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The Honorable Xavier Becerra
Secretary of Health & Human Services
U.S. Dept. of Health & Human Services
200 Independence Avenue S.W.
Washington, D.C. 20201

Dear Secretary Becerra:

Tennessee and the undersigned State Attorneys General appreciate the opportunity to comment on the Notice of Proposed Rulemaking from the Department of Health and Human Services ("HHS"). *See* Notice of Proposed Rulemaking. Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. 47824 (proposed Aug. 4, 2022) ("Proposed Rule"). Like HHS, Tennessee has a keen interest in the interpretation and enforcement of Section 1557 of the Patient Protection and Affordable Care Act—which has broad effects on healthcare in Tennessee, including Tennessee's successful Medicaid program.

Unfortunately, HHS's proposed interpretation of Section 1557's prohibition of discrimination "on the basis of sex," language incorporated from Title IX, does not comport with the statute as enacted by Congress. Simply put, the statutory text does not prohibit discrimination on the basis of "gender identity" or "sexual orientation." Congress alone possesses the authority to legislate. While the proposed regulations purport to interpret the law, they actually change its

meaning in a way that intrudes on Congress's exclusive domain. Your agency cannot rewrite the law.

Tennessee and the co-signing States have been at the forefront of challenging this Administration's attempts to rewrite Congress's statutes by executive fiat. Just recently, Tennessee and nineteen other States secured a preliminary injunction against similar examples of agency overreach including (1) a "technical assistance document" that the EEOC Chair unilaterally issued in an attempt to expand the meaning of "sex" in Title VII;[1] and (2) the U.S. Department of Education's Interpretation[2] and Fact Sheet[3] adopting a similarly unlawful interpretation of Title IX. *See Tennessee v. United States Dep't of Educ.*, No. 3:21-CV-308, 2022 WL 2791450, at *24 (E.D. Tenn. July 15, 2022) (enjoining EEOC guidance and interpretive rule for unlawfully misconstruing federal law and failure to adhere to Administrative Procedure Act requirements). The Eastern District of Tennessee warned that the agencies' attempted rulemaking "creates rights for students and obligations for regulated entities not to discriminate based on sexual orientation or gender identity that appear nowhere in *Bostock*, Title IX," or existing regulations. *Id.* at *21.

Similarly, just days ago, Texas obtained vacatur of the EEOC "technical assistance document" and HHS's own "guidance" attempting to require—under Section 1557—recipients of federal healthcare funding to engage in purported "gender affirming care" on minors.[4] *See* Opinion and Order, *Texas v. EEOC*, No. 2:21-cv-194 (N.D. Tex. Oct. 1, 2022), ECF 74.

The Proposed Rule here fails to heed the warnings from these rulings—not to mention other litigation enjoining similar attempts to interpret Section 1557 in ways contrary to the plain meaning of its statutory text.

Accordingly, HHS should hew to the regulations that it promulgated in 2020, which adhere to the law enacted by Congress. *See* Nondiscrimination in Health and Health Education Programs or Activities, Delegation of Authority, 85 Fed. Reg. 37160 (June 19, 2020) ("2020 Rule"). If your agency instead continues with this attempt to rewrite the law by executive fiat, HHS will face yet more litigation challenging this Administration's regulatory overreach.[5]

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[1] *See* EEOC, Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity, NVTA 2021-1 (June 15, 2021), https://bit.ly/3zgP7iP.

[2] Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 Fed. Reg. 32,637 (June 22, 2021).

[3] U.S. Dep't of Justice & U.S. Dep't of Educ., Confronting Anti-LGBTQI+ Harassment in Schools, https://bit.ly/3sQjZnM.

[4] U.S. Dep't of Health and Human Servs. Off. for Civil Rights, HHS Notice and Guidance on Gender Affirming Care, Civil Rights, and Patient Privacy (March 2, 2022), https://bit.ly/3UTIEWd.

