

February 20, 2020

ATTORNEY GENERAL RAOUL OPPOSES FEDERAL PROPOSALS TO ROLL BACK CRITICAL ANTI-DISCRIMINATION PROTECTIONS

Chicago — Attorney General Kwame Raoul, as part of a multistate coalition, opposed proposed federal rules that roll back critical safeguards that protect the rights of patients and students. The federal government's proposals would allow faith-based organizations to deny services by circumventing some requirements in federal law.

[In two comment letters](#), Attorney General Raoul and several attorneys general oppose rule changes proposed by the U.S. Department of Health and Human Services (HHS) and the U.S. Department of Education (DOE). In both letters, Raoul and the coalition argue that the proposed rule changes are arbitrary and could allow health care providers and schools to discriminate against individuals for faith-based reasons.

"We cannot allow the prejudices held by some to prevent others from receiving the medical services or educations they need and deserve," Raoul said. "I am committed to fighting proposals that will allow discrimination of already marginalized populations for any reason."

Raoul and the coalition submitted a letter to HHS opposing a rule change that would eliminate transparency requirements for faith-based providers that help patients understand their rights and access referrals to care from other providers. Raoul and the coalition contend the proposal fails to safeguard the rights of women, LGBTQ individuals, and low-income residents to obtain accurate information about their health care. Under the proposed rule, faith-based providers no longer would be required to notify patients of their rights, including their right to a referral. In the comment letter, Raoul and the coalition maintain that the proposal is arbitrary and capricious because it fails to consider evidence or adequately justify the proposed changes.

Raoul and the coalition also submitted a letter to the DOE opposing the department's proposed rule that would expand the criteria schools use to claim religious exemptions under Title IX of the Education Amendments Act of 1972 (Title IX). The expansion potentially would allow schools to discriminate against students or faculty on the basis of sex by citing the moral beliefs and practices of administrators, even if those practices have no connection with a religion. Raoul and the coalition argue the proposal could give schools wide latitude to discriminate against students or faculty on the basis of sex, significantly harming people who have experienced discrimination, sexual harassment, and violence. This kind of discrimination would disrupt students' academic trajectories and careers, and harm their mental and physical health. Raoul and the coalition argue the proposal is arbitrary and capricious because the federal government failed to provide any substantive reasoning that would justify this dramatic departure in policy.

Joining Raoul in submitting comments to HHS are the attorneys general of California, Connecticut, Delaware, the District of Columbia, Hawaii, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Vermont, Virginia, Washington, and Wisconsin. Joining Raoul in submitting a letter to the DOE are the attorneys general of Delaware, the District of Columbia, Hawaii, Maine, Maryland, Massachusetts, Michigan, New Jersey, Pennsylvania, Vermont, and Virginia.



State of California
Office of the Attorney General

XAVIER BECERRA
ATTORNEY GENERAL

February 18, 2020

Via e-filing at www.regulations.gov

Secretary Alex Azar
U.S. Department of Health & Human Services
Hubert H. Humphrey Building, Room 514-G
200 Independence Avenue SW
Washington, DC 20201

RE: Comments on Proposed Rule, “Ensuring Equal Treatment of Faith-Based Organizations,”
85 Fed. Reg. 2974 (Jan. 17, 2020); RIN 0991-AC13

Dear Secretary Azar:

The undersigned State Attorneys General of California, Connecticut, Delaware, the District of Columbia, Hawai‘i, Illinois, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Vermont, Virginia, Washington, and Wisconsin (the States) submit these comments in opposition to the proposed rule: “Ensuring Equal Treatment of Faith-Based Organizations,” (“Proposed Rule”). The Proposed Rule seeks to roll back critical patient protections established in 2016, which guaranteed transparency when patients received services from faith-based providers and ensured that those patients understood the parameters of their rights. *See* 81 Fed. Reg. 19,355 (April 4, 2016). The U.S. Department of Health & Human Services’s (HHS) Proposed Rule places providers over patients by eliminating requirements that faith-based health and social service providers receiving federal funds notify patients of their rights and protections. Further, these providers are no longer required to refer patients to alternative providers upon request by the patient. The Proposed Rule also redefines the term “indirect Federal financial assistance,” making it easier for faith-based organizations to promote religion using federal healthcare dollars. These changes will inflict harm on the States and their residents—particularly lesbian, gay, bisexual, transgender, and queer or questioning (LGBTQ) individuals, women, especially women of color, and lower-income patients—who already disproportionately face discrimination in the healthcare setting and experience barriers to accessing care.

