Congress of the United States
House of Representatives
Washington, D.C. 20515

November 21, 2017

The Honorable Eric Hargan
Acting Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

Dear Acting Secretary Hargan:

We write to provide our comments in response to the Department of Health and Human Services' (HHS) Request for Information (RFI) entitled, "Removing Barriers for Religious and Faith-Based Organizations to Participate in HHS Programs and Receive Public Funding." We hope that these comments will be taken into account as the Department moves forward.

With this administration, we have seen a disturbing trend in the furtherance of guidance and regulations that seek to undo civil rights protections, under the guise of religious freedom. For example, Section 4 of the Executive Order 13798 entitled, "Promoting Free Speech and Religious Liberty" lays the groundwork for sweeping changes across the government that may well result in discrimination not only against LGBTQ people and women, but also against religious minorities, nontheists, and almost anyone else, all under the guise of religious freedom.[1] The subsequent guidance confers upon federal employees, contractors, and grantees the right to discriminate, with public dollars, based on their religious or moral beliefs.[2] This could have the effect of undermining the health of the American public by allowing federally-mandated preventive health services to be denied, such as sexually transmitted disease testing and counseling for domestic violence for same sex couples.

Section 3 of that same Executive Order paved the way for the interim final rules (IFRs) released last month by the Departments of the Treasury, Labor, and Health and Human Services, which erode the preventive services requirements in the Affordable Care Act.[3] Those IFRs, taken together, allow virtually any employer or university to deny women

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[1] The White House, *Presidential Executive Order Promoting Free Speech and Religious Liberty*, (May 4, 2017) available at: https://www.whitehouse.gov/the-press-office/2017/05/04/presidential-executive-order-promoting-free-speech-and-religious-liberty.

[2] Office of the Attorney General, *Memorandum for all Executive Departments and Agencies,* (October 6, 2017) available at: https://www.justice.gov/opa/press-release/file/1001891/download.

[3] Departments of Treasury, Labor, and Health and Human Services, *Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act* (82 FR 47792) (pub. Oct. 13, 2017) available at: https://www.federalregister.gov/documents/2017/10/13/2017-21851/religious-exemptions-and-accommodations-for-coverage-of-certain-preventive-services-under-the; Departments of Treasury, Labor, and Health and Human Services, *Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act* (82 FR 47838) (pub. Oct. 13, 2017) available at: https://www.federalregister.gov/documents/2017/10/13/2017-21852/moral-exemptions-and-accommodations-for-coverage-of-certain-preventive-services-under-the-affordable.

comprehensive health coverage by virtue of a religious or moral objection. These IFRs pose a grave threat to Constitutionally-protected rights by prioritizing certain religious views, allowing the circumvention of vital civil rights laws in the process. In short, the release of this RFI is part of a multi-pronged approach taken by the administration to curtail the rights of Americans and misapply religious freedom.

Religious liberty is a fundamental American value, but religion should not permit people to use their religion to cause harm to others or subvert the rights of others – plain and simple. When Congress passed the Religious Freedom Restoration Act (RFRA) in 1993, it did so in a bipartisan fashion to correct the Supreme Court's overreach in a case involving the right of Native Americans to participate in a ceremonial religious practice during their personal time. Congress restored the free exercise doctrine; that is, the government cannot take action to interfere with one's practice of religion unless there is a compelling government interest and the law is the least restrictive way to further that interest.

RFRA did not change in any way the applicability of the Establishment Clause. The Establishment Clause of the Constitution limits the application of RFRA only to situations where an exemption would not result in third-party harms. Thus, any arguments that RFRA permits or requires the government to allow religious providers to discriminate in hiring, against beneficiaries, or in the services they provide are misguided.

It is clear that RFRA was never intended to allow discrimination. Thus, HHS may not adopt exemptions that permit contractors or grantees to discriminate in who it hires or who it serves. Nor may it create exemptions allowing government-funded organizations to refuse to provide services otherwise required under their grants or contracts. Organizations that voluntarily enter into a contract or grant with the government to provide specific services cannot claim to be substantially burdened because they must serve all beneficiaries, ensure equal employment opportunities, and generally abide by terms of the grant or contract.

The RFI poses a question as to how to "ensure faith-based organizations are affirmatively accommodated" in federal grant-making. We remind the Department that even before charitable choice statutory provisions or the implementation of the Faith-Based Initiative by the George W. Bush Administration, faith-based organizations were active recipients of federal grants. Indeed, for decades, religious organizations have been providing social services, including in some cases with the use of government funds, without allowances that provide for the evasion of certain rules and protections. It is imperative to ensure that blanket exemptions that invoke "religious liberty," "religious freedom," or "faith-based" are not used as a sword to cut the civil rights provisions that abolish discrimination based on race, color, nationality, age, disability, gender, sexual orientation, or gender identity. There is a partnership that can exist, and exist to mutual benefit, between religion and government and their agencies, but it requires

accountability to standards that allows religion to be religion and government to be government, without comingling the two.

We remain deeply committed to the belief that federal programs should not sanction employment-based religious discrimination. The policy of nondiscrimination in federal programs is a fundamental element of our civil rights strategy. Simply put, if the government fails to enforce civil rights in federal programs, then it loses its authority to impose those laws on private entities who may be devoutly religious and undermines the very intention of our civil rights laws.

Additionally, we also must protect the quality and comprehensive nature of services provided in HHS-run programs. Recently, an undocumented, pregnant 17-year-old girl at a federally-funded shelter in Brownsville, Texas was prevented from terminating her pregnancy by staff from the Office of Refugee Resettlement (ORR). Despite having met conditions to obtain an abortion in Texas, ORR staff physically prevented her from leaving the shelter to attend any medical appointments related to the abortion, and instead escorted her to a religiously affiliated pregnancy crisis center to receive an unwanted sonogram and counseling against ending the pregnancy.[4] It took private litigation challenging ORR's capricious violation of the teen's First and Fifth Amendment rights to secure her legal right to obtain the medical procedure. This was avoidable given the fact that the government failed to uphold its obligation to comply with the minimum care requirements of the *Flores v. Reno* Settlement Agreement for those in its custody, including providing or arranging for "appropriate routine medical . . . care," including specifically "family planning services and emergency health care services."[5] Simply put, the arbitrary restriction of access to needed services in government-funded programs is obstruction. This case further illustrates why all entities carrying out government-funded social service programs should comply with a uniform set of rules.

In closing, the information collected under RFI should not be used as a basis to invalidate the very laws designed to correct the injustices that persist in our nation's workplaces, schools, and communities. While faith-based organizations remain a powerful partner in delivering vital services to all of our communities, we urge the Department to uphold the Constitution and to restore the critical balance between church and state, by ensuring that our civil rights laws are protected and enforced through all HHS programs.

We thank you for your attention to our concerns.

Sincerely,

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[4] ACLU, *Government Shows Pattern of Interference with Abortion Access for Young Women in Federal Care*, (October 10, 2017) available at: https://www.aclu.org/news/aclu-court-fight-federal-officials-blocking-young-womans-abortion-texas.
[5] *The Flores Settlement Agreement*, Case No. CV 85-4544-RJK(Px).

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