[5] *E.g.*, *Franciscan All., Inc. v. Becerra*, 47 F.4th 368 (5th Cir. 2022) (affirming permanent injunction on RFRA grounds against future HHS attempts to require medical providers to perform abortions or gender-transition procedures); *Christian Employers All. v. EEOC*, No. 1:21-CV-195,

I. *Bostock*'s Limited Reach.

The Proposed Rule is the latest agency action designed to address the President's directive to agency heads to promulgate regulations conferring new protections outside the scope of federal civil rights statutes, ostensibly based on the Supreme Court's holding in *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020). *See* Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, 86 Fed. Reg. 7023 (Jan. 20, 2021).[6]

In *Bostock*, the Supreme Court decided a narrow question: Whether Title VII's precisely-worded protection for employment discrimination "because of . . . sex" prohibits an employer from "fir[ing] someone simply for being homosexual or transgender." 140 S. Ct. at 1753. In a 6-3 decision, the Court concluded that an employer "who fires an individual merely for being gay or transgender" violates Title VII. *Id.* at 1754. That decision, however, was cabined in various ways that limit its applicability to other statutes.

Broadly, the *Bostock* majority expressly noted that "other federal or state laws that prohibit sex discrimination"—like Section 1557—were not "before" the Court, and thus the Court would "not prejudge any such question" about what the text of those statutes requires. *Id.* at 1753. Thus, the *Bostock* majority itself disclaimed the decision's applicability to other statutory schemes.

Moreover, even within the context of the statute at issue in *Bostock*, the majority recognized the narrow limitations of its holding.

First, the *Bostock* majority declined to opine about what constituted unlawful discrimination "because of sex" under its Title VII interpretation. Specifically, the majority did "not purport to address" certain forms of sex-separated facilities or services like "bathrooms, locker rooms, or anything else of the kind." *Id.* at 1753.

Second, the *Bostock* majority emphasized that its interpretation of Title VII would have to accord with religious-liberty protections under the U.S. Constitution and the Religious Freedom Restoration Act. *Id.* at 1753-54.

2022 WL 1573689 (D.N.D. May 16, 2022) (challenge to predecessor to Proposed Rule: HHS's Notification of Interpretation); *Neese v. Becerra*, No. 2:21-CV-163-Z, 2022 WL 1265925 (N.D. Tex. Apr. 26, 2022) (same).

[6] "Under *Bostock*'s reasoning, laws that prohibit sex discrimination—including Title IX of the Education Amendments of 1972, . . . Fair Housing Act . . . , and section 412 of the Immigration and Nationality Act, . . . along with their respective implementing regulations—prohibit discrimination on the basis of gender identity or sexual orientation, so long as the laws do not contain sufficient indications to the contrary." Executive Order, 86 Fed. Reg. at 7023.

Third, the *Bostock* majority recognized "that homosexuality and transgender *status* are distinct concepts from sex." *Id.* at 1746-47 (emphasis added). Thus, the majority did not redefine "sex" to include "sexual orientation" and "gender identity."

II. Regulatory and Litigation Background.

This is the latest installment in HHS's whipsawing between interpretations of Section 1557's prohibition of discrimination "on the basis of sex." This latest interpretation reverses course from HHS's comprehensive 2020 analysis of Section 1557's plain statutory requirements. This inconsistent and chaotic regulatory approach demonstrates the wisdom of the Founders in assigning lawmaking to the people's representatives in Congress and not to the whim of whoever happens to hold executive power at a given time.

Generally, Section 1557 draws its anti-discrimination provision from Title IX: "Section 1557 clearly incorporates Title IX's prohibition of sex discrimination." *Franciscan All. Inc. v. Burwell*, 227 F. Supp. 3d 660, 686 (N.D. Tex. Dec. 31, 2016).[7] And under Title IX, Congress prohibited discrimination "on the basis of sex." 20 U.S.C. § 1681(a).

A. 2016 Rule. In 2016—before the *Bostock* majority interpreted Title VII—HHS defined Section 1557's prohibition of discrimination "on the basis of sex" to "encompass[ ] discrimination on the basis of gender identity": "an individual's internal sense of gender, which may be male, female, neither, or a combination of male and female." 2020 Rule, 85 Fed. Reg. at 37161 (quoting Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31375, 31384 (May 18, 2016)). Thus, the 2016 rule also "imposed several requirements regarding medical treatment and coverage on the basis of gender identity."[8] *Id.*

B. Litigation Enjoining 2016 Rule. In a comprehensive opinion, the Northern District of Texas enjoined HHS's enforcement of this regulation nationwide in relevant part. *Franciscan All.*, 227 F. Supp. 3d at 696; *accord* 2020 Rule, 85 Fed. Reg. at 37163 ("On December 31, 2016, the U.S. District Court for the Northern District of Texas preliminarily enjoined, on a nationwide basis, portions of the 2016 Rule that had interpreted Section 1557 to prohibit discrimination on the basis of gender identity and termination of pregnancy.").