While the Proposed Rule maintains that patients cannot be discriminated against for not holding the same religious beliefs as a provider, or for seeking counseling and care that the provider may object to, removing notice and referral requirements disempowers patients,

needlessly erects barriers to healthcare, and limits access to complete, accurate, and impartial information.

We respectfully request you withdraw the Proposed Rule.

I. The Proposed Rule Will Harm the States' Residents, Particularly Women, LGBTQ, and Lower-Income Patients

The Proposed Rule fails to safeguard the rights of women, LGBTQ, and lower-income individuals, who already disproportionately face barriers to care, particularly when it comes to obtaining accurate information about their healthcare and referrals. The receipt of accurate and impartial information from providers is vital to a patient's health, and could make the difference between life and death.¹ And the ability to obtain a referral should the patient desire, or need, to seek care from a different provider is not only an ethical imperative, it is part of the duty of care providers owe to patients, even where providers have a conscience objection.² Patients must feel

¹ Prior HHS rulemaking has acknowledged this. *See* 84 Fed. Reg. 7783 (March 4, 2019) (“[O]pen communication in the doctor-patient relationship would foster better over-all care for patients.”); *see also* Wendy Chavkin et al., *Conscientious Objection and Refusal to Provide Reproductive Healthcare: A White Paper Examining Prevalence, Health Consequences’ and Policy Responses*, 123 *Int’l J. Gynecol. & Obstet.*, S41, S46, S48 (2013) (refusal to provide abortion-related services and contraception led to increased maternal and infant morbidity and mortality); Shabab Ahmed Mirza et al., *Discrimination Prevents LGBTQ People From Accessing Health Care*, Center for American Progress (January 18, 2018), <https://www.americanprogress.org/issues/lgbtq-rights/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/>.

² *See, e.g.*, American Medical Association, *Code of Medical Ethics Opinions 1.1.7 and 1.2.3*, <https://www.ama-assn.org/sites/ama-assn.org/files/corp/media-browser/code-of-medical-ethics-chapter-1.pdf> (“In general, physicians should refer a patient to another physician or institution to provide treatment the physician declines to offer.” and “Physicians’ fiduciary obligation to promote patients’ best interests and welfare can include consulting other physicians for advice in the care of the patient or referring patients to other professionals to provide care.”); American College of Obstetricians and Gynecologists, *Code of Professional Ethics*, p. 3, <https://www.acog.org/About-ACOG/ACOG-Departments/Committees-and-Councils/Volunteer-Agreement/Code-of-Professional-Ethics-of-the-American-College-of-Obstetricians-and-Gynecologists?IsMobileSet=false> (“The obstetrician–gynecologist should consult, refer, or cooperate with other physicians, health care professionals, and institutions to the extent necessary to serve the best interests of their patients.”); American College of Obstetricians and Gynecologists, *Committee Opinion No. 385* (Nov. 2007, reaffirmed 2019), <https://www.acog.org/Clinical-Guidance-and-Publications/Committee-Opinions/Committee-on-Ethics/The-Limits-of-Conscientious-Refusal-in-Reproductive-Medicine?IsMobileSet=false> (“Physicians and other health care professionals have the duty to refer patients in a timely manner to other providers if they do not feel that they can in conscience provide the standard reproductive services that their patients request.”); *see also* Kinsey Hasstedt, *Unbiased*

confident that their provider is offering all relevant information necessary for their wellbeing.³ Yet, the Proposed Rule would eliminate the requirement that faith-based organizations receiving HHS funding provide referrals. *See* 85 Fed. Reg. 2982 (proposing to delete 45 C.F.R. §§ 87.3(j)–(k)).

