KEN PAXTON
ATTORNEY GENERAL OF TEXAS

May 15, 2019

The Honorable John Lewis
Chairman
Subcommittee on Oversight
Committee on Ways and Means
House of Representatives of the 116th United States Congress

The Honorable Danny K. Davis
Chairman
Subcommittee on Worker and Family Support
Committee on Ways and Means
House of Representatives of the 116th United States Congress
2157 Rayburn House Office Building
Washington, DC 20515-6143

Dear Chairman Lewis and Chairman Davis:

We received your May 1, 2019 letter that requests information and documents concerning a December 17, 2018 demand letter from the Attorney General of Texas to Assistant Secretary Lynn Johnson of the United States Department of Health and Human Services ("HHS") concerning 45 C.F.R. § 75.300(c)-(d) (the "Rule"), which governs child welfare funding provided to the States. This letter responds on behalf of the Office of the Attorney General ("OAG"), the Office of the Governor ("OOG"), and the Department of Family and Protective Services ("DFPS"). While any document production under state law will come directly from our clients, as legal counsel representing OOG and DFPS, OAG will be your only point of contact regarding this matter going forward. Do not contact other State of Texas entities concerning the content of your letter without our express permission.

As explained in our December 17, 2018 letter,[1] OAG demanded that HHS commence rulemaking to repeal the Rule, which issued in the closing days of President Obama's administration. In the alternative, OAG requested that HHS grant Texas an exception should rulemaking be delayed. The basis for those requests is simple: the Rule conflicts with Texas law, discriminates against faith-based and religious foster care and adoption agencies, and narrows the opportunities for children in need of permanent placement to find a loving home.

In no way does Texas law facilitate "discrimination" as your letter suggests. Instead, Texas law *requires* state agencies to ensure that secondary child welfare service providers are available if a child welfare service provider, pursuant to religious beliefs, declines to provide a particular service. In short, Texas law seeks to afford abused and neglected children the greatest possible

[1] For ease of reference, a copy of the letter is enclosed.

chance of placement by facilitating participation by a panoply of service providers—religious and secular alike.

Conversely, the Rule overtly discriminates against faith-based and religious providers while providing no benefit to the children who ultimately will be affected when those providers are forced from the scene on pain of violating their sincerely held religious beliefs. Repealing the Rule should be a priority for everyone who wishes to maximize the opportunities for abused and neglected children to find loving, permanent homes.

Turning to your requests for information and documents, they ignore well-established constitutional principles.

First and most importantly, your letter fails to recognize that Texas is not a subdivision of the federal government or a private citizen. Texas draws its authority not from the federal government, but from its status as a dual sovereign within the Union.[2] Far from being entities that can exercise "oversight" of the core functions of state governments, "each of the principal branches of the federal government [owes] its existence more or less to the favor of the State governments."[3] That being the case, the Supreme Court has recognized that preserving comity between the dual sovereigns that make up our union is a core value of our Constitution.[4] This comity demands "a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways."[5] Of course, Congress may use its spending power to encourage a State to adopt federal programs. That power, however, does not give a Congressional subcommittee authority to oversee a State's exercise of a core sovereign function in determining whether that program has created a legal dispute between the State and the United States government. Nor does it give Congress authority to oversee a State's decision to challenge such a rule solely because the State disagrees with a massive shift in federal agency policy governing the program without any underlying change in federal law. Instead, the Congressional subcommittee may seek information from the federal agency responsible for administering the program.[6]

Second, the Subcommittee does not acknowledge that, where Congress's exercise of investigatory functions clashes with another constitutional protection, the legislative need for information must outweigh the burden placed on that constitutional protection for the legislative need to prevail.[7] Although cases have traditionally turned on the rights of individuals, the same rationale applies with even more force to the Tenth Amendment's guarantee of States' core powers as necessary for maintaining a system of federalism. Granting Congress the power to exercise "oversight" over the constitutional officers of a State engaged in the lawful exercise of that State's core authority would

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[2] *See Printz v. United States*, 521 U.S. 898, 918–19 (1997); *New York v. United States*, 505 U.S. 144, 188 (1992); *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991).

[3] THE FEDERALIST NO. 45 (James Madison).

[4] *See Younger v. Harris*, 401 U.S. 37, 44–45 (1971).