Section 1557—like Title IX—reflects "Congress['s] inten[t] to prohibit sex discrimination on the basis of the biological differences between males and females." *Franciscan All.*, 227 F.

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[7] *Accord* 42 U.S.C. § 18116(a) ("[A]n individual shall not, on the ground prohibited under . . . title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et seq.) . . . be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments).").

[8] Notably, HHS did not define sex discrimination to include discrimination on the basis of sexual orientation, except in cases "where the evidence establishes that the discrimination is based on gender stereotypes." 2016 Rule 82 Fed. Reg. at 31390.

Supp. 3d at 687 (citing 20 U.S.C. § 1681); *accord Neese*, 2022 WL 1265925, at *12 ("Title IX presumes sexual dimorphism in section after section, requiring equal treatment for each 'sex.'").

The court concluded that "Congress's intent in enacting Section 1557 is clear because the statute explicitly incorporates Title IX's prohibition of sex discrimination." *Franciscan All.*, 227 F. Supp. 3d at 687. Rather than create a new body of nondiscrimination law, Section 1557 ". . . incorporates the grounds of four longstanding federal nondiscrimination statutes," including Title IX. *Id.*, at 671.

And the "text of Title IX indicates Congress's binary definition of 'sex'" is defined by biological sex—and not gender identity. *Id.* at 687; *see also* 20 U.S.C. § 1681 ("students of one sex"; "both sexes"; "students of the other sex"). The court provided extensive support for the proposition that when Congress enacted Title IX in 1972, "the term 'sex' was commonly understood to refer to the biological differences between males and females." [9] *Id.* at 688 (collecting definitions); *accord Neese*, 2022 WL 1265925, at *12 (same).

The Northern District of Texas also concluded that Congress's 2010 enactment of Section 1557—which incorporated Title IX's antidiscrimination provisions—did not alter the court's interpretation. In 2010: "(1) Congress knew how but did not use language indicating as much, and (2) in 2010 no federal court or agency had interpreted Title IX sex discrimination to include gender identity." *Franciscan All.*, 227 F. Supp. 3d at 688.

C. 2020 Rule. In 2020—with the benefit of *Franciscan Alliance*'s analysis and *after* the Supreme Court's Title VII decision in *Bostock*—HHS determined that its 2016 Rule was faulty. Section 1557's protections from discrimination "on the basis of sex" reflected that "'[s]ex' according to its original and ordinary public meaning refers to the biological binary of male and female that human beings share with other mammals." 2020 Rule, 85 Fed. Reg. at 37178.

Primarily, HHS concluded that its 2016 Rule was inconsistent with statutory text and thus imposed "essentially legislative changes that the Department lacked the authority to make." *Id.* at 37161-62. And HHS recognized that the 2016 Rule "imposed new requirements for care related to gender identity and termination of pregnancy that Congress has never required, and prevented covered entities from drawing reasonable and/or medically indicated distinctions on the basis of sex." *Id.* at 37162.

HHS also revised "[t]en provisions in CMS regulations, all of which cover entities that are also subject to Section 1557" to "delet[e] the provisions on sexual orientation and gender identity." *Id.* at 37162. In addition to Section 1557's failure to include "sexual orientation" as a protected

[9] Even among those who used the term "gender identity" around the time of Title IX's enactment, they recognized the difference between "sex" and "gender identity." *Franciscan All.*, 227 F. Supp. 3d at 688 (collecting authorities). Further, other portions of Title IX "authorize[] covered institutions to provide different arrangements for each of the sexes." *Id.* at 688 (citing 20 U.S.C. § 1686).

class, "distinctions on the basis of sexual orientation may be sex-neutral and apply equally to both sexes, which would mean that they do not burden anyone on the basis of sex." *Id.* at 37194.