The Proposed Rule also dispenses with faith-based organizations' notice obligations. Under the Proposed Rule, faith-based providers will no longer be required by federal law to notify patients of:

- The patient's right to a referral, should he or she object to the religious character of the organization,
- The patient's right to be free from discrimination based on his or her religious belief (or his or her refusal to hold a religious belief),
- The patient's right to refuse to attend or participate in any explicitly religious activities,
- Faith-based organizations' duty to separate in time and location any privately-funded, explicitly religious activities (e.g., worship, religious instruction, proselytization), and
- The patient's right to report any violation of these protections to the HHS awarding entity.

See 85 Fed. Reg. 2982 (proposing to delete 45 C.F.R. §§ 87.3(i)(1)(i)–(v)). These notices are not mere “administrative burdens,” they are vital protections that safeguard the rights of patients, particularly women and LGBTQ patients, who have historically faced discrimination and inequity in the healthcare field.

A. The Proposed Rule Will Harm Women, Particularly Women of Color

Removing notice and referral requirements will adversely impact women seeking reproductive care, including abortion, especially given the recent uptick in federal funding

Information on and Referral for All Pregnancy Options Are Essential to Informed Consent in Reproductive Health Care, Guttmacher Institute (Jan. 2018), <https://www.guttmacher.org/gpr/2018/01/unbiased-information-and-referral-all-pregnancy-options-are-essential-informed-consent>.

³ Particularly in the family planning context, extensive research in the field of family planning counseling demonstrates that women want to be supported by family planning staff, but that they have the opportunity to make their own decision based upon information provided by their providers. *See* Edith Fox et al., *Client Preferences for Contraceptive Counseling: A Systematic Review*, 55 Am. J. Preventive Med. 691 (2018); Karen Pazol et al. *Impact of Contraceptive Education on Knowledge and Decision Making: An Updated Systematic Review*, 55 Am. J. Preventive Med. 703 (2018).

supporting religiously-affiliated family planning organizations.⁴ Indeed, religiously affiliated so-called “crisis pregnancy centers” (CPCs) are now the recipients of significant amounts of federal funding from HHS. For example, on March 29, 2019, HHS granted Obria and its network of crisis pregnancy centers \$5.1 million in Title X funds.⁵ But, while access to a wide range of contraceptive methods is crucial for women’s reproductive health,⁶ CPCs often limit family planning counseling and options.⁷ Although CPCs market themselves as full scope healthcare clinics, in reality, they typically only offer limited healthcare services such as ultrasounds, pregnancy tests, and testing for sexually transmitted infections (STIs), to the exclusion of

⁴ The Title X program funds healthcare providers throughout the country to support preventive care, including critical reproductive healthcare. On March 4, 2019, HHS published a final rule that restricts access to critical preventive healthcare and prohibits doctors from providing accurate information to patients and referrals for abortion, disrupts the provider-patient relationship, and disproportionately affects communities of color. *See* 84 Fed. Reg. 7714 (Mar. 4, 2019). Since HHS announced that the Title X rule is in effect, Title X recipient the State of Illinois and fifteen sub-recipients of Title X funding operating 149 clinic sites in California have withdrawn from the Title X program. *See Essential Access Health, Inc., et al. v. Azar, et al.*, No. 3:19-cv-01195-EMC, Dkt. No. 135 at ¶ 7 (N.D. Cal. Jan. 23, 2020) (listing agencies that have withdrawn from the Title X program); Office of the Governor, *State of Illinois Refuses to Implement the Trump Administration’s Title X Gag Rule*, (July 18, 2019), <https://www2.illinois.gov/Pages/news-item.aspx?ReleaseID=20325>. Two grantees and 54 sub-recipients, operating 186 clinic sites, in New York have also withdrawn from the Title X program. *Compare Oregon, et al. v. Azar, et al.*, No. 6:19-cv-00317-MC, Dkt. No. 46 at ¶ 4 (declaration on behalf of grantee Public Health Solutions listing number of sub-recipients and sites) & Dkt. No. 66 at ¶ 15 (declaration on behalf of grantee New York State Department of Health listing same) (D. Or. Mar. 21, 2019); *with* Title X Family Planning Directory (January 2020) *available at* <https://www.hhs.gov/opa/sites/default/files/Title-X-Family-Planning-Directory-January2020.pdf> (listing only two New York grantees: Beacon Christian Community Health Center and The Floating Hospital, Inc. with no sub-recipients or service sites).

