v. U.S. Dep’t of Health and Human Serv., et al.*, No. 1:21-cv-308 (D.D.C. Feb. 9, 2021) (Order granting plaintiff’s motion for an order to postpone rule’s effective date and hold in abeyance.)

<sup>7</sup> Ruth Graham, *Major Evangelical Adoption Agency Will Now Serve Gay Parents Nationwide*, *N.Y. Times*, (March 1, 2021), <https://www.nytimes.com/2021/03/01/us/bethany-adoption-agency-lgbtq.html>.

<sup>8</sup> *Cutter v. Wilkinson*, 544 U.S. 709, 720, 722 (2005); see also *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-10 (1985).

<sup>9</sup> *Employment Division v. Smith*, 494 U.S. 872 (1990).

<sup>10</sup> 42 U.S.C. § 2000bb-4.

<sup>11</sup> E.g., *Burwell v. HobbyLobby Stores, Inc.* 134 S. Ct. 2751, 2781 n.37 (2014) (citing *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005)); *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring); *Cutter*, 544 U.S. at 726 (may not “impose unjustified burdens on other[s]”); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (may not “impose substantial burdens on nonbeneficiaries”).

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exempting their adoption agencies from nondiscrimination requirements was wrongly decided and fatally flawed in its analysis of RFRA and constitutional requirements governing its application.

Accordingly, I urge the Department to expeditiously review and repeal these RFRA waivers and to move forward with re-regulating uniform nondiscrimination requirements for HHS programs.

Thank you for your consideration of our request and attention to this important matter.

Sincerely,



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**ROBERT C. "BOBBY" SCOTT**  
Chairman