September 11, 2023

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Director for Office for Civil Rights
U.S. Department of Health & Human Services
200 Independence Ave, S.W.
Washington, D.C. 20201

Submitted electronically via regulations.gov

Re: HHS Grants Notice of Proposed Rulemaking (RIN–0945–AA19)

Dear Director Rainer:

We write on behalf of the eleven undersigned organizations[1] in response to the Department of Health and Human Services notice of proposed rulemaking (RIN 0945-AA19) published in the Federal Register on July 13, 2023.[2] We thank you for the opportunity to comment on the proposed rule. We applaud the Biden administration's commitment to repromulgating certain provisions of the 2016 Grants rule, in particular the proposal to add § 75.300(e) to codify critical interpretations from the Supreme Court's decision in *Bostock v. Clayton County*.[3]

However, the proposed rule leaves many HHS Grants programs without any explicit federal statutory or regulatory protections against discrimination on the basis of religion or sex (including sexual orientation, gender identity, or sex characteristics). As explained in greater depth below, this gap in protections exposes lesbian, gay, bisexual, transgender, queer, and intersex (LGBTQI+) individuals, certain religious communities, and nonreligious people to harmful discrimination when receiving or participating in government-funded services.

To ensure comprehensive non-discrimination protections in HHS grant-funded services, we urge HHS to swiftly initiate rulemaking to adopt broad nondiscrimination protections in grant programs that are authorized by statutes that lack explicit nondiscrimination protections, but which have general rulemaking authority, such as Titles IV-B and IV-E of the Social Security Act.[4] General rulemaking provisions, which authorize HHS to promulgate rules that are

[1] Many of the undersigned organizations have also signed on in support of a broader coalition letter on the proposed rule. This letter is distinct in that it elaborates in detail on HHS' authority to promulgate program-specific nondiscrimination protections. We remain in full support of both letters.
[2] This comment was prepared with the assistance of Kristen Miller of Democracy Forward Foundation, who is counsel for Family Equality.
[3] 140 S. Ct. 1731 (2020).
[4] While many programs are covered, in whole or in part, by cross-program statutes such as Title IX and Section 1557 of the ACA, these protections have not been well understood or enforced

necessary to implement the grant programs, comfortably encompass the authority to promulgate broad nondiscrimination protections. HHS should do so, beginning with protections for the child welfare programs under Title IV-B and IV-E of the Social Security Act.[5]

I. Nondiscrimination Protections Are Urgently Needed to Prevent Harms to Various Communities.

Although all federal grant programs are subject to generally applicable statutes that bar discrimination on the basis of race, color, national origin, disability, and age,[6] there are no federal statutes providing such universal protections against discrimination on the basis of religion or sex, including sexual orientation, gender identity, or sex characteristics ("SOGISC") in the grants-program context. Further, many authorizing statutes lack program-specific statutory protections against such discrimination. This is true, for example, of Titles IV-B and IV-E of the Social Security Act[7] under which HHS transfers nearly $10 billion per year to eligible states to subsidize child welfare services, including foster care, adoption assistance, guardianship assistance, services that protect children from abuse, and services that help preserve and reunite families.[8] Accordingly, there are no statutory protections that explicitly and uniformly prevent HHS-funded child welfare agencies from discriminating against children and prospective foster or adoptive parents on the basis of religious or SOGISC discrimination.[9]

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because the recipients are not considered typical educational or health care institutions. As recommended by other commenters, we urge the Department to clarify and codify by regulation where these cross-program statutes apply. We also recommend that HHS complement those efforts by using other statutory authorities to establish regulatory nondiscrimination requirements across key programs. Adopting both approaches will ensure that protections that are clear, consistent, and comprehensive. Doing so is essential to addressing ongoing discrimination, even for programs where protections may overlap in part.

[5] We also urge HHS to investigate its authority to promulgate such rulemakings for other programs, such as programs authorized by the Older Americans Act and the Child Abuse Prevention and Treatment Act.

[6] *See* 42 U.S.C. § 2000d; 29 U.S.C. § 794(a); 42 U.S.C. § 6102.

[7] *See* 42 U.S.C. § 671(a)(18) (prohibiting certain kinds of discrimination, but not SOGISC or religious discrimination).

[8] *See* 42 U.S.C. §§ 621, 624, 670, 674.

[9] Note, however, that broad nondiscrimination statutes apply to many aspects of these programs. For example, Title IX of the Education Amendments applies to all educational and training activities under Title IV-E and Title IV-B. These include, for example, all Title IV-E and IV-B training activities for child welfare and related workforces, community groups, and volunteers (such as those funded or required under 42 USC §§ 628c, 629f, 629g, 629h, 629i, 671, 674, 677, and 679c); all educational and training activities aimed at families, prospective foster or adoptive parents, or pregnant individuals (such as parental skills programs, kinship navigator programs, and other activities funded or required under 42 U.S.C. §§ 627, 629g(f)(5)(E), 671(e)(1)(B)); and all activities aimed at providing, planning for, or facilitating education or training for youth (such as residential educational programs, vocational programs, and others funded or required under 42 U.S.C. §§ 674(e), 675(1)(G), 677, and 1320a-9(a)(7)(G) and (J)).

In the absence of explicit protections, participants in many HHS grant programs, like those governed by Titles IV-B and IV-E, routinely experience discrimination that results in significant harms. The adoption of express nondiscrimination protections would help ensure that all participants have access to federally funded services and programs without unnecessary barriers and free from discrimination.

A. *Harms to LGBTQI+ Communities*.

Research consistently finds that LGBTQI+ people report high rates of discrimination, including while accessing government-funded services. Indeed, many LGBTQI+ people experience discrimination while accessing programs administered by HHS, including Title IV-B and IV-E services (e.g., family support and foster care / adoption services) and services provided to older adults under the Older Americans Act (e.g., meals on wheels).

