



VIA ONLINE PORTAL

December 12, 2019

U.S. Department of Health and Human Services
Office for Civil Rights
ATTN: RIN 0991-AC16
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue S.W.
Washington, D.C. 20201

RE: RIN 0991-AC16

Muslim Advocates is a national legal advocacy and educational organization working on the frontlines of civil rights to guarantee freedom and justice for Americans of all faiths. We write on behalf of a coalition of national Muslim organizations¹, comprised of Muslim Advocates, American Muslim Health Professionals (“AMHP”), the Islamic Circle of North America Council for Social Justice (“ICNA CSJ”), and the Muslim Public Affairs Council (“MPAC”) that are rooted in defending the civic participation of American Muslims, to express our grave concern regarding the impact of the proposed revision of 45 CFR § 75.300(c)-(d) (“Proposed Rule”).² The Proposed Rule injects dramatic, substantive changes into the original rule that will permit HHS subgrantees, including those that operate adoption and foster facilities, to discriminate against individuals on the basis of a host of protected classes, including religion, sex, sexual orientation, and gender identity.³ Such discrimination already exists and if adopted, the Proposed Rule would only

¹ As Muslim-focused organizations, we recognize the importance of the ability of American Muslim families to adopt children from HHS subgrantees and of ensuring that Muslim children in the care of HHS-funded, faith-based foster care or adoption providers have the opportunity to be placed into loving Muslim homes. See Josh Herman, *Striving to Find Foster Parents in America's Largest Muslim Community*, THE CHRONICLE OF SOCIAL CHANGE (June 2, 2016), <https://chronicleofsocialchange.org/news-2/religious-cultural-continuity-key-stability-muslim-children-foster-care/18544>.

² See generally, Health and Human Services Grants Regulation, 84 Fed. Reg. 223, 63,831-36 (proposed Nov. 19, 2019) (to be codified at 45 CFR pt. 75), available at <https://www.govinfo.gov/content/pkg/FR-2019-11-19/pdf/2019-24385.pdf>.

³ When a Proposed Rule, like this one, rests upon factual findings that contradict the earlier rule or when the prior policy has created reliance interests, the government must provide a detailed justification for the change. See *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). A summary discussion, like the one HHS offers with the Proposed Rule, that does not explain why the agency changed its mind, falls far short of that standard. See *id.* at 555.



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exacerbate it.⁴ Not only is the Proposed Rule contrary to American principles, but it puts child welfare at risk and transforms the federal government into an underwriter of discrimination in violation of the law.⁵

Freedom of religion is at the heart of what it means to be American. But our laws and the Constitution balance religious freedom in such a way that it does not come at the cost of others' dignity.⁶ Any discrimination permissible under the proposed revisions to 45 CFR § 75.300(c)-(d) only damages the bulwarks of antidiscrimination that allow all Americans to participate in public life and build families and relationships as equals.

I. The Proposed Revisions to 45 CFR § 75.300(c)-(d) Will Provide HHS Awardees with License to Use Federal Funds to Discriminate.

The earlier version of 45 CFR § 75.300(c)-(d), promulgated on December 12, 2016, added explicit provisions that recipients of HHS awards could not exclude, deny, or discriminate against individuals on the basis of age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation in accordance with HHS public policy requirements (hereinafter, the "Original Rule").⁷ Explicitly referencing *United States v. Windsor* and *Obergefell v. Hodges*, the

⁴ HHS states that the revision was motivated, in part, by certain subgrantees' concerns that non-discrimination interferes with their religious exercise; however, this revision does not take into account or otherwise reference the real discrimination faced by individuals interacting with HHS subgrantees or the perspectives of those that had supported the Original Rule. *See, e.g., See Angelia Davis, Scrutiny of Miracle Hill's faith-based approach reaches new level*, GREENVILLE NEWS (Mar. 2, 2018, 4:33 PM), <https://www.greenvilleonline.com/story/news/2018/03/01/miracle-hill-foster-care/362560002/>; Meg Kinnard, *AP Exclusive: Lawsuit Claims Discrimination by Foster Agency*, AP NEWS (Feb. 15, 2019), <https://apnews.com/ed3ae578ebdb4218a2ed042a90b091c1>; Julie Moreau, *Lesbian Couple Sues Health and Human Services after Foster Care Application Rejected*, NBC NEWS (Feb. 22, 2018, 4:09 PM), <https://www.nbcnews.com/feature/nbc-out/lesbian-couple-sues-health-department-after-foster-care-application-rejected-n850371>.

