Congress of the United States
Washington, DC 20515

December 19, 2019

Honorable Alex M. Azar II
Secretary, U.S. Department of Health & Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

Re: U.S. Dept. of Health and Human Services proposed rule: RIN 0991-AC16.

Dear Secretary Azar,

We write to encourage you to finalize the recently proposed rule modifying certain provisions of 45 CFR part 75. (*See* Notice of Proposed Rulemaking, 84 FR 63831, November 19, 2019.) In particular, we commend your decision not to enforce the regulatory requirements currently found in 45 CFR § 75.300(c) and (d), and, rather, to modify them to conform with applicable law. As explained more fully below, your proposed modifications to those subsections would resolve at least four significant problems with the existing regulatory scheme. Specifically, the current regulation: (1) invades Congress' lawmaking authority and grossly exceeds the authority of an Executive Branch agency to implement the relevant statutory scheme; (2) violates the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* ("RFRA"); (3) imposes restrictions that are arbitrary and capricious; and (4) infringes on private entities' constitutionally-protected rights of free exercise and association recognized and protected by Supreme Court precedent.

First, the requirements presently found in section 75.300(c) and (d) exceed HHS' authority and invade Congress' lawmaking prerogative. HHS' statutory authorization to provide federal funds to assist the States in the care of foster children and to promulgate regulations regarding the provision of such is found in Title IV-E of the Social Security Act, 42 U.S.C. §§ 670 to 679c. In that Act, Congress enacted a statutory nondiscrimination requirement mandating that States receiving such funds must certify "that neither the State nor any other entity in the State that receives funds from the Federal Government and is involved in adoption or foster care placements" discriminates "on the basis of the race, color, or national origin." *See* 42 U.S. Code § 671(a)(18). In contrast, HHS' nondiscrimination requirements found in the current version of 45 CFR § 75.300(c) and (d) go far beyond what Congress has required, and they do so in a way that is not necessary to implement the objectives of the statutory scheme. Accordingly, the regulations are *ultra vires* and are not authorized by law. *See Catholic Health Initiatives v. Sebelius*, 617 F.3d 490, 497 (D.C. Cir. 2010) ("It is a cardinal principle of administrative law that an agency may act only pursuant to authority delegated to it by Congress. … When an agency has acted beyond its delegated authority, a reviewing court will hold such action *ultra vires*." (citations omitted)); *Transohio Sav. Bank v. Dir., Office of Thrift Supervision*, 967 F.2d 598, 621 (D.C. Cir. 1992) ("Agency actions beyond delegated authority are '*ultra vires*,' and courts must invalidate them.").

Second, the requirements presently found in section 75.300(c) and (d) violate RFRA, which forbids the federal government from substantially burdening a person's exercise of religion unless the imposition of that burden is in furtherance of a compelling governmental interest and is implemented in the least restrictive way. 42 U.S.C. § 2000bb-1. The hallmark of a substantial

burden on one's free exercise of religion is governmental pressure to abandon one's religious convictions. *See Wisconsin v. Yoder*, 406 U.S. 205, 217–18 (1972); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (noting that even "indirect" burdens are "substantial" when they place pressure on religious adherents to forgo their religious practices); *see also Thomas v. Review Bd. of Indiana Empl. Sec. Div.*, 450 U.S. 707, 717–18 (1981). As demonstrated by requests HHS has received for exemption from section 75.300(c) and (d) and by ongoing litigation relating to the regulation, HHS' current requirements apply such coercive pressure on faith-based foster and adoption providers.

Further, HHS failed to articulate any compelling interest in burdening these particular providers when it promulgated the requirements at issue. Accordingly, the restrictions violate RFRA. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006) (holding the government may not rely on generalized and broadly formulated interests to satisfy RFRA analysis, but rather must demonstrate a compelling interest in applying the challenged law to the particular person whose sincere exercise of religion is being substantially burdened). HHS cannot claim its interest was to ensure that previously-excluded groups were permitted to become foster and adoptive parents. Such a claim is utterly implausible, both because (i) any qualified individuals in any State could already be licensed by the relevant State's agency or in conjunction with numerous willing private providers, and (ii) the administrative record from HHS' promulgation of the current regulation is devoid of any evidence of anyone actually being prevented by any faith-based provider from becoming a foster parent or adoptive parent. *See* 81 Fed. Reg. 45270-01, at 45271 (July 13, 2016); 81 Fed. Reg. 89393-01, at 89395 (Dec. 12, 2016).