Title IV-B and IV-E. With respect to Title IV-B and IV-E programs, for example, discrimination results in poorer outcomes for LGBTQI+ families and youth. To begin, research shows that families headed by an LGBTQI+ parent, especially an LGBTQI+ parent of color, are particularly vulnerable to investigations by child protective services and that discrimination may be partially to blame for this differential treatment.[10]

Moreover, a pattern of discrimination has led to the overrepresentation of LGBTQI+ youth in the child welfare system and among youth experiencing homelessness, where they represent 30.4 percent[11] and 40 percent[12] of the population respectively, even though they comprise only 11 percent of youth overall.[13] Likewise, transgender and nonbinary youth are at greater odds of

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Similarly, the nondiscrimination protections in Section 1557 of the ACA apply to all health activities under Title IV-E and Title IV-B. These include, for example, all activities aimed at assessing health and health needs or at providing, planning for, or facilitating medical or mental health care or health prevention activities, or identifying or preventing medical neglect for youth or caregivers (such as those funded or required under 42 U.S.C. §§622(b)(15)(A), 629a(a)(7)(B)(i)-(iii), 629g(f), 671(a)(9) and (15) and (21)-(22), 671(e)(1)(A), 672(k), 675A(c), 677, and 1320a-9(a)(7)(B) and (J)).
Moreover, provisions of the Americans with Disabilities Act, Rehabilitation Act, and ACA likely prohibit discrimination based on gender dysphoria, as well as discrimination based on intersex variations, in all aspects of these programs.

[10] Nancy D. Polikoff, *Neglected Lesbian Mothers*, 52 Fam. L. Q. 87, 90 (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3407307 (mothers who identify as lesbian or bisexual are four times as likely to lose custody than their heterosexual peers).

[11] Laura Baams et al., *LGBTQ Youth in Unstable Housing and Foster Care*, 143(3) Pediatrics 1, 1 (2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6398424/pdf/PEDS_20174211.pdf.

[12] Michael Santos & Justin T. Rush, True Colors United & Nat'l L. Ctr. on Homelessness & Poverty, *State Index on Youth Homelessness* 13, 19 (2018), https://drive.google.com/file/d/14hCgF6gwxF7At2kanWLulciE1NPN-Z5C/view.

[13] Megan Martin et al., Ctr. for the Study of Soc. Pol'y, *Out of the Shadows: Supporting LGBTQ Youth in Child Welfare Through Cross-System Collaboration* 8 (2016), https://cssp.org/resource/out-of-the-shadows/. *See also* Theo G. M. Sandfort, N.Y.C. Admin. for Child.'s Servs., *Experiences and Well-Being of Sexual and Gender Diverse Youth in Foster Care*

being in foster care than are their cisgender LGBQ peers.[14] One 2019 study by researchers at the University of Texas at Austin explains how discrimination leads to such overrepresentation: when LGBTQI+ youth disclose their sexual orientation or gender identity to family members, they can face verbal and physical harassment, which in turn can result in their entry into the child welfare and foster systems, or in homelessness.[15] The pattern of discrimination continues in the child welfare and foster systems, where "LGBTQ youth are more likely to experience victimization and abuse by social work professionals, foster parents, and peers."[16] This in turn results in "poorer functional outcomes," including higher rates of multiple placements, educational instability, including multiple school changes, and exiting foster care to homelessness.[17]

Discrimination against LGBTQI+ youth by state-contracted agencies can take many forms. For example, child welfare agencies may refuse to recognize a child's gender identity and require them to wear clothing that doesn't match their gender or go by a different name; agencies may require children to attend classes that denigrate being LGBTQI+; or they may be placed with a family whose religious beliefs actively discriminate against or denigrate a child's identity.

In addition, state officials or state-contracted agencies may engage in discriminatory conduct based on a child or youth having been born with variations in their physical sex characteristics. This may take the form of inappropriately withholding information about a young person's own medical history from the youth or their caregivers, or improperly disclosing it to others; refusing to respect an intersex youth's gender identity in the same manner as has been documented with transgender youth; or withholding or imposing medical interventions on an intersex infant, child, or adolescent based on sex stereotypes rather than medical need. Adults in these systems typically have little awareness and no training on supporting this population, and anecdotal reports indicate significant concerns about the quality of care they may receive. While little or no formal data yet exist specifically on the experiences of intersex youth in the U.S. foster care system, a growing body of research documents the stigma and discrimination on the basis of sex characteristics experienced by intersex individuals across their lifespans and in many areas of life, including in education and pediatric health care.

These harms are compounded when foster care and adoption agencies discriminate against LGBTQI+ couples by refusing to license them as prospective foster and adoptive parents or as guardians.[18] Such discrimination harms LGBTQI+ youth in two ways. First, it signals to

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in New York City: Disproportionality and Disparities (2020), https://www1.nyc.gov/assets/acs/pdf/about/2020/WellBeingStudyLGBTQ.pdf; Marlene Matarese et al., The Inst. for Innovation and Implementation at Univ. of Md.'s Sch. Of Soc. Work, *The Cuyahoga Youth Count: A Report on LGBTQ+ Youth Experience in Foster Care* (2021), https://theinstitute.umaryland.edu/media/ssw/institute/Cuyahoga-Youth-Count.6.8.1.pdf.

[14] The Trevor Project, *LGBTQ Youth with a History of Foster Care* 1 (May 2021), https://www.thetrevorproject.org/research-briefs/lgbtq-youth-with-a-history-of-foster-care-2/.

[15] Baams, *LGBTQ Youth in Unstable Housing and Foster Care*, *supra* note 11, at 2.

[16] *Id.*

[17] *Id.*

[18] *See, e.g.*, Lambda Legal, *Rogers v. United States Department of Health and Human Services*, https://lambdalegal.org/case/rogers-v-us-department-health-human-services/ (last visited Aug.