⁵ *See Nat'l Black Police Ass'n v. Velde*, 712 F.2d 569, 580 (D.C. Cir. 1983) (holding that "Activities that the federal government could not constitutionally participate in directly cannot be supported indirectly through the provision of support for other persons.").

⁶ *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 558 (2003) (noting that while condemnation of homosexual conduct has partially been shaped by religious beliefs, "the liberty protected by the Constitution allows homosexual persons [to]...retain their dignity as free persons.").

⁷ 45 CFR § 75.300, available at <https://www.govinfo.gov/content/pkg/FR-2016-12-12/pdf/2016-29752.pdf>. The exact language of the Original Rule reads as follows:

(c) It is a public policy requirement of HHS that no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services based on non-merit factors such as age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation. Recipients must comply with this public policy requirement in the administration of programs supported by HHS awards.

Original Rule also required subgrantees, for the purposes of work funded by federal money, to treat all same-sex marriages as valid.⁸ In doing so, the Original Rule established which classes of individuals were protected, which Supreme Court cases applied to subgrantees, and to what end. The Original Rule was designed to prohibit specific forms of discrimination by HHS subgrantees in their duties as awardees. Even so, the Original Rule did not impinge upon the religious liberty of these organizations. Subgrantees, for the purposes of their granted projects, had to *treat* same-sex marriages as valid in the course of administering federally funded projects. Yet, as a religious or spiritual matter, objecting subgrantees had no obligation to *recognize* them as such. And while there is no unencumbered right to federal funding, American citizens are entitled to be free from invidious discrimination, particularly when interacting with federally funded entities.⁹ The fair balance struck by the Original Rule is underscored by the fact that when it was proposed, HHS received only twelve comments, all “strongly supportive” of the Rule.¹⁰

By slicing away the Original Rule’s specificity, the Proposed Rule guts the protections offered by the Original Rule. The revised language for subparts (c) and (d) of the Proposed Rule is as follows:

(c) It is a public policy requirement of HHS that no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services, to the extent doing so is prohibited by federal statute.

(d) HHS will follow all applicable Supreme Court decisions in administering its award programs.¹¹

(d) In accordance with the Supreme Court decisions in *United States v. Windsor* and in *Obergefell v. Hodges*, all recipients must treat as valid the marriages of same-sex couples. This does not apply to registered domestic partnerships, civil unions, or similar formal relationships recognized under state law as something other than a marriage.

⁸ *Id.*

⁹ The Supreme Court has repeatedly rejected the notion that First Amendment rights oblige the government to *subsidize* the exercise of those rights. See *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 546 (1983). Should a party object to a condition on receipt of federal funding, such as a commitment to non-discrimination, a party can simply decline the funds. *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 570 U.S. 205, 214 (2013). This is equally true if the objection claims that a condition may impact the recipient’s religious exercise. *Id.* A party remains free to offer services on its own preferred terms without federal assistance. See *United States v. Am. Library Ass’n, Inc.*, 539 U.S. 194, 212 (2003). As the Supreme Court has held, not receiving state funding is “a relatively minor burden.” *Locke v. Davey*, 540 U.S. 712, 725 (2004).

¹⁰ See 81 Fed. Reg. 89, 393-401 (Dec. 12, 2016).

¹¹ 84 Fed. Reg. 223, 63,835.

