Congress of the United States

House of Representatives

Washington, DC 20515

January 11, 2019

The Honorable Alex M. Azar II
Secretary
Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

Dear Secretary Azar:

We write to raise our concerns regarding continued press reports that the Department of Health and Human Services (HHS) is considering using the Religious Freedom Restoration Act (RFRA) to allow a taxpayer-funded child welfare provider to violate laws and policies that bar discrimination by refusing to place foster children in appropriate homes, based solely on religious preference against the potential foster parents.[1]

Many faith-based organizations play a vital role in providing social services to communities. Particularly, faith-based child welfare agencies serve children in the foster care system, often in partnership with the government. However, these agencies are also 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.[2] It is very troubling that these protections seem to be at stake as the Department considers granting a RFRA-based exemption to child welfare agencies who wish to fund discriminatory practices using federal dollars. Apart from the legal and constitutional questions raised, a waiver would also threaten the health and wellbeing of children – by denying children access to loving, stable homes at a time when nearly all states have a severe shortage of willing, qualified foster parents – simply because prospective parents do not share the religious views of the organization. There is simply no reason to deny otherwise qualified prospective parents the opportunity to care for children because they are Humanist, Jewish, Mormon, Catholic, or LGBTQ. Lastly, we note that federal money should also not be used to fund discriminatory hiring practices, and religious character should not be used to circumvent statutory protections against employment discrimination.

As the Department reportedly considers relying on RFRA to exempt agencies from the current laws and policies, it is important to note the legislative history behind the law. When Congress passed RFRA in 1993, it did so in response to a Supreme Court case focused on religious

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[1] See e.g., The Washington Post, *A Christian ministry won't change its Christians-only criteria for foster-care parents. Is that okay with Trump?* (January 6, 2019) https://www.washingtonpost.com/local/education/a-christian-ministry-has-worked-only-with-christian-foster-care-parents-is-that-okay-with-trump/2019/01/06/bf2ee646-dee4-11e8-b3f0-62607289efee_story.html?noredirect=on

[2] *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).

minorities' exercise of their faith.[3] The law was never intended to be a tool to violate constitutional and statutory protections against discrimination. Moreover, RFRA explicitly states that it does not affect in any way the Establishment Clause of the First Amendment,[4] which specifically prohibits granting religious exemptions that would detrimentally affect any third party.[5] Therefore, its application remains limited and bound by these constitutional considerations.

For the abovementioned reasons, we believe any RFRA-based exemption would be a misapplication of RFRA and override existing civil rights protections. We also believe it would undermine state efforts to expand the pool of foster and adoptive parents and place children with kin or other members of their communities – contradicting Congressional intent and new policies being implemented as part of the recently-enacted Family First Prevention Services Act. We urge the Department to not adopt any exemptions under RFRA. As chairs of the Committees responsible for child welfare and the care of foster children, we are dedicated to ensuring that the programs in the Committees' jurisdictions are faithfully implemented. Thank you for your attention to this matter.

Sincerely,

ROBERT C. "BOBBY" SCOTT
Chairman
Committee on Education and Labor

RICHARD E. NEAL
Chairman
Committee on Ways and Means

[3] *Employment Division v. Smith,* 485 U.S. 660 (1988).
[4] 42 U.S.C. § 2000bb-4.
[5] *E.g., Burwell v. Hobby Lobby 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").