For both gender identity and sexual orientation, the Agency concluded that "[m]uch as the reasonable distinctions on the basis of sex discussed above are not illegitimate sex stereotypes, so too, distinctions on the basis of sexual orientation do not as such constitute sex stereotyping." *Id.*

At bottom, "[g]iven Congress's decision not to extend civil rights protections on the basis of sexual orientation" and gender identity "in the field of health and human services, the Department believes that State and local governments are best equipped to balance the multiple competing considerations involved in what remain a contentious and fraught set of questions." *Id.* at 37194.

* * *

Just two years after HHS's well-reasoned decision to return to Congress's plain meaning, HHS has reversed course again. First, HHS issued its Notification of Interpretation, and certain affected parties immediately—and successfully—challenged HHS's reversion to its incorrect interpretation. *E.g.*, *Christian Employers All. v. EEOC*, 2022 WL 1573689; *Neese*, 2022 WL 1265925. Now, HHS seeks comment on a new proposed rule which shares similar defects to the agency's prior failed effort.

III. Defects in Proposed Rule.

In *Bostock*, Justice Kavanaugh recognized that "[h]ealthcare benefits may emerge as an intense battleground under the Court's holding." 140 S. Ct. at 1781 (Kavanaugh, J., dissenting) (collecting cases).

With the Proposed Rule here, Justice Kavanaugh's prediction has come true. For reasons evident in Section 1557's plain text and statutory context—and for reasons that HHS identified in 2020 and the reviewing court recognized in 2016—the Proposed Rule's attempts to contort Congress's demands are unlawful. Thus, without substantial alteration, the Proposed Rule will join a long list of unlawful agency actions.[10]

A. Improper Reliance on *Bostock* over Title IX's Text. Rather than developing from Title IX's plain text, the Proposed Rule is over-reliant on inapposite judicial precedent.

[10] HHS may not promulgate regulations that violate Section 1557. *E.g.*, *Children's Health Def. v. FCC*, 25 F.4th 1045, 1052 (D.C. Cir. 2022). The Proposed Rule is not a permissible reading of the statute and instead constitutes an unlawful exercise of Congress's legislative authority that exceeds the agency's jurisdiction. *See* 5 U.S.C. § 706(2)(B)-(C) (allowing a court to set aside agency action that is "contrary to constitutional right [or] power" or "in excess of statutory jurisdiction, authority, or limitations"); U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in . . . Congress.").

After President Biden directed that agencies conform their regulations to the *Bostock* majority's interpretation, *see* 86 Fed. Reg. at 7023, the Proposed Rule unsurprisingly relies in large part on *Bostock's* analysis of Title VII. Proposed Rule, 87 Fed. Reg. at 47829 (noting the *Bostock* decision as reason to depart from 2020 Rule).

As an initial matter, *Bostock* expressly noted that "other federal or state laws that prohibit sex discrimination"—like Section 1557 and Title IX—were not "before" the Court and thus the Court would "not prejudge any such question" about what the text of those statutes requires. *Bostock*, 140 S. Ct. at 1753.

Thus, as many federal courts have held, "the rule in *Bostock* extends no further than Title VII." *Pelcha v. MW Bancorp, Inc.*, 988 F.3d 318, 324 (6th Cir. 2021) ("[T]he Court in Bostock was clear on the narrow reach of its decision and how it was limited only to Title VII itself."). And "it does not follow that principles announced in the Title VII context automatically apply in the Title IX context." *Meriwether v. Hartop*, 992 F.3d 492, 510 n.4 (6th Cir. 2021); *see also* U.S. Dep't of Educ., Memorandum for Kimberly M. Richey Acting Assistant Secretary of the Office for Civil Rights Re: *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020), at 1-4 (Jan. 8, 2021) (*Bostock* did not interpret Title IX and "does not affect the meaning of 'sex' as that term is used in Title IX").

Bostock is especially inapplicable here because Title IX's text is fundamentally different from Title VII: Title IX prohibits discrimination "on the basis of sex," 20 U.S.C. § 1681(a) (emphasis added), rather than "because of . . . sex," 42 U.S.C. § 2000e-2(a)(1).