[5] *Id.*

[6] It is worth noting that by attempting to exercise "oversight" of state executive-branch officers, Congress endangers separation of powers within the federal government itself by seeking to force state officers to enact federal policies, thereby circumventing the President. *See Printz*, 521 U.S. at 922–23.

[7] *See Watkins v. United States*, 354 U.S. 178, 198 (1957).

undermine the fabric of our system of dual sovereignty. As the Supreme Court recently explained, the Constitution "withhold[s] from Congress the power to issue orders directly to the States."[8]

Third, the Subcommittee fails to identify any valid legislative purpose for its inquiry. As the Supreme Court has rightly observed, Congress is not "a law enforcement or trial agency," nor can it investigate "solely for the personal aggrandizement of the investigators or to 'punish' those investigated."[9] The House of Representatives' own rules require inquiries to be "related to, and in furtherance of, a legitimate task of Congress."[10] Especially because the Rule is invalid under federal law, we see no legitimate legislative purpose for the Subcommittee's inquiry.

Given these core constitutional principles, a State and its officers are under no obligation to disclose confidential and privileged information to a Congressional subcommittee concerning a potential challenge to federal law. However, as we will explain, most of the information you seek is contained within the December 17 letter.

In your first request, you ask us to describe the process we relied upon in connection with the December 17 letter. We do not comment on matters involving potential litigation, privileged and confidential communications, deliberative process, or attorney work product. That said, the reasoning underpinning the December 17 letter is set forth in the letter itself. In short, the Rule departed from longstanding civil rights laws enacted by Congress. Not only did HHS exceed its statutory authority by enacting a rule that is contrary to the plain language of federal law, but it also trampled upon the ability of Texas to work cooperatively with as many qualified foster care and adoption placing agencies as possible to provide safe and loving homes to children. Thus, OAG issued a demand letter to HHS asking that it either repeal the Rule based on its statutory and constitutional defects, or provide Texas with an exception from its requirements.

Second, you ask about the experts we consulted and staff analysis we conducted to determine the impact of a possible "waiver" on our foster care system. Again, we will not describe our legal and factual analysis involving potential litigation, privileged and confidential communications, deliberative process, or attorney work product. The focus of the December 17 letter is the unlawful nature of the Rule. Federal agencies may only issue rules and regulations if they have statutory authority to do so. Here, it is enough to state that HHS lacked authority for the aspects of the Rule discussed in our letter.

Third, you ask us to explain how Texas's child welfare system would promote the best interest of all children if 45 C.F.R. § 75.300(c) were changed, and how this change would interact with any recent court decisions concerning foster care in Texas. As an initial matter, we are unaware of any pending third-party litigation concerning foster care that squarely addresses the issues raised in our December 17 letter. But regardless, Texas law already protects the best interest of all children and will continue to do so.[11] Keep in mind that, with few exceptions, the regulation of domestic relations is an area of law over which the States possess exclusive authority.[12] "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states,

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[8] *Murphy v. NCAA*, 138 S. Ct. 1461, 1475 (2018).
[9] *Watkins*, 354 U.S. at 187.
[10] U.S. House Rule X.
[11] TEX. FAM. CODE §§ 153.002, 161.001.
[12] *Sosna v. Iowa*, 419 U.S. 393, 404 (1975).

and not to the laws of the United States."[13] When States and the federal government cooperate to provide additional domestic services through federal spending programs, federal agencies may not place additional conditions on those funds that the statute does not authorize, as HHS has done here. Thus, absent the Rule or if HHS changes the Rule to comply with federal law, Texas will continue to protect the best interests of all children.

Fourth, you request all documents and communications relating to the December 17 letter. We will not provide documents discussing potential litigation, privileged and confidential communications, deliberative process, or attorney work product. We are unaware of any case holding that a congressional committee or subcommittee may obtain such information pursuant to its oversight responsibilities. Moreover, for the reasons discussed above, Congress lacks authority to compel production of such materials from States. To the extent that your request could include documents outside the scope of the potential litigation that are non-privileged, not confidential, and not subject to another protection from disclosure, you may submit a public records request.[14]

Please direct all further communication regarding this matter to OAG.

Sincerely,

Jeffrey C. Mateer
First Assistant Attorney General

cc: The Honorable Mike Kelly, Ranking Member
Subcommittee on Oversight

The Honorable Jackie Walorski, Ranking Member
Subcommittee on Worker and Family Support

[13] *Ex parte Burrus*, 136 U.S. 586, 593–94 (1890).