HHS' replacement of the Original Rule with the vague language of the Proposed Rule dilutes the Original Rule's antidiscrimination protection to the point of meaninglessness. It does so in two ways:

First, the Proposed Rule removes the specific classes covered by the Original Rule's nondiscrimination language and replaces it with a vague reference to "federal statute." The Proposed Rule's silence on which federal statutes are now applicable to HHS subgrantees risks extensive litigation to determine which statutes the Proposed Rule contemplates. Without specifying any statutes, HHS explains, "HHS grants programs will be administered consistent with the Federal statutes that govern the programs, including the nondiscrimination statutes that Congress has adopted and made applicable to the Department's programs." Even the statutes which individuals can guess apply offer only a fraction of the protection from discrimination afforded by the Original Rule.¹² HHS' website lists statutes applicable to various HHS funded programs and enforced by its Office for Civil Rights.¹³ While certain of the referenced statutory provisions may cover discrete types of HHS grantees, only the protections for race, color, national origin, disability, and age are widely applicable to most if not all HHS grantees. The Proposed Rule *does not* cover discrimination by subgrantees against people because of their religion, sex, sexual orientation, and gender identity. Title VI, which is likely among the federal statutes that the Proposed Rule contemplates as applicable, *only* bans federal funding recipients from discrimination on the basis of race, color, or national origin.¹⁴ By design, Title VI does not protect individuals from religious discrimination, which means that subgrantees like adoption agencies can refuse to work with prospective parents because they are Muslim or Jewish.¹⁵ Moreover, because Title IX only applies to educational institutions and no other relevant federal statute forbids sex discrimination, subgrantees can reject prospective adoptive mothers and fathers because of their sex. And because no relevant federal statutes specifically cover discrimination due to sexual orientation or gender identity, HHS subgrantees can refuse to work with queer and/or transgender individuals. By dismantling the Original Rule's specific nondiscrimination language and replacing it with vague reference to statute, the Proposed Rule leaves individuals exposed to at least religious, sex, sexual orientation, and gender identity discrimination at the hands of federally funded HHS subgrantees. To ensure that the Proposed Rule does not give an imprimatur of approval for federally funded discrimination and make subgrantees feel empowered to

¹² *Id.* at 63,833.

¹³ U.S. Dep't of Health and Human Services, *Civil Rights for Individuals and Advocates*, HHS.gov Civil Rights (last accessed Nov. 22, 2019, 3:28 PM), <https://www.hhs.gov/civil-rights/for-individuals/index.html>. The key statutes listed on the website as applicable to HHS programs are Title VI of the Civil Rights Act of 1964, Section 1557 of the Affordable Care Act, Sections 504 and 508 of the Rehabilitation Act of 1973, Title II of the Americans with Disabilities Act, Age Discrimination Act, Title IX of the Education Amendments of 1972, and 20 U.S.C § 1681.

¹⁴ Title VI, 42 U.S.C. § 2000d, *et seq.*

¹⁵ See Nimra H. Azmi, *Uncovered: Title VI & Title IX's Limited Protections for Muslim Students Who Veil*, HARV. J.L. & GENDER (forthcoming, 2020).

discriminate, it should revert to clearly articulating the protected classes that HHS grantees may not discriminate against as part of grantees' privilege of taking advantage of federal funding for their operations.

Importantly, in its explanation of the Proposed Rule, HHS only explicitly references *one* statute that the new language in 45 CFR § 75.300(c) contemplates: the Religious Freedom Restoration Act ("RFRA").¹⁶ But RFRA applies only to federal government actors and does not impose commitments to uphold religious freedom on subgrantees in their dealings with individuals.¹⁷ As such, the Proposed Rule intends to protect HHS grantees and subgrantees from any conditions on receiving federal grant money that would place perceived substantial burdens on their religious exercise. But RFRA already allows for that: for example, a 2007 Office of Legal Counsel opinion offered that exempting a grantee or subgrantee from antidiscrimination provisions in employment was permitted under RFRA.¹⁸ The fact that HHS thought that the only federal statute worth mentioning in its explanation of the Proposed Rule was RFRA conveys a concerning message about the spirit of the Proposed Rule, indicating that it is designed not to protect individuals but rather, to give special status to faith-based subgrantees.¹⁹

Second, the Proposed Rule transforms the Original Rule's assurance that *HHS grantees* treat the marriages of same sex couples as valid into an entirely different, ambiguous commitment that "*HHS will follow all applicable Supreme Court decisions in administering its award programs.*"²⁰ (emphasis added). By shifting the onus from the grant recipients to HHS, the Proposed Rule eviscerates the purpose of the Original Rule to protect individuals interacting with HHS grantees. HHS states that this change is being made to expand the breadth of applicable Supreme Court precedent.²¹ Unfortunately, in its current form, the Proposed Rule does not do that.