Bostock concluded that Title VII's precise textual formulation imposed a but-for causation requirement in which biological sex can only be one reason among many for employment termination. 140 S. Ct. at 1739; *id.* at 1741-42 ("if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred," even if the primary reason for the termination was the employee's gender identity or sexual orientation).

Title IX, by contrast, prohibits only discrimination "on the basis of sex." That language clarifies that biological sex must be *the reason* for the discrimination; mere "but for" causation will not suffice. "A statutory provision's use of the definite article 'the,' . . . indicates that Congress intended the term modified to have a singular referent." *SEC v. KPMG LLP*, 412 F. Supp. 2d 349, 387-88 (S.D.N.Y. 2006); *accord Rumsfeld v. Padilla*, 542 U.S. 426, 434 (2004). Thus, the discrimination prohibited in Title IX must be based on sex itself, not based on distinct concepts such as sexual orientation and gender identity.

B. Ignoring Contextual Sources of Meaning. The Proposed Rule also fails to grapple with Title IX's broader contextual understanding of sex and sex discrimination. Title IX's meaning comes from its terms, "read in context," and in light of "the problem Congress sought to solve." *Goldstein v. SEC*, 451 F.3d 873, 878 (D.C. Cir. 2006) (quoting *PDK Labs. Inc. v. DEA*, 362 F.3d 786, 796 (D.C. Cir. 2004)).

Critically, Title IX's use of the term "sex" not only necessarily means biological sex, but also reflects a view of biological sex in which discrimination must be based on biological sex itself. "Sex" in Title IX refers only to biological sex, and not gender identity or sexual orientation. The word "sex" in Title IX must be read "in accord with the ordinary public meaning of ['sex'] at the time of [Title IX was] enact[ed]." *Bostock*, 140 S. Ct. at 1738. And at that time, "virtually every dictionary definition of 'sex' referred to the physiological distinctions between males and females." *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 632 (4th Cir. 2020) (Niemeyer, J. dissenting), *cert. denied*, 141 S. Ct. 2878 (2021); *see also Adams v. Sch. Bd. of St. Johns Cnty.*, 3 F.4th 1299, 1322 (11th Cir. 2021) (W. Pryor, C.J., dissenting) (collecting dictionary definitions from time of enactment), *vacated upon granting en banc review*, 9 F.4th 1369; *Franciscan All.*, 227 F. Supp. 3d at 688 (same); *accord Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion) ("sex . . . is an immutable characteristic determined solely by the accident of birth"). In 1961, the Oxford English Dictionary defined "Sex" as "[t]he sum of those differences in the structure and function of the reproductive organs on the ground of which beings are distinguished as male and female, and of the other physiological differences consequent on these." 9 Oxford English Dictionary 578 (1961). In 1970, the American College Dictionary defined "Sex" to mean "the sum of the anatomical and physiological differences with reference to which the male and the female are distinguished." The American College Dictionary 1109 (1970). A year later, Webster's Third New International Dictionary defined "Sex" to mean "the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction." Webster's Third New International Dictionary 2081 (1971). The year after Title IX became law, Random House defined "Sex" as "either the male or female division of a species, esp. as differentiated with reference to the reproductive functions." The Random House College Dictionary 1206 (rev. ed. 1973). And a few years after that, the American Heritage Dictionary defined "Sex" as "[t]he property of quality by which organisms are classified according to their reproductive functions." American Heritage Dictionary 1187 (1976). Each of these sources indicate that Title IX uses "sex" as a reference to the categories of "male" and "female," which "simply are not physiologically the same." *Bauer v. Lynch*, 812 F.3d 340, 350 (4th Cir. 2016) (citing and discussing *United States v. Virginia*, 518 U.S. 515 (1996)).