LGBTQI+ youth that families with LGBTQI+ parents are less deserving of dignity and equal protection under the law. Second, by excluding LGBTQI+ adults from eligibility, the total pool of potential homes, and particularly LGBTQ affirming homes, for kids who desperately need those homes, is diminished.

Older Americans Act. LGBTQI+ older people are also highly vulnerable to the consequences of systemic discrimination. Lack of legal and social recognition, as well as discrimination throughout the lifespan–including in employment, housing, and health care–contribute to higher rates of poverty and economic insecurity for LGBTQI+ older adults compared to non-LGBTQI+ older adults.[19] LGBTQI+ older adults may be targets of discrimination when accessing government-funded services that they rely on, such as long-term services programs supported by the Administration for Community Living through Title III of the Older Americans Act.[20]

For example, staff at institutional and long-term care facilities may deny visitors of LGBTQI+ elders, disallow same-sex couples sharing a room, refuse to place a transgender older adult in accommodations that match their gender identity, or prohibit partners from participating in medical decision making.[21] Transgender older adults in particular may experience mistreatment, including physical or psychological abuse, denial of personal care services, being "outed" against their will, and denied the ability to dress in accordance with their gender identity, or denied admission altogether.[22] Research demonstrates that LGBTQI+ older adults fear being denied care or being subject to mistreatment, neglect, or abuse in long-term care communities and senior housing.[23] This has led some LGBTQI+ elders to hide their identity and re-enter the closet when accessing these programs.[24]

Programs to support older adults are especially important for LGBTQI+ elders who face unique barriers when aging. While many non-LGBTQI+ elders may rely on informal support networks comprising children and other family members, LGBTQI+ adults are less likely to have children,

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31, 2023) (summarizing litigation that resulted when a South Carolina child welfare agency refused to certify a lesbian couple as foster parents).

[19] *See, e.g.*, Soon Kyu Choi & Ilan H. Meyer, UCLA Sch. of L.'s Williams Inst., *LGBT Aging: A Review of Research Findings, Needs, and Policy Implications* (2016), https://williamsinstitute.law.ucla.edu/publications/lgbt-aging/; SAGE, *Disrupting Disparities: Solutions for LGBTQ+ New Yorkers Age 50+* (2021), https://www.sageusa.org/resource-posts/disrupting-disparities-solutions-for-lgbtq-new-yorkers-50/.

[20] The Administration for Community Living recently proposed a rulemaking that, if finalized, will advance the provision of equitable services for LGBTQI+ older adults. *See* 88 Fed. Reg. 39568 (June 16, 2023). However, that proposed rule falls short of providing nondiscrimination protections.

[21] The Keck School of Medicine of USC, *Research Brief: Mistreatment of Lesbian, Gay, Bisexual, and Transgender (LGBT) Elders* (2020), https://www.lgbtagingcenter.org/resources/resource.cfm?r=1012.

[22] *Id.*

[23] SAGE, *LGBTQ Seniors Fear Having to Go Back in the Closet for the Care They Need* (Oct. 12, 2021), https://www.sageusa.org/news-posts/lgbtq-seniors-fear-having-to-go-back-in-closet-for-the-care-they-need/.

[24] *Id.*

more likely to be estranged from their family of origin, and more likely to experience social isolation later in life.[25] These factors may increase the likelihood of LGBTQI+ elders relying on government-supported aging and long-term services programs.

B. *Harms Caused by Religious Discrimination.*

Various communities, including religious communities and nonreligious people, also face religious discrimination in government-funded services. But people who use social services should never be pressured to participate in religious activities or be required to meet a religious litmus test in exchange for the help they need. When the government funds social service programs, it must ensure they are open to people of all faiths and nonreligious people.

As just one example of religious discrimination, some taxpayer-funded child welfare agencies have refused opportunities to families to serve as foster parents or mentors because of their religion. In South Carolina, a Protestant child welfare agency initially informed a woman named Aimee Maddonna that her family would be a good fit to work with children in foster care, but ultimately turned her away when they learned she was Catholic.[26] That organization requires volunteers and foster parents to sign an evangelical Protestant Statement of Faith and to attend one of its approved churches. As a result of this policy, the organization has turned away 25-30 other families, including other Catholic families, Jewish families, and same-sex couples.

Similarly, a taxpayer-funded organization in Tennessee refused to provide Elizabeth and Gabriel Rutan-Ram foster-parent training.[27] The Rutan-Rams wanted to foster and adopt a child from out of state. But before they could do so, they had to complete a foster-parent training program and receive a home-study certification, which they scheduled with the only agency in their area that was willing to provide those services for out-of-state placements. But on the day they were supposed to begin the training, the organization told Elizabeth and Gabe that it would not serve them because they are Jewish—and they were unable to foster and adopt that child.

Nonreligious people likewise routinely face discrimination when receiving services because of their beliefs. For example, an atheist man in Colorado was involuntarily committed to various religious facilities to treat substance-use disorder at the direction of a state agency. These programs required him to attend not only Bible study and church, but also religious twelve-step

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[25] Movement Advancement Project & SAGE, *Understanding Issues Facing LGBT Older Adults* (2017), https://www.lgbtmap.org/policy-and-issue-analysis/understanding-issues-facing-lgbt-older-adult.

[26] Americans United, *Maddonna v. Department of Health and Human Services* (last visited Sep. 5, 2023), https://www.au.org/how-we-protect-religious-freedom/legal-cases/cases/maddonna-v-department-of-health-and-human-services/# (describing litigation that resulted from this litigation).