¹⁶ 42 U.S.C. § 2000bb-1-4.

¹⁷ While it may be argued that foster care and adoption agencies that use federal funds to deliver a public service are operating as "instrumentalities" of the government, RFRA does not define the term "instrumentality" nor does RFRA's legislative history clarify the term's meaning. The Ninth Circuit has found that to be an instrumentality subject to RFRA, an entity must be a government actor under the First Amendment. *See Hall v. Am. Nat. Red Cross*, 86 F.3d 919, 923 (9th Cir. 1996) (finding that the American Red Cross, although created to further government objectives, was not subject to sufficient government authority to be considered a government actor and thus an instrumentality under RFRA). On the other hand, some courts have determined that private institutions that work with states to care for foster or adoptive children may be state actors. *See, e.g., Brent v. Wayne Cty. Dep't of Human Servs.*, 901 F.3d 656, 676–77 (6th Cir. 2018). Therefore, although it is not a settled question, RFRA may not offer protection from religious discrimination to the individuals who interact with most HHS subgrantees.

¹⁸ *Application of the Religious Freedom Restoration Act to the Award of A Grant Pursuant to the Juvenile Justice & Delinquency Prevention Act*, 31 U.S. Op. Off. Legal Counsel 162 (2007).

¹⁹ RFRA's application *must* account for burdens that religious exemptions from neutral, generally applicable laws—such as antidiscrimination laws—would impose on nonbeneficiaries. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 764 (2014) ("No tradition, and no prior decision under RFRA, allows a religion-based exemption when the accommodation would be harmful to others.").

²⁰ *See supra* note 1, Health and Human Services Grants Regulation, 84 Fed. Reg. 223, 63833.

²¹ *Id.*

Far from expanding which Supreme Court decisions *grantees* must abide by, the proposed language only states that which is already true: HHS is required to abide by relevant Supreme Court precedent. If HHS is sincere that this revision is intended to expand the scope of applicable Supreme Court decisions, then the language should reflect the duties of *grantees* and *subgrantees*, not just HHS. Moreover, the Proposed Rule should designate, by way of illustrative example, which Supreme Court cases are considered applicable and how, including specifying the obligation of recipients of federal funds to treat same sex marriage as valid under *Obergefell* and *Windsor*.

The Proposed Rule is so vague and open to misinterpretation that it exposes grantees and the government to extensive litigation to resolve how the Proposed Rule should be applied. To that end, the Proposed Rule should make clear that it protects individuals from discrimination by HHS grantees and subgrantees at least on the basis of age, disability, race, color, national origin, religion, sex, sexual orientation, and gender identity. Further, the Proposed Rule should make clear that grantees are bound by applicable specific Supreme Court decisions, including *Obergefell* and *Windsor*, in the work they carry out pursuant to federal funding.

II. The Proposed Rule Threatens to Create a Safe Harbor for Discrimination, a Risk Reflected by Repeated Instances of Religious and Sex-Based Discrimination by HHS Subgrantees.

Part I of this comment explained how by removing reference to specific protected classes, the Proposed Rule risks encouraging and empowering HHS grantees to engage in discrimination against individuals on the basis of their religion, sex, sexual orientation, and gender identity. This is not mere conjecture. There have been repeated incidents of such discrimination by HHS subgrantees that offer essential functions like adoption and foster services. For example, earlier this year, Miracle Hill Ministries, a Christian adoption agency in South Carolina that only serves Christian prospective parents and receives almost half of its funding from federal and state programs, refused to accept a Jewish woman as a volunteer mentor for foster children simply because she was Jewish.²² In another incident, Miracle Hill denied Aimee Madonna, a Catholic woman, the ability to foster children through its agency merely because she was Catholic.²³ Faith-based agencies serving children is a laudable effort; but if that effort is premised for whatever reason on discrimination, then unencumbered federal funding becomes inappropriate.

The discrimination by HHS subgrantees is not limited to religious discrimination. By not requiring grantees and subgrantees to treat as valid same-sex marriage for the purposes of their

²² See Davis, *supra* note 4; Letter from Gov. Henry McMaster to the Hon. Steven Wagner (Feb. 27, 2018), *available at* [https://governor.sc.gov/sites/default/files/Documents/newsroom/Scanned%20from%20ECO S-XR-SH119.pdf](https://governor.sc.gov/sites/default/files/Documents/newsroom/Scanned%20from%20ECO%20S-XR-SH119.pdf).