Title IX repeatedly uses the biological binary of sex. For example, Title IX speaks of permitting sex-based discrimination among ''Men's'' and ''Women's'' associations and organizations for ''Boy[s]'' and ''Girls,'' "the membership of which has traditionally been limited to persons of one [or the other] sex." 20 U.S.C. § 1681(a)(6)(B). The statute also describes how an institution may change "from . . . admit[ting] only students of one sex" (that is, male or female) "to . . . admit[ting] students of both sexes," (male and female). 20 U.S.C. § 1681(a)(2).[11] Title IX thus treats "sex" as having two biological possibilities: male or female. The Affordable Care Act also uses this biological binary. For example, Section 1558 of the Affordable Care Act—the

[11] Consequently, the Department of Education has always construed the term "sex" in Title IX to mean biological sex—not gender identity. *E.g.*, 85 Fed. Reg. 30,178 (May 19, 2020) ("Title IX and its implementing regulations include provisions that presuppose sex as a binary classification. . . . In promulgating regulations to implement Title IX, the Department expressly acknowledged physiological differences between the male and female sexes.").

provision immediately following Section 1557—uses this biological binary in amending the Fair Labor Standards Act to prohibit an employer from discriminating in certain ways "against any employee with respect to *his or her* compensation, terms, conditions, or other privileges of employment." Pub. L. No. 111-148, § 1558, 124 Stat. 119, 261 (2010), codified at 29 U.S.C. § 218c (emphasis added).

Further, Title IX makes clear that not all disparate treatment *based on biological differences* is unlawful discrimination.[12] In other words, sex discrimination under Title IX—and thus under Section 1557—does not arise merely from the "but-for" analysis employed by the *Bostock* majority. *Bostock*, 140 S. Ct. at 1742 ("Just as sex is necessarily a but-for *cause* when an employer discriminates against homosexual or transgender employees, an employer who discriminates on these grounds inescapably intends to rely on sex in its decisionmaking.").

Specifically, Title IX—unlike Title VII addressed in *Bostock*—expressly permits sex-based separation. *E.g.*, 20 U.S.C. § 1686 ("nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes"); *see Tennessee*, 2022 WL 2791450, at *21 ("Title IX does allow for sex-separation in certain circumstances."); *Franciscan All.*, 227 F. Supp. 3d at 688 ("For example, in § 1686 Congress authorized covered institutions to provide different arrangements for each of the sexes.").[13]

It makes perfect sense to import Title IX's understanding of "sex"—and sex discrimination—into Section 1557, which governs "health programs." Much like in the educational context where differential treatment on the basis of sex may be warranted (in facilities or on sports teams), healthcare also requires different treatment based on biological realities. Men and women have different health needs based on biological sex. As Justice Ginsburg recognized—especially in healthcare contexts—"[p]hysical differences between men and women . . . are enduring" and the "two sexes are not fungible"; they have "inherent differences." *United States v.*

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[12] Not only does this analysis help define what constitutes unlawful discrimination, it also demonstrates that Congress meant for "sex" to mean "biological sex."

[13] Both HHS and the Department of Education's implementing regulations have long provided that parties regulated by Title IX may provide sex-separated facilities and teams. 34 C.F.R. § 106.33 (allowing "separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex"); *id.* § 106.41(b) (covered institutions "may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport"); 45 C.F.R. § 86.32(b) (allowing "separate housing on the basis of sex"); *id.* § 86.33 (allowing "separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex"); *id.* § 86.41(b) (allowing "separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport").

Virginia, 518 U.S. 515, 533 (1996) (quoting *Ballard v. United States*, 329 U.S. 187, 193 (1946); *Califano v. Webster*, 430 U.S. 313, 320 (1977) (per curiam)).

Indeed, the Proposed Rule itself recognizes that discrimination on the basis of pregnancy is unlawful sex discrimination—which can only be true if unlawful discrimination under Section 1557 were based on biological differences between the sexes. Proposed Rule, 87 Fed. Reg. at 47848; *see also* 2020 Rule, 85 Fed. Reg. at 7179-80 ("Section 1557's protection against discrimination 'on the basis of sex' covers women's health issues including pregnancy, uterine cancer, and prenatal and postpartum services. That assumption is correct: These issues are protected under Section 1557 because of the ordinary and biological meaning of 'sex.'").

In response to the overwhelming evidence that Title IX (and thus Section 1557) does not support HHS's preferred interpretation, the preamble of the Proposed Rule contends that Section 1557 only incorporates the "grounds" of illegal discrimination from Title IX—*i.e.*, the protected classes or "bases"—but not Title IX's definition of sex discrimination. Proposed Rule, 87 Fed. Reg. at 47840.

This unduly narrow interpretation has two flaws.