[27] Christine Hauser, *Tennessee Couple Says Adoption Agency Turned Them Away for Being Jewish*, New York Times (Jan. 22, 2022), https://www.nytimes.com/2022/01/22/us/tennessee-jewish-couple-adoption.html.

programs. They also punished the man because of his beliefs and emphasized that an atheist could never overcome substance use or addiction.[28]

Indeed, a national survey of nearly 34,000 nonreligious people showed that 14.6% of nonreligious participants who sought reproductive care within the past three years had negative experiences because of their nonreligious beliefs.[29] Similarly, 17.7% had negative experiences in mental health services, 15.2% in substance abuse services, and 10.7% in other health services, all because of their nonreligious beliefs. For each of these areas, nonreligious people experienced a significantly higher level of discrimination in very religious communities.[30]

II. HHS' General Rulemaking Authority Under Various Statutes Encompasses Nondiscrimination Protections.

HHS should address these harms by drawing on its general rulemaking authorizations to promulgate nondiscrimination protections.[31] Courts have repeatedly recognized the broad authority conferred by such provisions, which typically authorize agencies to publish rules that are "necessary and appropriate" to carry out the purposes of a statute.[32]

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[28] Because the state agency was funded by HHS, this individual filed two complaints with the HHS Office for Civil Rights ("OCR") related to this case (DO-21-453070: Civil Rights & Conscience and Religious Freedom Discrimination Complaint against New Beginnings Recovery Center; DO-21-430481: Civil Rights & Conscience and Religious Freedom Discrimination Complaint against the Office of Behavioral Health of the Colorado Department of Human Services). The response to both complaints stated in pertinent part: "Upon review of your complaint, we have determined that OCR's Conscience and Religious Freedom Division (CRFD) does not have authority to investigate the religion or conscience claims of your complaint and, therefore, is closing the above-referenced matter." American Athiests, *Comment Letter Re: Partnerships With Faith-Based and Neighborhood Organizations* 3 (Mar. 13, 2023), https://www.atheists.org/wp-content/uploads/2023/03/USAID-American-Atheists-Comment-Faith-Based-Social-Services-March2023.pdf. This example clearly illustrates the shortcomings of HHS's current regulations and enforcement procedures. Although this beneficiary faced direct harm as a result of the violation of faith-based social services program rules and encountered religious discrimination and coercion, HHS OCR failed to address, or even investigate, the issue because of a lack of clear regulatory authority.

[29] S. Frazer, et al., *Reality Check: Being Nonreligious in America* (2020), *available at* www.secularsurvey.org. Moreover, research shows that nonreligious LGBTQ people face elevated levels of discrimination compared to their heterosexual/cisgender peers. S. Frazer, et al., American Atheists, *Nonreligious Lesbian, Gay, Bisexual, Transgender, and Queer People in America: A Brief from the U.S. Secular Survey* 283 (2022), www.secularsurvey.org.

[30] *Id.*

[31] *See, e.g.*, 42 U.S.C. § 1302(a) (providing general rulemaking authority for Social Security Act functions).

[32] *See, e.g.*, *Merck v. U.S. Dep't of Health & Human Servs.*, 962 F.3d 531, 537 (D.C. Cir. 2020) (the Social Security Act's general rulemaking authority is "undoubtedly broad").

Indeed, the Supreme Court has instructed that such "necessary and appropriate" provisions "leave[] agencies with flexibility" to act in furtherance of statutory goals.[33] Moreover, the "power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress."[34] Under these principles, courts have upheld rules promulgated pursuant to general rulemaking authority where those rulemakings were necessary to implement the statute's mandates.[35, 36]

With respect to programs for which (1) HHS has general rulemaking authority and (2) for which the statute directs HHS to fund services that promote the well-being of program beneficiaries, the agency may rely on this authority to promulgate broad nondiscrimination protections. Such protections are both consistent with and necessary to implement the relevant grant programs. First, such protections are necessary to ensure that program participants are able to access services mandated by statute. Moreover, in some cases—as is true of the Title IV-B and IV-E programs—such protections are necessary to ensure that grantees meet specific statutory requirements when providing services.[37] Second, preventing discrimination is consistent with the statutory directive to promote the well-being of program participants. Because nondiscrimination protections are both consistent with and necessary to implement HHS grant programs, they are

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[33] *Michigan v. EPA*, 576 U.S. 743, 752 (2015).

[34] *Morton v. Ruiz*, 415 U.S. 199, 231 (1974). *See also Smith v. Berryhill*, 139 S.Ct. 1765, 1778 (2019) ("[A] statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps."); *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) ("[A]mbiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion.").

[35] *See, e.g.*, *Nat'l Welfare Rights Org. v. Mathews*, 533 F.2d 637, 640 (D.C. Cir. 1976); *cf. Doe, 1 v. Fed. Elec. Comm'n*, 920 F.3d 866, 870-71 (D.C. Cir. 2019) (noting that a Federal Election Commission regulation was authorized by the Commission's general rulemaking authority under the Federal Election Campaign Act); *HCA Health Servs. of Oklahoma, Inc. v. Shalala*, 27 F.3d 614, 618 (D.C. Cir. 1994) (HHS's authority to promulgate Medicaid regulations governing the process for reimbursing providers was "comfortably locate[d] . . . in [it]s general rulemaking authority under 42 U.S.C. § 1302").

[36] When upholding such rules, courts have often applied the familiar *Chevron* framework, asking whether Congress has "directly spoken to the precise question at issue," and, if not, whether the agency's interpretation "is based on a permissible construction of the statute." *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Under this framework, agencies receive deference on their statutory interpretations so long as those interpretations are "reasonable." *Michigan*, 135 S. Ct. at 2707. As made clear below, the best reading of the general rulemaking provisions at issue here is that they provide authority for broad nondiscrimination protections. Such an interpretation of these provisions would accordingly survive judicial review even in the absence of the broad deference normally given to agencies at *Chevron* Step Two. HHS should therefore not feel constrained by the Supreme Court's recent decision to reconsider *Chevron* deference in *Loper Bright Enters. v. Raimondo*. *See* United States Supreme Court, Docket for Case No. 22-451 (last updated July 24, 2023), https://www.supremecourt.gov/docket/docketfiles/html/public/22-451.html (granting petition for certiorari).