⁵ Kenneth P. Vogel and Robert Pear, *Trump Administration Gives Family Planning Grant to Anti-Abortion Group*, N.Y. Times (Mar. 29, 2019), <https://www.nytimes.com/2019/03/29/us/politics/trump-grant-abortion.html>.

⁶ U.S. Centers for Disease Control and Prevention, *Providing Quality Family Planning Services*, 63:4 Morbidity & Mortality Wkly. Rep. (Apr. 25, 2014), <https://www.cdc.gov/mmwr/pdf/rr/rr6304.pdf> (“The report . . . emphasizes offering a full range of contraceptive methods for persons seeking to prevent pregnancy . . . in accordance with the recommendations for women issued by the Institute of Medicine and adopted by HHS.”).

⁷ Maggie Jo Buchanan et al., *The Anti-Choice Movement’s Continued Pursuit of Politicized Medicine*, Center for American Progress (Mar. 14, 2018) <https://www.americanprogress.org/issues/women/reports/2018/03/14/447885/anti-choice-movements-continued-pursuit-politicized-medicine/> (collecting examples of CPCs providing misleading information to pregnant women and refusing to provide certain reproductive health services).

providing contraception and abortion care.⁸ CPCs have been known to offer misleading information to patients in order to discourage them from obtaining abortions.⁹ In terms of referrals, most explicitly do not provide referrals for abortion, tend to avoid discussion of contraception, and dismiss the role of condoms in preventing STIs.¹⁰ CPCs have also been reported to target women of color because of the higher than average rates of abortion among their demographic. The reason for these higher rates further demonstrates why the Proposed Rule will disproportionately affect women in minority communities: Abortion rates are directly tied to unintended pregnancy rates, which are high among women of color due to the barriers they face in accessing high quality contraceptive services and the difficulties of using their chosen method of birth control consistently, and effectively, over long periods of time.¹¹

This surge in federal funding for CPCs, combined with the Proposed Rule's removal of crucial notice and referral requirements, would exacerbate the deceptive practices by CPCs to the detriment of women seeking reproductive counseling. In the context of women's health decisions, and in particular with respect to a woman's decision about whether to carry to full term or terminate a pregnancy, obtaining complete and honest healthcare information is critical *and* time-sensitive. In healthcare, information can "save lives," *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011), permit "alleviation of physical pain," *Va. State Bd. Of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763-64 (1976), and enable people to act in "their own best interest," *Sorell*, 564 U.S. at 578 (quoting *Va. State Bd. of Pharmacy*, 425 U.S. at 770). Such medical information allows women to take control of their most "intimate and personal choices . . . central to personal dignity and autonomy." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992) (plurality op.).

Removing the referral requirement will create an additional barrier to the provider-patient relationship, as women will not be able to either obtain the care they need or make an informed decision about their healthcare condition and options. For example, timely access to emergency contraception is crucial to survivors of sexual assault, such that many states have made it a

⁸ Amy G. Bryant et al., *Why Crisis Pregnancy Centers Are Legal but Unethical*, AMA Journal of Ethics (May 2018), <https://journalofethics.ama-assn.org/article/why-crisis-pregnancy-centers-are-legal-unethical/2018-03>; Joanne D. Rosen, *The Public Health Risks of Crisis Pregnancy Centers*, Guttmacher Institute (September 10, 2012), <https://www.guttmacher.org/journals/psrh/2012/09/public-health-risks-crisis-pregnancy-centers>.

⁹ United States House of Representatives Committee on Government Reform—Minority Staff Special Investigations Division, *False and Misleading Health Information Provided by Federally Funded Pregnancy Resource Centers* (2006), <https://web.archive.org/web/20170320194302/http://www.chsourcebook.com/articles/waxman2.pdf>.