[14] For information about how to request public records from OAG, see Office of the Attorney General, How to Request Public Information, https://www.texasattorneygeneral.gov/open-government/members-public/how-request-public-information. For information about how to request public records from OOG, see Office of the Governor of Texas, Make an Open Records Request, https://gov.texas.gov/pir-info. For information about how to request public records from DFPS, see Texas Department of Family and Protective Services, Requesting a Copy of Non-case Records, https://www.dfps.state.tx.us/policies/non-case_records.asp.

KEN PAXTON
ATTORNEY GENERAL OF TEXAS

December 17, 2018

Lynn Johnson
Assistant Secretary
Administration for Children and Families
U.S. Department of Health and Human Services
330 C Street, SW
Washington, DC 20201

Re: Texas's Requests for Rulemaking and Exception Regarding 45 C.F.R. § 75.300(c-d)

Dear Ms. Johnson:

On behalf of the State of Texas, this letter requests that the U.S. Department of Health and Human Services ("HHS") commence rulemaking to repeal 45 C.F.R. § 75.300(c–d) (the "Rule"), which governs child welfare funding provided to the States under Title IV-E of the Social Security Act, 42 U.S.C. §§ 670–679b. The Rule exceeds statutory authority, conflicts with Texas law, and infringes the religious freedom of foster care and adoption service providers. In the alternative, if HHS is unwilling to commence rulemaking and until such a decision is made, Texas requests an exception, pursuant to 45 C.F.R. § 75.102, from the requirements imposed by the Rule on Texas and its providers.

I. Texas Partners with Private and Faith-Based Child Welfare Services Providers to Implement the Purposes of Title IV-E Funding.

Texas receives Title IV-E funds and administers the programs to distribute these funds to eligible foster care and adoption service providers. The Texas Department of Family and Protective Services ("DFPS"), through its Child Protective Services ("CPS"), provides services to children and families and seeks permanency for children in substitute care. At the end of fiscal year 2017, CPS placed over 48,000 children in substitute care (including foster care), and out of more than 7,000 children in CPS custody waiting for adoption, placed over 5,000 in adoptive homes.

CPS works with both secular and faith-based communities to find loving homes for children removed from their homes due to abuse and neglect. Several of those initiatives involve faith-based organizations. One program, called Congregations Helping in Love and Dedication ("CHILD"), encourages faith partners across Texas to join with DFPS to help provide current and potential adoptive and foster parents support, training, and resources. Another program is the One Church, One Child adoption recruitment program designed to partner with the minority community to identify adoptive families and single parents for children in need of homes.

Several faith-based providers receive Title IV-E funding through DFPS to provide their services. Some of these providers require potential foster care or adoptive parents to share a religious faith or agree to the provider's statement of faith.[1] The Rule, however, requires these faith-based organizations to abandon their core religious beliefs as a condition of receiving Title IV-E funding.

In anticipation of such a dilemma, in 2017, Texas enacted House Bill 3859, which protects the religious liberty of these organizations and prohibits the State from granting or refusing to grant funding to such organizations because of their religious beliefs. *See* Tex. Hum. Res. Code §§ 45.001–.010. HB 3859 provides that a "child welfare services provider may not be required to provide any service that conflicts with the provider's sincerely held religious beliefs." Tex. Hum. Res. Code § 45.005(a). The Rule now asks Texas to ignore the protections afforded to these religious organization under federal and state law. Thus, as discussed below, HHS must repeal the unlawful Rule, or provide Texas with an exception.

II. The Rule Violates the Administrative Procedure Act and the Religious Liberty of Texas's Faith-Based Foster Care and Adoption Service Providers.

A. The Rule is contrary to law.

The Rule prohibits Title IV-E funding recipients from excluding, denying benefits to, or discriminating against individuals on the basis of "age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation." 45 C.F.R. § 75.300(c). It also requires recipients to treat as valid the marriages of same-sex couples. *Id.* § 75.300(d). The purported regulatory authority for the Rule is the Office of Management and Budget's Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards published on December 19, 2014, 79 Fed. Reg. 75,871, and HHS's regulatory implementation of those standards on January 20, 2016, 81 Fed. Reg. 3004. *See* 81 Fed. Reg. 89,393 (Dec. 12, 2016) (describing authority for the Rule). But none of these regulations includes a provision allowing HHS to prohibit discrimination on the basis of gender identity or sexual orientation in Title IV-E funding programs.