[37] *See infra* pages 12-14.

within the agency's general rulemaking authorities. As explained in depth below, this general principle is well-illustrated by the Social Security Act's general rulemaking provision, which provides ample authority to promulgate nondiscrimination protections for Title IV-B and IV-E programs.[38]

Indeed, HHS has previously relied on general rulemaking authority to promulgate nondiscrimination protections. For example, under the Runaway and Homeless Youth Act—which is devoid of statutory nondiscrimination protections[39]—the agency promulgated a 2016 rulemaking that prohibits grantees from discriminating against youth based on their "race, ethnicity, nationality, age, religion / spirituality, gender identity / expression, sexual orientation, socioeconomic status, physical or cognitive ability, language, beliefs, values, behavior patterns or customs."[40] HHS relied on its general rulemaking authority, which provides that "the Secretary of Health and Human Services . . . may issue such rules as the Secretary considers necessary or appropriate to carry out the purposes of this subchapter."[41] Similarly, the Department has adopted nondiscrimination requirements for various other grant programs pursuant to statutory program authorities including grants for Title X Family Planning Services,[42] the Child Care Fund,[43] Community Health Services,[44] and Migrant Health Services.[45] Additionally, the Department has relied upon similar general rulemaking authorities—including, but not limited to, Section 1302 of the Social Security Act—to promulgate various substantive program requirements, including nondiscrimination requirements, in Medicare and Medicaid programs.[46]

Moreover, carrying out a statute's mandates necessarily involves ensuring that it is done in compliance with constitutional requirements.[47] As HHS acknowledged in both the 2016 and

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[38] *See infra* pages 12-16.
[39] *See generally* 34 U.S.C. § 11202 et seq.
[40] Runaway and Homeless Youth, 81 Fed. Reg. 93,030, 93,062 (Dec. 20, 2016) (codified at 45 C.F.R. § 1351.22(a)).
[41] *Id.* at 93,030 (quoting 42 U.S.C. § 5702, which has since been transferred to 34 U.S.C. § 11202).
[42] 42 CFR § 59.5.
[43] 45 CFR § 98.20(b).
[44] 42 CFR § 51c.109.
[45] 42 CFR § 56.110.
[46] Under these authorities, CMS has adopted nondiscrimination rules, which are more expansive in various respects than applicable nondiscrimination statutes, for the PACE program, 42 CFR §§ 460.98, 460.112 (pursuant to 42 U.S.C. §§ 1395eee(f), 1396u-4(f)); Medicaid services, 42 CFR § 440.262 (pursuant to 42 U.S.C. §1302); Medicare Parts C and D (42 CFR §§ 422.134(g), 423.128(d)(5)(ii) (pursuant to 42 U.S.C. § 1302, 1395hh)); Hospital conditions of participation, 42 CFR §§ 482.13(h)(3), 485.614(h)(3) (pursuant to 42 U.S.C. §§ 1302, 1395hh); and Long-term care facilities, 42 CFR § 483.10 (pursuant to 42 U.S.C. §§ 1302, 1320a-7j, 1395hh).
[47] *See Nat'l Juv. L. Ctr., Inc. v. Regnery*, 738 F.2d 455, 462 (D.C. Cir. 1984) (when "Congress has delegated authority for making policy . . . a given agency must obey the substantive and procedural constraints that the Constitution and Congress impose.").

2021 Grants Rules, constitutional compliance is an appropriate subject for rulemaking.[48] As the APA itself plainly recognizes, agency action cannot be "contrary to constitutional right, power, privilege, or immunity."[49] Issuing nondiscrimination regulations to ensure that people do not experience discrimination in HHS grant-funded programs is necessary to ensure that the agency's statutory mandates are carried out within constitutional constraints.[50]

III. HHS Should Begin, at a Minimum, with Title IV-B and IV-E of the Social Security Act.

While HHS should promulgate nondiscrimination protections for all grant programs authorized with general rulemaking authority, it should begin with Titles IV-B and IV-E of the Social Security Act. Under these programs, HHS transfers nearly $10 billion a year to eligible states to subsidize child welfare services. 42 U.S.C. §§ 621, 624, 670, 674. To be eligible for those payments, states must develop and submit for approval state plans for their child welfare programs that meet various detailed statutory requirements. *See id.* §§ 622, 671. As discussed in depth further below, many of these requirements are designed to ensure that states and child welfare agencies provide quality services that secure the well-being of children in the child welfare system and ultimately place such children in permanent, safe homes. Because nondiscrimination protections are necessary to ensure that states and child welfare agencies meet these statutory requirements, such protections fall within the agency's "undoubtedly broad" rulemaking authority.[51]

A. *Scope of rulemaking authority under the Social Security Act.*

Section 1302(a) of the Act provides that "the Secretary of Health and Human Services . . . shall make and publish such rules and regulations, not inconsistent with this chapter, as may be necessary to the efficient administration of the functions with which [the Secretary] is charged

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[48] *See* 86 Fed. Reg. 2257, 2257 (Feb. 11, 2021) ("The Department is committed to the principle that every person must be treated with dignity and respect and afforded all of the protections of the Constitution and statutes enacted by Congress."); *id*. (acknowledging that "nondiscrimination requirements required by the Constitution" are "applicable to the Department's grantees"); 81 Fed. Reg. 45270, 45271 (noting in the 2016 proposed rule the requirement that determinations of beneficiary eligibility and participation in grant-related activities must be carried out "consisten[t] with law" set forth in constitutional rulings).

[49] 5 U.S.C. § 706. *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009) (unconstitutional action by agency must be set aside as unlawful).