First, it disregards the most important takeaway from Title IX's other provisions: Title IX's various exclusions help to define what the term "sex" does—and does *not*—mean. And "sex" does not mean "sexual orientation" and "gender identity."

Second, the Proposed Rule does not explain why Section 1557 incorporating the "grounds" for discrimination does *not* incorporate the broader scope of Title IX's prohibitions, as well as Title IX's religious exemption which is integral to properly interpreting the scope of Title IX.

C. The Proposed Rule's Effects on Regulated Parties and Others. Another defect in the Proposed Rule is the effect it will have on regulated parties and others and the Proposed Rule's failure to consider those effects.

First, the Proposed Rule's prohibition of "gender-identity" discrimination will likely compel speech in the form of requiring regulated parties to use preferred pronouns—as compared to pronouns reflecting biological sex. *E.g.*, *Meriwether*, 992 F.3d at 507 (noting First Amendment problems with compelling people to use pronouns affirming that "[p]eople can have a gender identity inconsistent with their sex at birth").[14] Furthermore, under the Proposed Rule, both public and private healthcare providers and organizations would be compelled to provide and post nondiscrimination notices that convey the federal government's messages about controversial topics, such as gender identity and abortion, without regard for the providers' and organizations'

[14] Moreover, some gender dysphoric or transgender individuals prefer novel pronouns to the traditional masculine or feminine pronouns. *See United States v. Varner*, 948 F.3d 250, 256-57 (5th Cir. 2020) (declining to use a litigant's "preferred pronouns" and providing a chart of preferred pronouns that includes "such neologisms" as fae/faer/faers/faerself, per/per/pers/perself, ve/ver/vis/verself, and xe/xem/xyr/xyrs/xemself, ze/hir/hirs/hirself).

views on those topics. *See Bongo Prods., LLC v. Lawrence*, No. 3:21-cv-00490, 2022 WL 1557664, at *1, *16-17 (M.D. Tenn. May 17, 2022) (ruling that a government cannot compel others to affirm the government's position on a controversial topic relating to gender identity).

Second, the Proposed Rule may encourage regulated parties to insert themselves into constitutionally protected family affairs. As the Supreme Court has concluded, "[t]here [is] a 'private realm of family life which the state cannot enter,' that has been afforded both substantive and procedural protection[s]" under our Constitution. *Smith v. Org. of Foster Fams. for Equal. & Reform*, 431 U.S. 816, 842 (1977) (citation and footnotes omitted) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)). Thus parents may "bring up" their children as they deem fit, including through instruction on matters of behavior and ethics. *See M.L.B. v. S.L.J.*, 519 U.S. 102, 116 (1996) (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923)). In this regard, the Treasury and General Government Appropriations Act of 1999 requires federal agencies to issue a Family Policymaking Assessment for any rule that may affect family well-being. *See* Pub. L. No. 105-277, Div. A, § 654, 112 Stats. 2681-480, 2681-528 (1998), codified at 5 U.S.C. § 601 (note). HHS must conduct an analysis of the NPRM's impact on families, which it has not done.

Third, the Proposed Rule offers little assurance that the religious beliefs and practices of all will be respected. To be sure, various proposed regulations pay lip service to the Religious Freedom Restoration Act's requirements, and they purport to establish an exemption process for religious objections. *See* Proposed Rule, 87 Fed. Reg. at 47911, 47918-19. To many religious adherents, however, those promises for exemptions and exceptions ring hollow. *E.g.*, *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2375-78 (2020) (detailing the tortured history of the Little Sisters of the Poor); *Franciscan All., Inc.*, 47 F.4th at 380 (affirming the permanent injunction of the HHS's attempts to require the Franciscan Alliance to provide gender-identity treatment due to their religious beliefs). The Proposed Rule's case-by-case approach to religious exemptions inverts the process; puts the burden of compliance on regulated entities to justify such exemptions; chills the exercise of religion; and permits arbitrary and capricious oversight of such requests for exemption by government employees who lack training on the Frist Amendment, RFRA, statutory protections for religious exercise, and religious liberty issues. The proposed requirements may well cause healthcare providers to stop providing certain types of healthcare services and treatment, to stop accepting Medicaid (or Medicare)[15] patients, or to leave (or not enter) the medical profession completely. Religious or religiously motivated healthcare organizations and professional tend to provide a significant amount of healthcare to minority and other underserved and low-income populations and in medically underserved areas, such as inner cities and rural and frontier areas. As a result, this could impact access to care and negatively impact health equity considerations and our States' Medicaid programs. HHS needs to

