

Congress of the United States
Washington, DC 20510

December 16, 2021

The Honorable Xavier Becerra
Secretary of Health and Human Services
U.S. Department of Health and Human Services
200 Independence Ave, SW
Washington, DC 20201

Secretary Becerra:

Faith-based child welfare providers perform vital services for hundreds of thousands of foster children nationwide and are often the best at finding forever homes for children in need. Alongside secular child welfare providers, faith-based organizations provide support, resources, and care to the nearly half a million kids who have found themselves in foster care through no fault of their own.

The freedom to work with faith-based agencies is vital to many foster families. Many studies have shown that faith is often a key motivator in a family's decision to foster children. Families recruited through church or religious organizations on average foster more than two and a half years longer than other foster parents. One study found that 82 percent of families cited faith or church support as a factor that facilitated successful fostering. Another study revealed that 36 percent of families recruited by one religious organization would not have become foster or adoptive parents were it not for that organization's efforts.

Furthermore, states that have pushed faith-based providers out of the picture have seen a measured decrease in their ability to respond to the foster care crisis. For example, in the eight years after Illinois passed a law ending its partnerships with faith-based agencies, the state lost over 5,000 foster homes. Massachusetts lost 2,000 foster families between 2014 and 2019.

These are loving homes that we cannot afford to lose in the middle of a national foster care crisis. According to the Administration for Children & Families' annual Adoption and Foster Care Analysis and Reporting System (AFCARS) report, 407,493 children are in foster care, 117,470 of whom are waiting to be adopted. With these staggering numbers in mind, our primary goal should be safe, loving, and permanent placements for all children.

We find it disturbing that one day before it released its 2021 AFCARS report, the Department of Health and Human Services (HHS)—with your express approval—announced the rescission of waivers that were previously granted to faith-based adoption and foster care agencies in Michigan, Texas, and South Carolina. As you know, rescinding the waivers puts providers in these states in the untenable position of choosing between serving children under the Title IV-E foster care program or operating in accordance with the tenets of their faith – the same faith that

drives them to serve children in the first place. HHS should be *welcoming* child welfare providers, not *excluding* them. Children are too important to be pawns in political games.

As you know, the waivers acknowledged that prospective foster parents of all faiths, or no faith at all, have options for agencies that will work with their particular circumstances. As a result, your precipitous actions create no winners, only losers in the form of children, parents, religious freedom, and the rule of law.

On April 10, 2018, a dozen United States Senators sent a letter to then-Secretary Alex Azar concerning the Obama administration's grants rule, 45 C.F.R. § 75.300, which wrongfully targeted a number of faith-based child welfare providers, forcing them to forgo their sincerely held religious beliefs to qualify for grants. Miracle Hill Ministries, South Carolina's oldest and largest provider of foster families for foster children, for example, would have lost access to Title IV-E funding under the Obama rule. The Trump administration rightly recognized that the Religious Freedom Restoration Act (RFRA) entitled certain faith-based agencies protection from exclusion from the program because of their faith, including through application of 45 C.F.R. § 75.102(b).

Earlier this year, a unanimous Supreme Court in *Fulton v. City of Philadelphia* validated the principle that religious adoption agencies have a right to be free from discriminatory exclusion from adoption and foster care programs because of their beliefs. The Supreme Court found that "the refusal of Philadelphia to contract with Catholic Social Services for the provision of foster care services unless it agrees to certify same-sex couples as foster parents cannot survive strict scrutiny, and violates the First Amendment." However, HHS and the Biden administration appear to be ignoring the Court's clear direction that religious foster care agencies cannot be shut down because of their religious beliefs.

Philadelphia's attempt to eradicate faith-based foster care was not only unconstitutional, but also detrimental to the goal of finding enough loving homes to meet the city's great need. The Court noted that "[i]f anything, including CSS in the program seems likely to increase, not reduce, the number of available foster parents."

What was clear to the Supreme Court—and what is borne out in the empirical data—does not appear to be clear to you. In the very moment when your agency should be taking action to expand opportunities for children and families within the foster care system, you are instead taking actions that will reduce options for the 407,493 children in foster care.

Worse still, you have personally stripped the Office for Civil Rights (OCR) of existing authority to receive, handle, investigate, and oversee resolution of complaints under RFRA and the religion clauses of the First Amendment. 86 F.R. 67,067 (Nov. 24, 2021). On June 2021, You were questioned specifically and extensively in Congressional hearings on whether you were planning to limit or shut down conscience and religious freedom enforcement at the Office for Civil Rights and in response you said "we, under the Office of Civil Rights will be protecting those rights" and "we will continue to provide protections for the civil constitutional rights of all Americans including those that involve religion and so nothing there changes." With these and other anti-religious freedom actions you have taken, you have betrayed your promise.