[50] *See, e.g.*, *United States v. Windsor*, 570 U.S. 744 (2013) (federal government's discrimination against same-sex couples violates Equal Protection); *Karnoski v. Trump*, 926 F.3d 1180, 1200–01 (9th Cir. 2019) (federal government's discrimination against transgender people is subject to heightened scrutiny); *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 590 (1989) (the government "may not discriminate among persons on the basis of their religious beliefs and practices"); *Marouf v. Azar*, 391 F.Supp.3d 23, 34 (D.D.C. 2019) (government could not exclude prospective parents from fostering a child based on their religious faith).

[51] *Merck*, 962 F.3d at 537.

under this chapter."[52] The D.C. Circuit has provided guidance on the scope of this authority, remarking that it "would be difficult to devise" a "more plenary [grant] of rule-making power."[53]

To determine whether a rule is "necessary" to a program's "administration"—and thus whether it is authorized under Section 1302(a)—the D.C. Circuit has asked whether there is "an actual and discernible nexus between the rule and the conduct or management" of the functions with which the Secretary is charged.[54] The D.C. Circuit also considers whether the rule's "operational focus [is] on [those functions]" and whether "the rule's effect [is] more than tangential."[55] Consistent with this "broad grant of power," the D.C. Circuit has found Section 1302(a) to authorize regulations that directly regulate conduct that is central to the administration of HHS programs.[56]

For example, in *National Welfare Rights Organization v. Mathews*, that court held that Section 1302(a) provided authority for a rulemaking related to the Aid to Families with Dependent Children ("AFDC") program, which was the precursor to TANF.[57] As is true of Title IV-E, the AFDC program provided states with federal funds to assist needy children if the states submitted for approval plans that met certain federal criteria.[58] The rule at issue imposed certain requirements on state plans, including, among other things, a maximum limit on the amount of resources families could own without becoming ineligible for aid.[59] Notably, the regulation of state plan requirements had a clear nexus with the Secretary's duties under the AFDC program, which included approving state plans.[60]

Conversely, where the D.C. Circuit has found a regulation to exceed section 1302(a)'s rulemaking authority, the court has emphasized just how far the rule "stray[ed] from truly facilitating the 'administration' of the Secretary's duties."[61] For example, the D.C. Circuit held in *Merck v. HHS* that the Centers for Medicare and Medicaid Services exceeded its statutory authority when it promulgated a regulation that required drug manufacturers to make certain disclosures in their television ads about the wholesale costs of drugs covered by Medicare or Medicaid.[62] In that case, HHS argued that the rule was necessary to the efficient administration of Medicare / Medicaid because it "would have the arguable effect of driving down drug prices," which would in turn lower prices for the Medicare / Medicaid programs.[63] The court rejected this argument. Among other things, the record showed that the disclosure requirement was largely unrelated to the drug prices ultimately paid by Medicare / Medicaid participants.[64] Moreover,

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[52] 42 U.S.C. § 1302(a).
[53] *Nat'l Welfare Rights Org.*, 533 F.2d at 640 (internal quotation omitted).
[54] *Merck*, 962 F.3d at 537-38.
[55] *Id.* at 538.
[56] *Nat'l Welfare Rights Org.,* 533 F.2d at 640.
[57] *Id*. at 638-39.
[58] *Id.* at 640.
[59] *Id.* at 638-39.
[60] *See id.*; *see also Merck*, 962 F.3d at 537-38 (requiring a nexus between the rule and the conduct or management of the program at issue).
[61] *Merck*, 962 F.3d at 538.
[62] *Id.* at 533.
[63] *Id.* at 540.
[64] *Id.* at 538-39.

much of the regulated conduct was wholly unrelated to Medicare and Medicaid. Indeed, the rule "regulate[d] advertising directed at the general public and not communications targeted specifically, or even predominantly, to Medicare or Medicaid recipients."[65] In other words, the rule's "operational focus" was not the administration of the HHS program at issue.[66]

Reading these cases together, Section 1302(a) provides broad authority to promulgate rules so long as they are consistent with the relevant program, related to the administration of that program, and operationally focused on the program.

B. The Social Security Act's Rulemaking Authority Encompasses Nondiscrimination Protections for Title IV-B and IV-E.

The best reading of section 1302(a) is that it authorizes HHS to adopt broad nondiscrimination protections, which are "necessary to the efficient administration" of Title IV-B and IV-E and consistent with the purposes of those programs.

First, much like the AFDC regulation at issue in *National Welfare Rights Organization*,[67] the recommended nondiscrimination protections contain "an actual and discernible nexus between the rule and the conduct or management" of the Title IV-B and IV-E programs.[68] Just as the AFDC rule addressed requirements at the heart of the AFDC program (*i.e.*, how to determine which families were eligible to receive benefits), so too would the proposed protections address core elements of Title IV-B and IV-E. Specifically, nondiscrimination protections would govern how child welfare services are provided (e.g., by prohibiting discriminatory and abusive treatment of LGBTQI+ children in foster care) and to whom such services are provided (e.g., by prohibiting child welfare agencies from turning away prospective foster parents based on their religious beliefs, sexual orientation, gender identities, or sex characteristics). Thus, the proposed rulemaking's "operational focus [would be] on [Title IV-E and IV-B]," unlike in *Merck*, where the operational focus was on conduct (*i.e.*, pharmaceutical ads for all consumers) that largely took place outside of the programs at issue in that case (*i.e.*, Medicaid and Medicare).[69]

Second, the proposed protections are necessary to implement myriad specific statutory requirements that apply to state plans approved under Title IV-B and IV-E. Among other things, states are required to (1) protect children's safety, (2) protect children's civil rights, (3) ensure that children receive safe and healthy services, and (4) make efforts to find children safe and permanent placements in a timely manner. Below are just a few examples of specific statutory requirements:

- Section 671(a)(10)(A) requires states to establish standards that "are reasonably in accord with recommended standards of national organizations concerned with standards [for foster family homes and child care institutions], including standards related to . . . safety . . . and protection of civil rights." *See also id.* § 671(a)(10)(B) (requiring states to

[65] *Id.* at 540.
[66] *See id.* at 538.
[67] *Nat'l Welfare Rights Org.*, 533 F.2d at 638-40.
[68] *Merck*, 962 F.3d at 537-38.
[69] *Merck*, 962 F.3d at 540.