Even if HHS had a compelling interest in burdening private providers' religious exercise (which it did not), HHS' present means of effectuating that interest is far too broad, impermissibly exchanging the requisite scalpel for a bludgeon. *See Thomas v. Review Bd. of Indiana Empl. Sec. Div.*, 450 U.S. 707, 719 (1981) (stating that for purposes of free exercise analysis, the state's interest must be narrowly defined); *Yoder*, 406 U.S. at 228–29 (same). Accordingly, the present version of section 75.300(c) and (d) violates RFRA and demands modification.

Third, the requirements presently found in section 75.300(c) and (d) are arbitrary and capricious. Agency action is arbitrary and capricious where it "entirely fail[s] to consider an important aspect of [a] problem." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Previous regulations have always left faith-based private providers the freedom to select employees and foster homes that share their faith. If HHS had intended to alter this long-standing accommodation, the administrative record should have contained some basis justifying the burden, explaining the government's interest, and narrowly tailoring the restriction. It did not. *See* 81 Fed. Reg. 45270-01, at 45271 (July 13, 2016); 81 Fed. Reg. 89393-01, at 89395 (December 12, 2016). Given the vulnerable populations at issue and the existing shortage of foster homes, there should also have been at least some phase-in system that would not have jeopardized foster care for thousands of children nationwide. There was not. Modification of the regulation is warranted to correct these arbitrarily and capriciously chosen restrictions.

Fourth, the requirements presently found in section 75.300(c) and (d) infringe on private entities' constitutionally-protected rights recognized and protected by the Supreme Court. By restricting faith-based providers' ability to consider the beliefs and behaviors of potential employees, volunteers, and foster and adoptive parents, the current regulation violates the providers' free exercise and associational rights under the First Amendment to the United States Constitution.

See, e.g., *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. Equal Employment Opportunity Comm'n*, 565 U.S. 171 (2012); *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Conlon v. InterVarsity Christian Fellowship*, 777 F.3d 829 (6th Cir. 2015); *EEOC v. Roman Catholic Diocese of Raleigh*, 213 F.3d 795, 801 (4th Cir. 2000). The Supreme Court has noted that "implicit in the right to engage in activities protected by the First Amendment" is "a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). "Government actions that may unconstitutionally burden this freedom may take many forms, one of which is 'intrusion into the internal structure or affairs of an association" like a "regulation that forces the group to accept members it does not desire." *Dale*, 530 U.S. at 648; *see also Roberts*, 468 U.S. at 623 ("Freedom of association . . . plainly presupposes a freedom not to associate."). HHS' current requirement does so, and the proposed modification is both well-justified and required. It is time for the Obama-era regulation to be replaced.

Sincerely,

William R. Timmons, IV
Member of Congress

Ralph Norman
Member of Congress

Jeff Duncan
Member of Congress

Tom Rice
Member of Congress

Joe Wilson
Member of Congress

Rick Crawford
Member of Congress

Jody B. Hice
Member of Congress

Doug Lamborn
Member of Congress

K. Michael Conaway
Member of Congress

Mark Meadows
Member of Congress

Steve King
Member of Congress

Brian Babin, D.D.S.
Member of Congress

Doug LaMalfa
Member of Congress

Pete Olson
Member of Congress

Glenn Grothman
Member of Congress

Bill Flores
Member of Congress

Roger Williams
Member of Congress

Jim Banks
Member of Congress

Robert B. Aderholt
Member of Congress

Ron Wright
Member of Congress

John Ratcliffe
Member of Congress

Rick W. Allen
Member of Congress

Mike Kelly
Member of Congress

Greg Gianforte
Member of Congress

Vicky Hartzler
Member of Congress

Chris Stewart
Member of Congress

Ross Spano
Member of Congress

Guy Reschenthaler
Member of Congress

Steve Chabot
Member of Congress

Andy Biggs
Member of Congress

Randy Weber
Member of Congress

John Joyce, M.D.
Member of Congress

Lance Gooden
Member of Congress

Jim Jordan
Member of Congress

Kevin Hern
Member of Congress

Bill Posey
Member of Congress

Gregory F. Murphy, M.D.
Member of Congress

Ralph Abraham, M.D.
Member of Congress

Blaine Luetkemeyer
Member of Congress

Austin Scott
Member of Congress

Ron Estes
Member of Congress

Dan Newhouse
Member of Congress

Tim Walberg
Member of Congress

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Mike Bost
Member of Congress

Ken Buck
Member of Congress

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Member of Congress

Russ Fulcher
Member of Congress

Michael Guest
Member of Congress

Mark Walker
Member of Congress

Debbie Lesko
Member of Congress