¹⁰ Bryant, *supra* note 8.

¹¹ National Women's Law Center, *Crisis Pregnancy Centers are Targeting Women of Color, Endangering Their Health*, Fact Sheets (March 6, 2013), <https://nwlc.org/resources/crisis-pregnancy-centers-are-targeting-women-color-endangering-their-health/>.

requirement by law.¹² Yet, the Proposed Rule seeks to permit faith-based organizations who do not provide contraception to abstain from providing such a referral, adding delays that could result in negative health consequences or unintended pregnancy.

B. The Proposed Rule Will Harm LGBTQ Patients

In the healthcare setting, it is well documented that LGBTQ individuals face discrimination.¹³ LGBTQ individuals report experiencing barriers to receiving medical services, including disrespectful attitudes, discriminatory treatment, inflexible or prejudicial policies, and even outright refusals of essential care, leading to poorer health outcomes and often serious or even catastrophic consequences.¹⁴ Transgender people in particular report hostile and/or disparate treatment from providers.¹⁵ More broadly, LGBTQ individuals experience worse physical health compared to their heterosexual and non-transgender counterparts,¹⁶ have higher

¹² See Cal. Penal Code § 13823.11(e) (requiring health care providers give female survivors of sexual assault the option of postcoital contraception); Cal. Health & Safety Code § 1281 (requiring hospitals to adopt protocol for immediate referral of survivors of sexual assault to a local hospital that can comply with provisions of Cal. Penal Code § 13823.11); N.Y. Pub. Health Law § 2805-p (McKinney 2008) (requiring hospitals providing emergency treatment to provide emergency contraception to rape survivors upon request); see also generally National Women’s Law Center, *Providing Emergency Contraception to Sexual Assault Survivors: Elements of a Successful State EC in the ER Law*, Fact Sheet (June 2013), https://nwlc.org/wp-content/uploads/2015/08/providing_ec_to_sexual_assault_survivors_factsheet_6-28-13.pdf.

¹³ See Human Rights Watch, “All We Want Is Equality”: Religious Exemptions & Discrimination Against LGBT People in the United States 20-26 (2018), https://www.hrw.org/sites/default/files/report_pdf/lgbt0218_web_1.pdf (providing numerous examples); see also American Medical Association, *Advocating for the LGBTQ Community*, <https://www.ama-assn.org/delivering-care/population-care/advocating-lgbtq-community> (last visited Feb. 7, 2020) (collecting issue briefs on discrimination against LGBTQ patients); Patrick M. O’Connell, American Academy of Pediatrics, *Policy offers recommendations for care of LGBTQ youth* (July 2013), <https://www.aappublications.org/content/aapnews/34/7/22.1.full.pdf>.

¹⁴ Lambda Legal, *When Health Care Isn’t Caring: Lambda Legal’s Survey on Discrimination Against LGBT People and People Living with HIV* at 5–7 (2010), https://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-report_when-health-care-isnt-caring.pdf; see also Jennifer Kates, et al., Kaiser Family Found., *Health and Access to Care and Coverage for Lesbian, Gay, Bisexual, and Transgender (LGBT) Individuals in the U.S.* (May 3, 2018), <https://www.kff.org/report-section/health-and-access-to-care-and-coverage-lgbt-individuals-in-the-us-health-challenges/>.

¹⁵ Nat’l Ctr. for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey* at 97 (2016), <http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf>; see also Kates, *supra* note 14.

¹⁶ Kates, *supra* note 14, at 5.

rates of chronic conditions,¹⁷ and are at higher risk for certain mental health and behavioral health conditions, including depression, anxiety, and substance misuse.¹⁸ LGBTQ youth, in particular, report a greater incidence of mental health issues and suicidal behaviors, suffer bullying and victimization to a greater extent than heterosexual youth, and have difficulty addressing concerns related to their sexual identity with their medical providers.¹⁹

The Proposed Rule will only exacerbate these health disparities. Excusing faith-based organizations from notifying patients of their rights and providing referrals will particularly disadvantage LGBTQ patients who may seek services from faith-based organizations for mental health services²⁰, addiction counseling²¹, or screening for STIs, including HIV. The Proposed Rule has the potential to undermine the U.S. Centers for Disease Control and Prevention's (CDC) national strategy for ending the HIV epidemic in the United States. Early diagnosis and treatment are "key strategies" in the CDC's national HIV strategy.²² As such, removing the notice and referral requirements not only needlessly create barriers to LGBTQ patients obtaining diagnosis and treatment, it fuels a potential public health risk.