"appl[y]" those standards "to any foster family home or child care institution" receiving Title IV-E or IV-B funds).

- Section 671(a)(22) requires states to "develop and implement standards to ensure that children in foster care placements in public or private agencies are provided quality services that protect the safety and health of the children."
- Section 671(a)(15)(A)-(C) requires states to make "reasonable efforts"—with "the child's health and safety [as] the paramount concern"—to find "permanent placement[s]" in a "timely manner" for children who are in foster care. *See also id.* § 675(1)(A)-(B) (requiring states to ensure that individual case plans focus on the "safety and appropriateness" of placements and that such plans include "a plan for assuring that the child receives safe and proper care").
- Section 671(a)(24) requires state plans to ensure that foster parents are "prepared adequately with the appropriate knowledge and skills to provide for the needs of the child," including "knowledge and skills relating to the developmental stages of the cognitive, emotional, physical, and behavioral capacities of a child, and knowledge and skills relating to applying the standard to decisions such as whether to allow the child to engage in social, extracurricular, enrichment, cultural, and social activities."[70]
- Section 671(e)(4)(C)-(D) requires states to use funding for prevention services only on those services for which there is at least some evidence of benefit, and no evidence of likely harm. *See also id.* § 671(e)(4)(C)-(D) (requiring HHS to maintain updated guidance on these criteria).
- Section 672(k)(4) requires states to ensure that residential treatment programs have "a trauma-informed treatment model" and be "able to implement the treatment identified for the child" by clinical professionals. *See also id.* § 675a(c)(1)(A)-(C), (2), (4) (requiring states to ensure that children in such programs receive "the most effective and appropriate level of care" in "the least restrictive environment").[71]
- Section 677(b)(2)(E) requires states–when providing services to help teens and young adults transition into adulthood–to "[u]se objective criteria for determining eligibility for benefits and services under the programs, and for ensuring fair and equitable treatment of benefit recipients."
- Section 622(b)(15)(A) requires state plans to "ensure a coordinated strategy to identify and respond to the health care needs of children in foster care placements, including mental health," including how children's needs will be identified and treated, "steps to ensure continuity of health care services," and ensuring appropriate medical professionals are "involve[d]" in "determining appropriate medical treatment."

As noted above, these requirements are intended to ensure the well-being and safety of children in the child welfare system, including by protecting their civil rights and finding safe, permanent placements for children in a timely manner. But such objectives are undermined by ongoing discriminatory practices. As noted above, discrimination in the child welfare system endangers

[70] Such knowledge should include an awareness that certain discriminatory and abusive behaviors are harmful to children who identify as LGBTQI+.

[71] Clearly, an environment that, for example, restricted a youth from expressing their gender identity, that was likely to exacerbate gender dysphoria, or that was otherwise not affirming or hostile for an LGBTQI+ youth, could not meet these criteria.

children, threatens their health and wellbeing, violates their civil rights, and decreases the number of available foster and adoption placements that are safe and loving.[72]

Indeed, the recommendations of national organizations—which are incorporated into the statutory requirements in section 671(a)(10)(A)—broadly agree that discrimination in the child welfare system is harmful to LGBTQI+ children. For example, the Child Welfare League of America published a 2012 report that summarized the recommendations of a wide variety of national organizations for the best practices for promoting the safety and well-being of LGBTQ+ youth in child welfare settings.[73] That set of practice standards, which HHS has previously endorsed,[74] condemns a wide range of discriminatory behaviors as harmful to LGBTQ+ children.[75] Such behaviors include conversion therapy, isolating children from others in congregate care settings, verbal abuse, denial of medically necessary gender affirming care, and misgendering children.[76]

In short, child welfare agencies that receive Title IV-B and IV-E funding frequently engage in discriminatory behavior that prevent compliance with the above statutory requirements. Adopting explicit nondiscrimination protections is therefore necessary to ensure that states and grantees are complying with standards that the statute already requires states to adopt.

Third, the proposed nondiscrimination protections are "not inconsistent with [the Social Security Act]"[77] because they are necessary to achieve the purposes of Title IV-B and IV-E.[78] Specifically, the nondiscrimination protections are necessary to ensure the safety and well-being of children in care—a goal shared by both Title IV-B and IV-E. Title IV-B provides that the "purpose of this subpart is to promote . . . a coordinated child and family services program that . . . ensures all children are raised in *safe*, loving families, by protecting and *promoting the welfare* of all children; *preventing* the *neglect, abuse*, or exploitation of children; . . . [and] *promoting the safety, permanence, and well-being* of children in foster care and adoptive families[.]"[79] While the language of Title IV-E is not so explicit, the focus on the safety and well-being of children in

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[72] *See supra* pages 3-5.
[73] *See* Child Welfare League of America, *Recommended Practices to Promote the Safety and Well-Being of LGBTQ Youth and Youth at Risk of or Living With HIV in Child Welfare Settings* (2012), https://legacy.lambdalegal.org/sites/default/files/publications/downloads/recommended-practices-youth.pdf.
[74] *See* Lambda Legal, *CWLA and Experts Join in Issuing Recommended Practices for LGBTQ Youth in Foster Care* (2012), https://legacy.lambdalegal.org/news/ny_20120607_recommended-practices-lgbtq-youth (noting that then-ACYF commissioner Brian Samuels endorsed CWLA's recommended practices as a helpful guide that child welfare agencies can use to meet the needs of LGBTQ+ youth in their care).
[75] CWLA, *Recommended Practices*, *supra* note 73, at 2-3.
[76] *Id.*
[77] 42 U.S.C. § 1302(a).
[78] *See Vierra v. Rubin*, 915 F.2d 1372, 1378 (9th Cir. 1990) (reasoning that section 1302(a)'s rulemaking authority extends only to regulations consistent with the purposes of the Social Security Act).
[79] 42 U.S.C. § 621 (emphasis added).