The November 18 announcements made by HHS's Administration for Children and Families (ACF) and OCR regarding the rescission of waivers, and your Federal Register notice of November 24, raise a number of questions. We request your full and complete responses to the requests and questions below no later than January 15, 2022. Please provide a response below each question instead of a narrative response.

1. Identify all outside persons or groups that communicated to HHS advocating for the revocation of the waivers.
2. Identify all outside persons or groups that communicated to HHS advocating for the revocation of the RFRA and First Amendment delegations of authority to OCR.
3. Identify who originated the idea to revoke the waivers.
4. Identify who originated the idea to revoke the delegations of authority.
5. Produce all documents, memos, and communications from January 20, 2021 until December 1, 2021 discussing or seeking approval of the revocations of the waivers.
6. Produce all documents, memos, and communications from January 20, 2021 until December 1, 2021 discussing or seeking approval of the revocations of the delegations of authority.
7. Produce all documents from January 20, 2021 until December 1, 2021 approving the revocation of the waivers.
8. Produce all documents from January 20, 2021 until December 1, 2021 approving the revocation of the delegations of authority.
9. Produce all communications from January 20, 2021 until December 1, 2021 sent to outside individuals, groups, entities, or parties, including non-profits, advocacy organizations, states and state agencies, concerning the revocations of the waivers before and after they were approved.
10. Produce all communications from January 20, 2021 until December 1, 2021 sent to outside individuals, groups, entities, or parties, including non-profits, advocacy organizations, states and state agencies, concerning the revocations of the delegations of authority before and after they were approved.
11. Were any career professionals in the Conscience and Religious Freedom Division consulted (not merely informed) before the revocation of the waivers? If not, explain in detail why not. If so, did any oppose the revocation of the waivers?
12. Were any career professionals in the Conscience and Religious Freedom Division consulted (not merely informed) before the revocation of the delegations of authority? If not, explain in detail why not. If so, did any oppose the revocation of the delegations of authority?
13. Please provide us with a legal analysis for how HHS reached the decision to rescind each waiver. Include all internal communications and documentation used to consider the necessity of the waivers and all analysis that was done on the potential impact of the decision *before* the revocations were decided.
14. Please provide us with a legal analysis for how HHS reached the decision to rescind each delegation of authority. Include any internal communication and documentation used to consider the necessity of the delegations and all analysis that was done on the potential impact of the decision *before* the revocations were decided.

15. In ACF's letter to South Carolina Governor Henry McMaster, ACF mentions that "accommodations could have been explored to address the specific religious burden identified by Miracle Hill." Why was there no outreach to South Carolina or Miracle Hill to explore the aforementioned accommodations before revoking these waivers? Will Texas and Michigan and faith-based providers there be afforded consideration of potential accommodations?
16. Did you consult with the Governors or Attorneys General of South Carolina, Texas, or Michigan or any representatives of their offices prior to revoking the waivers?
17. Your agency appeared to justify the decision to rescind the waivers by stating that they had applied to "other similarly situated entities," instead of applying only to the specific individual entities (Miracle Hill, St. Vincent, and Archdiocese of Galveston-Houston). Why didn't HHS leave in place the waivers for those individual entities if the justification was that the waiver encompassed similarly situated entities?
18. Will HHS commit to maintaining the notice of non-enforcement for the 2016 grants rule and disavow its enforcement moving forward, or will HHS continue to reserve its right to revoke the notice of non-enforcement at any time?
19. Yes or no, will HHS exclude from the Title-IV E program religious adoption and foster care providers that cannot assist in the placement of children in same-sex households without violating their religious exercise when those households have alternative providers available to assist them in the state?
20. Identify every civil rights statute applicable to your agency that does not have a delegation of authority assigned to any particular component of HHS for handling of complaints.

Despite being in the middle of a pandemic, your focus on reversing structural and individual religious freedom protections—protections which have worked well—demonstrate that you are placing ideology over the interests of the law, children, and faith-based partners who only want to continue serving their communities in peace. It is our hope that you will promptly correct these unprecedented actions and abide by your promises made to Congress.