LGBTQ patients already tend to avoid seeking care out of fear of discrimination.²³ Any deterrent, including refusal to provide a referral, would further discourage LGBTQ patients from

¹⁷ *Id.*

¹⁸ *Id.* at 8.

¹⁹ Hudaisa Hafeez et al., *Health Care Disparities Among Lesbian, Gay, Bisexual, and Transgender Youth: A Literature Review*, Cureus (April 2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5478215/>.

²⁰ "Research suggests that sexual minorities (e.g., people who identify as lesbian, gay, or bisexual) are at greater risk for substance use and mental health issues compared with the sexual majority population that identifies as being heterosexual." Grace Medley et al., *SAMHSA, Sexual Orientation and Estimates of Adult Substance Use and Mental Health: Results from the 2015 National Survey on Drug Use and Health*, NSDUH Data Review (October 2016), [https://www.samhsa.gov/data/sites/default/files/NSDUH-SexualOrientation-2015/NSDUH-SexualOrientation-2015.pdf](https://www.samhsa.gov/data/sites/default/files/NSDUH-SexualOrientation-2015/NSDUH-SexualOrientation-2015/NSDUH-SexualOrientation-2015.pdf).

²¹ National Institute on Drug Abuse, *Substance Use and SUDs in LGBTQ Populations* (September 5, 2017), <https://www.drugabuse.gov/related-topics/substance-use-suds-in-lgbtq-populations> ("Surveys thus far have found that sexual minorities have higher rates of substance misuse and substance use disorders (SUDs) than people who identify as heterosexual.").

²² See HIV.gov, *What is 'Ending the HIV Epidemic: A Plan for America'?* (December 3, 2019), <https://www.hiv.gov/federal-response/ending-the-hiv-epidemic/overview>; see also State of California Office of the Attorney General, *Response to Request for Information (RFI): Developing an STD Federal Action Plan* (June 3, 2019), <https://oag.ca.gov/system/files/attachments/press-docs/6-3-2019-ltr-secretary-alex-azar-response-request-action-std-plan.pdf>.

²³ See, e.g., Mirza, *supra* note 1 ("The 2015 U.S. Transgender Survey found that nearly 1 in 4 transgender people (23 percent) had avoided seeking needed health care in the past year due to fear of discrimination or mistreatment due to their gender identity.").

seeking necessary care. Obtaining referrals to providers is particularly crucial for LGBTQ patients because of the shortage of LGBTQ-friendly healthcare providers that can properly serve this population, particularly in rural areas where such providers are fewer and far between.²⁴

C. The Proposed Rule Will Harm Lower-Income Patients and Lead to Direct Costs on the States

Finally, the Proposed Rule will disproportionately harm lower-income patients.²⁵ As previously acknowledged by HHS, patients with lower incomes already face prohibitive barriers to accessing care, such as affordability.²⁶ The Proposed Rule would only exacerbate these obstacles. Patients with lower incomes typically have lower health literacy levels.²⁷ The Proposed Rule permits the withholding of information, making it even more difficult for these patients to navigate an already complicated healthcare system. Moreover, any roadblock on the way to receiving care is aggravated for lower-income patients. For example, getting to a medical appointment can require monumental efforts from lower-income patients, who must often obtain time off from work, arrange childcare, and use public transportation.²⁸ Being denied a referral to medically necessary services would further impede access to care for these patients, leading to lower health outcomes.