Title IV-E requirements is undeniable.[80] In fact, the statute explicitly requires states to establish standards that protect the civil rights of children,[81] which is exactly what the proposed regulation would help states to accomplish.

Fourth, the above reading of Section 1302(a)'s authority is further confirmed by the statutory and regulatory scheme presented by Title IV-E and IV-B.[82] Specifically, the statute provides the Secretary with discretion to determine whether Title IV-E and IV-B plans meet the statutory criteria in order to be eligible to receive federal funds.[83] The statute also directs the Secretary to "establish" "requirements" and "guidance" regarding appropriate prevention plans and services.[84] As was true in *National Welfare Rights Organization*, this statutory framework "clearly contemplate[s] that . . . the Secretary can, through review and scrutiny of state plans, be instantly apprised of problems in the federally-funded assistance programs and rectify or eliminate troublesome areas in whatever way he, as his expertise may direct him, finds most effective and within the purposes of the public assistance statutory fabric."[85]

Finally, there is a history of Congress chipping away at state discretion by amending Title IV-B and IV-E to include ever-more requirements for state plans.[86] Against this background, it is clear that Congress has intended to "restrict[] state discretion" over child welfare standards.[87] As the D.C. Circuit has recognized, "this increased control over [Title IV-E programs]" indicates that

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[80] *See, e.g.*, 42 U.S.C. § 671(a)(22) (requiring states to "develop and implement standards to ensure that children in foster care placements in public or private agencies are provided quality services that *protect the safety and health* of the children") (emphasis added).
[81] 42 U.S.C. § 671(a)(10).
[82] *Nat'l Welfare Rights Org.,* 533 F.2d at 640 ("The breadth of the rule-making authority of s 1302 is underscored when seen in the perspective of the entire federal statutory scheme of public assistance.").
[83] 42 U.S.C. § 671(a) (plans must be approved by the Secretary before states are eligible to receive aid); 42 U.S.C. § 1320a-2a (directing the Secretary to "promulgate regulations for the review of [state Title IV-B and IV-E] programs to determine whether such programs are in substantial conformity with state plan requirements under such parts B and E, [as well as] implementing regulations promulgated by the Secretary.").
[84] 42 U.S.C. § 671(e)(4)(A), (D).
[85] *Nat'l Welfare Rights Org.,* 533 F.2d at 640.
[86] Since 2008 alone, Congress has enacted four different pieces of legislation that have added requirements to state Title IV-E plans or otherwise limited state discretion with respect to those plans. *See* Trafficking Victims Prevention and Protection Reauthorization Act of 2022, Pub. L. No. 117-348, 136 Stat. 6211 (amending 42 U.S.C. § 671(a)(35)(B) to include additional requirements); Substance Use-Disorder Prevention that Promotes Opioid and Treatment for Patients and Communities Act, Pub. L. No. 115-271, 132 Stat. 3894 (amending 42 U.S.C. § 671(e)(10)(A) to limit state discretion to reduce medical assistance available to program recipients); Preventing Sex Trafficking and Strengthening Families Act, Pub. L. No. 113-183, 128 Stat. 1919 (amending 42 U.S.C. § 671(a)(9) to include additional requirements); Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949 (adding new requirements at 42 U.S.C. §§ 671(a)(10), (20), and (29)-(33)).
[87] *Nat'l Welfare Rights Org.,* 533 F.2d at 643.

Congress "acted to limit state choices . . . [and] also intended to extend the Secretary's rulemaking authority in that area of concern."[88]

In sum, the authority for the proposed nondiscrimination protections is "comfortable locate[d] . . . in [the agency's] general rulemaking authority under 42 U.S.C. § 1302."[89] We urge the Department to exercise that authority.[90]

IV. Conclusion

Thank you for taking the time to consider our views, and the impact these proposed revisions will have on the communities on whose behalf we advocate. Please do not hesitate to reach out to Kristen Miller, counsel for Family Equality, at kmiller@democracyforward.org with any questions.

Sincerely,

American Atheists
American's United for Separation of Church and State
Center for the Study of Social Policy
Child Welfare League of America
Family Equality
interACT: Advocates for Intersex Youth
Lambda Legal
Movement Advancement Project
National Center for Transgender Equality
National Women's Law Center
Whitman-Walker Institute

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[88] *Id.*

[89] *See HCA Health Servs. of Oklahoma, Inc.*, 27 F.3d at 618.

[90] Opponents may cite Section 671(a)(18)–which prohibits discrimination on the basis of race, color, and national origin–to argue that Congress intended to foreclose the agency from establishing protections against discrimination on any other basis. *See* Richard A. Posner, *Statutory Interpretation-in the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 805 n. 25 (1983) (explaining that the *expressio unius* statutory construction canon is used to argue that "the expression of one thing is the exclusion of another"). Such arguments are misplaced. As the D.C. Circuit has explained, this sort of *expressio unius* reasoning "when countervailed by a broad grant of authority contained within the same statutory scheme, . . . is a poor indicator of Congress' intent." *Adirondack Med. Ctr. v. Sebelius*, 740 F.3d 692, 697 (D.C. Cir. 2014). Indeed, "the *expressio unius* canon is a feeble helper in an administrative setting, where Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved." *Id.* Thus, Congress's silence on other forms of nondiscrimination protections "suggests not a prohibition" against such protections "but simply a decision not to mandate" such protections– "*i.e.*, to leave the question to the agency's discretion." *Fisher v. Pension Benefit Guar. Corp.,* 994 F.3d 664, 671 (D.C. Cir. 2021).