[15] In this regard, HHS takes the unprecedented step of redefining Medicare Part B as providing federal financial assistance to healthcare professionals who merely accept Medicare reimbursement for providing services to elderly Americans.

consider and address the impact and effects on low-income and rural peoples of such reduced access to healthcare.[16]

Fourth, to the extent that the Proposed Rule governs federal funding, "[t]he legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the contract." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981) (quotation marks omitted). Congress, through Section 1557, did not unambiguously prohibit discrimination based on sexual orientation or "gender identity," and thus HHS cannot now impose that requirement on receipt of federal funds, including Medicaid funds. And even if HHS could interpret Section 1557 to impose such a requirement, which it cannot, such a new requirement putting existing funds at risk would be unconstitutionally coercive. *See Nat'l Fed'n of Indep. Bus. V. Sebelius*, 567 U.S. 519, 581 (2012) (opinion of Roberts, C.J.).

D. Reliance on Currently Enjoined Department of Education Interpretation. Finally, the Proposed Rule is also defective because it relies on the very Department of Education Interpretation that the Eastern District of Tennessee preliminarily enjoined. 47 Fed. Reg. at 47828 & n.46 (citing the Interpretation in the Summary of the Proposed Rule as a "Federal agency interpretation[]" that HHS aims to make its regulations "consistent with"). The Proposed Rule, published *after* the Eastern District of Tennessee's order, does not even acknowledge the existence of the injunction.

As the Eastern District of Tennessee held, the Department of Education Interpretation unlawfully attempted to "create[] rights for students and obligations for regulated entities not to discriminate based on sexual orientation or gender identity that appear nowhere in *Bostock*, Title IX, or" existing regulations. *Tennessee*, 2022 WL 2791450, at *21. So too is the Proposed Rule an attempt to stretch HHS's power beyond the text of the statute Congress enacted.

HHS provided no justification in the Proposed Rule for attempting to make its regulations consistent with an Interpretation that the Department of Education itself is not allowed to implement against twenty States. The Department of Education agrees that it may "not cite, reference, treat as binding, or otherwise rely upon" the Interpretation in any enforcement action against the twenty States. Notice of Compliance at 2, *Tennessee v. U.S. Dep't of Educ.*, No. 3:21-CV-308 (E.D. Tenn. Aug. 25, 2022), ECF No. 97. There is no reason for HHS to rely on the enjoined Interpretation either. If HHS insists on pursuing its rulemaking proposal, it must "make appropriate changes" to the proposed rule, *Mann Constr., Inc. v. United States*, 27 F.4th 1138, 1142 (6th Cir. 2022), that acknowledge how the Proposed Rule unlawfully attempted to create rights and obligations that appear nowhere in *Bostock*, Title IX, Section 1557, or existing regulations.

* * *

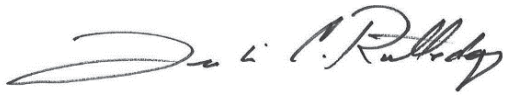
[16] In this regard, HHS should also explain how the Proposed Rule does not violate Section 1554 of the Affordable Care Act, codified at 42 U.S.C. § 18114.

Thank you for consideration of these concerns. We value our close working relationship with your agency and the good works we have been able to achieve together, but the Proposed Rule raises serious concerns that HHS will exceed its statutory authority and promulgate unlawful regulations. If necessary, Tennessee and the co-signing States will take action to safeguard the rights of their residents.

Sincerely,

Jonathan Skrmetti
Tennessee Attorney General and Reporter

Steve Marshall
Alabama Attorney General



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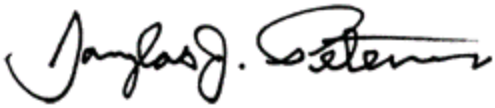

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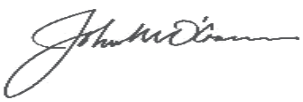

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