The purported statutory authority for the Rule is 42 U.S.C. § 671(a)(18), which prohibits discrimination on the basis of "race, color, or national origin." Title IV-E, however, does not authorize HHS to prohibit discrimination on characteristics other than race, color, or national origin, or to mandate particular treatment of same-sex marriages. Under any "ordinary, contemporary, common meaning," *Contender Farms, LLP v. USDA*, 779 F.3d 258, 269 (5th Cir. 2015), the operative terms of section 671(a)(18)—"race, color, or national origin"—do not include "age, disability, sex, . . . religion, gender identity, or sexual orientation." Nor do they contemplate the treatment of same-sex marriages. The Rule's expanded definition of prohibited discrimination is "contrary to clear congressional intent" in section 671. *Chevron, USA, Inc. v. Nat. Res. Defs.*

[1] A list of these providers is located on the DFPS website. *See* DFPS, Texas Adoption Resource Exchange, *available at* https://www.dfps.state.tx.us/Adoption_and_Foster_Care/Adoption_Partners/private.asp. The particular requirements of each provider may be determined by clicking on a provider's name and accessing that provider's website.

Council, Inc., 467 U.S. 837, 843 n.9 (1984); *see also Franciscan All., Inc. v. Burwell*, 227 F. Supp. 3d 660 (N.D. Tex. 2016) (enjoining HHS regulation that included "gender identity" within the definition of "sex" under the Affordable Care Act and Title IX).

Even HHS's authority to enforce other nondiscrimination statutes fails to justify the prohibitions contained in the Rule.[2] Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, or national origin, 42 U.S.C. § 2000d, section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act prohibit discrimination based on disability, 29 U.S.C. § 794; 45 C.F.R. pt. 84, and the Age Discrimination Act of 1975 prohibits discrimination on the basis of age, 42 U.S.C. § 6101; 45 C.F.R. pt. 90. Moreover, even Section 1808(c) of the Small Business Job Protection Act of 1996, which is aimed at prohibiting discrimination in foster care placements or adoptions, focuses only on discrimination based on race, color, or national origin. 42 U.S.C. § 1996b. None of the statutory authority conveyed to HHS authorizes prohibitions in foster care and adoption funding based on "gender identity" or "sexual orientation." In fact, when the Obama Administration attempted to reinterpret the prohibition on "sex" discrimination in Title VII and Title IX, 20 U.S.C. § 1681(a); 42 U.S.C. § 2000e-2(a), to include sexual orientation and gender identity discrimination, a federal court blocked those efforts, *Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. 2016), and President Trump eventually rescinded those unlawful interpretations.

To be sure, when Congress wants to include other forms of prohibited discrimination in a federal funding statute, it knows how to do so. For example, Title IV-A of the Social Security Act, which provides block grants to States for temporary assistance for needy families, prohibits gender discrimination, 42 U.S.C. § 603(a)(5)(I)(iii), and incorporates by reference the Age Discrimination Act of 1975, section 504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, and Title VI of the Civil Rights Act of 1964, *id.* § 608(d). But Title IV-A also broadly protects religious organizations who participate in State funding from discrimination because of their religious character and beliefs. *Id.* § 604a. Other federal nondiscrimination laws provide similar exemptions for religious organizations. *See, e.g.*, 42 U.S.C. § 1687 (providing religious organizations an exemption from the requirements of Title IX of the Education Amendments of 1972).

Title IV-E, by comparison, contains no references to other federal anti-discrimination laws. It simply prohibits discrimination on the basis of race, color, and national origin, which makes sense because those prohibitions are based on Title VI, which applies to any program or activity receiving federal financial assistance. 42 U.S.C. § 2000d. Congress knows how to include or exclude nondiscrimination policies in its welfare funding statutes, and its decision to focus on only race, color, and national origin in Title IV-E means no other forms of discrimination are prohibited by funding recipients. HHS's expansion of Title IV-E's nondiscrimination provision in 45 C.F.R. § 75.300(c–d) is contrary to law. Absent statutory authorization, HHS must repeal the Rule or risk its invalidation in court.

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[2] *See* HHS, Office for Civil Rights, Laws and Regulations Enforced by OCR, *at* https://www.hhs.gov/civil-rights/for-providers/laws-regulations-guidance/laws/index.html.