²³ See Kinnard, *supra* note 4.

operations and to not discriminate against individuals on the basis of their sexual orientation, the Proposed Rule guarantees increased discrimination against queer couples who wish to adopt and foster children. In 2017, Fatma Marouf, a lesbian woman of Middle Eastern background, sought to foster a refugee child with her wife through the Catholic Charities of Fort Worth, another HHS subgrantee.²⁴ Their foster care application was rejected because the couple “did not mirror the Holy Family.”²⁵ This and numerous other instances make clear that discrimination based on sexual orientation is a real threat, one that the Original Rule tried to address. The Proposed Rule, far from strengthening protections for individuals, would empower federally funded entities to discriminate against fellow Americans.

Subgrantees’ policies of discriminating against prospective parents not only harm prospective parents, but can also injure the children in the agencies’ care. Such discrimination reduces the pool of prospective parents for children in need and creates barriers to matching children with adoptive or foster parents of the same faith, including helping ensure that Muslim children are placed in Muslim homes.

In sum, HHS should not use taxpayer money to fund foster and adoption agencies that discriminate against the taxpayers themselves on the basis of their religion or sexual orientation or any other protected ground. If such discrimination is critical to the entities’ missions, then they should proceed without federal support—otherwise, the federal government becomes an accomplice to invidious discrimination.

III. HHS’ Proposed Rule May Violate the First and Fifth Amendments

The Proposed Rule would allow HHS grantees and subgrantees to refuse to work with individuals on the bases of at least religion, sex, sexual orientation, and gender identity. That the Proposed Rule appears designed to allow such discrimination means that it runs counter to at least the Establishment Clause of the First Amendment and the Equal Protection and Due Process components of the Fifth Amendment.

Establishment Clause. It is imperative that the government accommodate religious practices and such accommodation is fully possible within the Establishment Clause.²⁶ But there is a clear difference between that inalienable principle and an entity carrying out governmental

²⁴ See Moreau, *supra* note 4.

²⁵ *Id.*

²⁶ See *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334 (1987) (quoting *Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136, 144–145 (1987) (“This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause...At some point, accommodation may devolve into an unlawful fostering of religion...”) (internal quotations omitted).

duties with federal funding in accordance with its own religious beliefs.²⁷ The Establishment Clause mandates that governmental benefits be allocated “on the basis of neutral, secular criteria.”²⁸ Because the Proposed Rule is engineered to permit government grantees to allocate benefits on non-neutral bases, it risks running afoul of the *Lemon* Test and the Endorsement Test. The explanation HHS provides in support of the Proposed Rule—predicated on the concerns of faith-based subgrantees, including lawsuits they have initiated, RFRA concerns, and waivers religious organizations have sought to permit faith-motivated discrimination—highlights that the purpose of the Proposed Rule is solely to advance and impermissibly sponsor faith-based entities.²⁹ Because the Proposed Rule is designed to allow the federal government to continue funding religious entities that discriminate against individuals due to the tenets of their faith, it impermissibly effectuates the advancement of religion, excessively entangling the government with faith.³⁰ And because the Proposed Rule is designed to fund and protect actors that use their faith to discriminate, ratifying discrimination in the name of faith, it constitutes impermissible endorsement of and favoritism of faith by the federal government, communicating a message that those whom subgrantees choose to exclude from the government-funded program are undeserving of equal treatment.³¹

Equal Protection under the Fifth Amendment.³² The Fifth Amendment’s Equal Protection component directs that the federal government treat “all persons similarly situated” alike.³³ Thus, when the government treats people differently because of a suspect classification, such actions are treated as “presumptively invidious.”³⁴ Further, the Constitution forbids government entities like HHS from providing significant aid to institutions that practice invidious discrimination.³⁵ The Proposed Rule, by both apparent design and its inevitable effect, will continue to fund and protect subgrantees who discriminate on the basis of protected grounds like sex and religion and deny individuals participation in federally funded programs because of their

²⁷ *Dumont v. Lyon*, 341 F. Supp. 3d 706, 739 (E.D. Mich. 2018).