Sincerely,



Tim Scott
United States Senator



Ralph Norman
United States Representative



John Thune
United States Senator



Joni Ernst
United States Senator



John Cornyn
United States Senator



Chuck Grassley
United States Senator



James Lankford
United States Senator



Thom Tillis
United States Senator



Richard Burr
United States Senator



Marsha Blackburn
United States Senator



Cindy Hyde-Smith
United States Senator



Mike Braun
United States Senator



Ted Cruz
United States Senator



Bill Hagerty
United States Senator



Roger F. Wicker
United States Senator



James M. Inhofe
United States Senator



Rick Scott
United States Senator



Tom Cotton
United States Senator



Marco Rubio
United States Senator



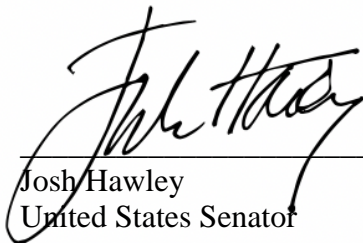
John Boozman
United States Senator



Steve Daines
United States Senator



Roger Marshall, M.D.
United States Senator



Josh Hawley
United States Senator



John Kennedy
United States Senator



Lindsey O. Graham
United States Senator



Bill Cassidy, M.D.
United States Senator



Kevin Cramer
United States Senator



James E. Risch
United States Senator



Jerry Moran
United States Senator



John Hoeven
United States Senator



Michael S. Lee
United States Senator



Todd Young
United States Senator



Mitt Romney
United States Senator



Mike Kelly
United States Representative



Mike Johnson
United States Representative



Gary Palmer
United States Representative



Richard Hudson
United States Representative



Vicky Hartzler
United States Representative



Jeff Duncan
United States Representative



William R. Timmons, IV
United States Representative



Doug Lamborn
United States Representative



Bill Posey
United States Representative



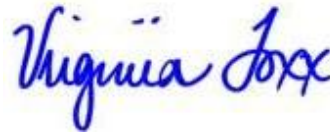
Jeff Fortenberry
United States Representative



Glenn Grothman
United States Representative



Jake Ellzey
United States Representative



Virginia Foxx
United States Representative



Andy Biggs
United States Representative



Rick W. Allen
United States Representative



Joe Wilson
United States Representative



Doug LaMalfa
United States Representative




Lisa McClain
United States Representative



Ronny L. Jackson
United States Representative



Lloyd Smucker
United States Representative



Tim Walberg
United States Representative



Debbie Lesko
United States Representative



Chip Roy
United States Representative



John Moolenaar
United States Representative



Lauren Boebert
United States Representative



Dan Crenshaw
United States Representative



Ben Cline
United States Representative



Tom Rice
United States Representative



Ted Budd
United States Representative



Randy K. Weber
United States Representative


M.C.

Brian Babin
United States Representative



Blaine Luetkemeyer
United States Representative



Roger Williams
United States Representative



Nancy Mace
United States Representative



Don Bacon
United States Representative



Mary E. Miller
United States Representative



Matthew M. Rosendale
United States Representative



Bill Huizenga
United States Representative



Michael C. Burgess, M.D.
United States Representative



Billy Long
United States Representative



Austin Scott
United States Representative



Brian Mast
United States Representative



Bob Good
United States Representative



Pete Sessions
United States Representative



Jody Hice
United States Representative



Tony Gonzales
United States Representative



Stephanie Bice
United States Representative



Dan Bishop
United States Representative



Julia Letlow
United States Representative



Burgess Owens
United States Representative



Byron Donalds
United States Representative



Michael Cloud
United States Representative



Russ Fulcher
United States Representative



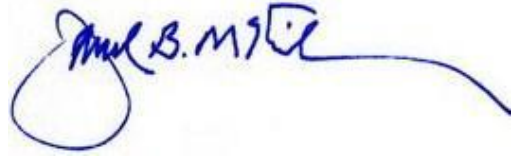
Jack Bergman
United States Representative



Daniel Webster
United States Representative



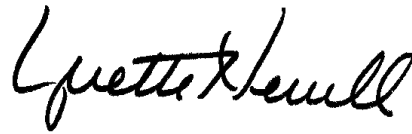
Pat Fallon
United States Representative



David McKinley, P.E.
United States Representative



Michael Guest
United States Representative



Yvette Herrell
United States Representative



Rick Crawford
United States Representative



Dan Newhouse
United States Representative



Tom Emmer
United States Representative



Jason Smith
United States Representative



Jim Hagedorn
United States Representative



Ann Wagner
United States Representative



Andy Harris, M.D.
United States Representative



Robert B. Aderholt
United States Representative



W. Gregory Steube
United States Representative



Kat Cammack
United States Representative