B. The Rule violates the religious liberty of Texas's foster care and adoption partners.

By mandating nondiscrimination based on religion and recognition of same-sex marriages, the Rule violates the religious liberty protections provided to foster care and adoption agencies under federal and Texas law. The Religious Freedom Restoration Act ("RFRA") prohibits the federal government from substantially burdening a person's exercise of religion, even if the burden results from a rule of general applicability, unless the government demonstrates a compelling interest that is the least restrictive means. 42 U.S.C. § 2000bb–1(a–b). "RFRA was designed to provide very broad protection for religious liberty," *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2767 (2014), and protects individual and businesses alike, *id.* at 2768–69. Moreover, the Rule puts Texas's child welfare service providers to a choice: participate in an otherwise available government funding program or remain a religious entity. In other words, under the Rule, providers must abandon their religious beliefs to receive the funding, a result recently held unconstitutional in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017).

The Rule substantially burdens the religious beliefs of religious child welfare service providers in Texas by requiring them to abandon their core tenets of serving families who share a particular faith and regularly attend religious services, among other things. The Rule requires these providers to abandon those requirements because it prohibits the providers from discriminating on the basis of religion in the provision of their services. Moreover, the Rule substantially burdens religious beliefs of providers whose faith disagrees with same-sex marriage and precludes them from placing children in such arrangements. And this conflict is not hypothetical. A couple in Fort Worth, Texas is suing HHS and the United States Conference of Catholic Bishops ("USCCB") because USCCB provides foster care and adoption services in Texas, but places children according to core Catholic beliefs—a decision Texas protects. *See* Complaint ¶¶ 41–42, *Marouf v. Azar*, No. 18-cv-378 (D.D.C. 2018).

HHS, however, lacks a compelling interest to impose the Rule's nondiscrimination policy on Title IV-E grantees, and the Rule is not the least restrictive means of advancing any purported interest that may exist. First, as discussed above, HHS lacks a compelling interest to enact the Rule because Congress did not authorize HHS to impose those requirements on States and their child welfare service providers. Second, even if HHS had authority, the Rule is not the least restrictive means. Other federal anti-discrimination statutes provide exemptions for religious entities when the policy goals of the nondiscrimination mandate would potentially conflict with a person or entity's religious beliefs. Here, the Rule itself provides no express exemption. Instead, the Rule's nondiscrimination restricts the religious beliefs of key State-partners in foster care and adoption. This leaves Texas with no choice but to seek a state-wide exception under 45 C.F.R. § 75.102.

The Rule also collides with Texas law protecting the religious liberty of child welfare service providers. A "child welfare services provider may not be required to provide any service that conflicts with the provider's sincerely held religious beliefs." Tex. Hum. Res. Code § 45.005(a). The Rule asks Texas to ignore this law by mandating that providers not discriminate based on religion to receive funding. *Id.* §§ 45.006–.008.

But Texas did not leave individuals who do not want to work with religious child welfare service providers without options. To facilitate the religious liberty protection, but also serve all children and potential foster care or adoptive parents in the State regardless of their religious beliefs, Texas requires state entities to ensure that secondary child welfare services providers are available if a child welfare services provider, pursuant to religious beliefs, declines to provide a particular service. It also requires that provider to provide the person seeking the service information related to other service providers and a referral to another provider. Tex. Hum. Res. Code § 45.005(c).

Requiring faith-based entities who receive Title IV-E funding through a Texas foster care or adoption services grant to comply with the Rule's broad nondiscrimination statement and policy regarding same-sex marriages infringes their rights to freedom of conscience and religious belief under federal and Texas law. Some faith-based partners require potential foster or adoptive homes to maintain a certain belief system and regularly attend religious services. Some have particular religious views on marriage, gender identity, and sexual orientation. But none of them should be required to forfeit their beliefs as a condition of helping Texas's most vulnerable children.

III. Conclusion

The Rule not only undermines the first liberty provided in the Bill of Rights—religious liberty—it is also contrary to Title IV-E's nondiscrimination provision, violates RFRA, and conflicts with Texas law. For these reasons, I respectfully request that HHS commence the process of repealing the Rule. In the alternative, and while HHS considers that option, I request, on behalf of the State of Texas and our faith-based child welfare service providers, an exception from subparts (c) and (d) of 45 C.F.R. 75.300. I look forward to hearing from you at your earliest convenience.

Very truly yours,

Ken Paxton

Ken Paxton
Attorney General of Texas

cc: Roger Severino, Director, HHS Office for Civil Rights