²⁸ *Agostini v. Felton*, 521 U.S. 203, 231, 234 (1997).

²⁹ HHS states that there are concerns that compliance with the Original Rule would reduce foster care placements. HHS cites no statistics in support for this conjecture that either show that the agencies are in fact leaving HHS’s Administration for Children and Families Program and that there are no other agencies that could take their place or that agencies do not continue to provide foster/adoption services after such departure. Without these showings by HHS and in light of the countervailing facts, the Proposed Rule does not reveal the existence of a potential secular purpose of providing an adequate level of services.

³⁰ *Mitchell v. Helms*, 530 U.S. 793, 844, 857 (2000) (O’Connor, J., controlling concurrence).

³¹ *Dumont*, 341 F. Supp. 3d at 734.

³² While the Fifth Amendment, applicable to the federal government, does not contain an Equal Protection Clause, the Supreme Court’s “approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment.” *See, e.g., Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975).

³³ *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

³⁴ *See Plyler v. Doe*, 457 U.S. 202, 216 (1982).

³⁵ *See Norwood v. Harrison*, 413 U.S. 455, 467 (1973).

sex or religion, stamping them with a brand of inferiority. Further, the message the Proposed Rule communicates will embolden such discrimination perpetuated by HHS grantees. This discrimination is not simply incidental: HHS' explanation makes clear that it is well-aware of the discrimination underway and is, in fact, acting to protect such discrimination.³⁶ HHS' choice to create a flow of funding to programs that it knows do not serve all Americans equally violates the Equal Protection component of the Fifth Amendment.

Due Process Clause of the Fifth Amendment. The Proposed Rule also risks creating violations of the Due Process Clause of the Fifth Amendment. The Due Process Clause protects individuals' substantive rights to practice their religion or be free from discrimination on the basis of their sexual orientation.³⁷ By permitting subgrantees to impose religious tests or differentiate on the basis of sexual orientation to deny individuals the ability to foster or adopt children because of their religion, the Proposed Rule risks violating the Due Process Clause of the Fifth Amendment. Additionally, foster and adoptive parents are entitled to a minimal level of procedural due process that forbids *per se* discriminatory rules concerning who is eligible to adopt children or out-of-hand rejections of adoption applications, standards which the Proposed Rule is designed to allow subgrantees to circumvent.³⁸ For these reasons, the Proposed Rule may also run afoul of the Fifth Amendment's Due Process Clause.

IV. Conclusion

As organizations rooted in the American Muslim community, Muslim Advocates, AMHP, ICNA CSJ, and MPAC know that religious liberty and antidiscrimination are twin, bedrock principles of American democracy and they rise and fall together. When well-balanced, they foster a functional republic, where people of diverse faith backgrounds can thrive and live free from discrimination. The Proposed Rule, however, will subject many Americans to discrimination on the basis of religion, sex, sexual orientation, and gender identity by entities receiving federal funds. Moreover, transforming subpart (d), which recognized the *grantees'* obligation to follow *Obergefell* and *Windsor*, into HHS' duty to merely abide by unspecified Supreme Court decisions broadly, nullifies subpart (d)'s utility. This vitiation greenlights not only increasing religion or sex-based discrimination by subgrantees, but also potential violations of the First and Fifth Amendments by HHS.

Muslim Advocates, AMHP, ICNA CSJ, and MPAC therefore urge that HHS either modify the Proposed Rule to reflect the serious concerns in this comment or revert to enforcing the

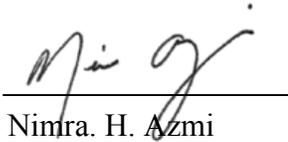
³⁶ 84 Fed. Reg. 223, 63,832.

³⁷ See generally, *Lawrence*, 539 U.S. 558. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 399–400 (1923).

³⁸ See, e.g., *Drummond v. Fulton Cty. Dep't of Family & Children's Servs.*, 547 F.2d 835, 859 (5th Cir.), *on reh'g*, 563 F.2d 1200 (5th Cir. 1977).

Original Rule, which struck the appropriate balance between protecting religious freedom and advancing antidiscrimination.

Respectfully submitted,



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