By eliminating protections necessary to improve access to adequate healthcare to women, LGBTQ patients, and lower-income patients, the Proposed Rule will decrease access to health services, thus imposing significant costs on the States. As already discussed above, denying access to health services will negatively affect public health. Moreover, individuals denied coverage and healthcare as a result of discrimination will turn to government-funded programs that act as both providers and insurers of last resort. This includes care provided at public

²⁴ *Id.* (“A total of 13 states—mainly those in the central United States—do not have any LGBTQ community health centers.”).

²⁵ Title X clients, for example, are among the nation’s most vulnerable populations: Two-thirds have incomes at or below the federal poverty level, nearly half are uninsured, and another 35% have coverage through Medicaid and other public programs. Kinsey Hasstedt, *Why We Cannot Afford to Undercut the TitleX National Family Planning Program*, Guttmacher Institute (May 17, 2017), https://www.guttmacher.org/sites/default/files/article_files/gpr2002017.pdf.

²⁶ U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, *Financial Condition and Health Care Burdens of People in Deep Poverty* (July 16, 2015), <https://aspe.hhs.gov/basic-report/financial-condition-and-health-care-burdens-people-deep-poverty>.

²⁷ American Hospital Association, *Transportation and the Role of Hospitals* (Nov. 2017), <https://www.aha.org/system/files/hpoe/Reports-HPOE/2017/sdoh-transportation-role-of-hospitals.pdf>.

²⁸ *Id.*; Corinne Lewis et al, *Listening to Low-Income Patients: Obstacles to the Care We Need, When We Need It*, The Commonwealth Fund, <https://www.commonwealthfund.org/blog/2017/listening-low-income-patients-obstacles-care-we-need-when-we-need-it>.

healthcare facilities and paid for through State-funded programs, including Medicaid. Finally, the Proposed Rule also fails to account for increased costs to state regulatory agencies from an uptick in complaints alleging discrimination in healthcare. This will be particularly true in States that have civil rights laws and regulations that explicitly prohibit discrimination on the basis of gender identity and sexual orientation in healthcare. *See, e.g.*, Cal. Gov't Code § 11135; 775 ILCS 5/1-103(O-1); 775 ILCS 5/5-102.1(a); M.G.L. c. 272, § 98; N.J. Stat. Ann. § 10:5-12(f).

II. The Proposed Rule is Contrary to Law

The Administrative Procedure Act (APA) requires a reviewing court to “hold unlawful and set aside agency action” that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). “[N]ot in accordance with law’ . . . means, of course, *any* law, and not merely those laws that the agency itself is charged with administering.” *F.C.C. v. NextWave Pers. Commc’ns Inc.*, 537 U.S. 293, 300 (2003) (emphasis in original); *see Michigan v. E.P.A.*, 268 F.3d 1075, 1081 (D.C. Cir. 2001) (noting agency’s power to promulgate legislative regulations is limited to the authority delegated to it by Congress).

A. Removing the Referral Requirement Flies in the Face of the Nondirective Pregnancy Counseling Mandate

The Proposed Rule violates Congress’s nondirective mandate. In appropriations bills since 1996, Congress has mandated that “all pregnancy counseling” in Title X family planning projects “shall be nondirective.” Omnibus Consolidated Rescissions and Appropriations Act of 1996, PL 104–134, April 26, 1996, 110 Stat 1321; *see, e.g.*, Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, PL 115-245, September 28, 2018, 132 Stat 2981, Div. B, Tit. II, 132 Stat 2981, 3070–71 (2018); Further Consolidated Appropriations Act, 2020, PL 116-94, 133 Stat 2534 (2019). This accords with the statutory requirement that all Title X grants support only “voluntary family planning projects,” 42 U.S.C. § 300, *see also* Pub. L. 115-245, 132 Stat. at 3070-71 (reiterating the “voluntary” nature of services in setting forth the nondirective mandate).

Here, the Proposed Rule allows providers to opt out from providing *any* referrals to patients. Yet, HHS explicitly does not prohibit providers from making referrals, should they so choose. 85 Fed. Reg. 2983 (clarifying that “nothing in this proposed rule would prevent a faith-based social service provider from making . . . a referral” to an alternative provider). This would permit a scenario where a faith-based provider chooses to give referrals for prenatal services while refusing to refer for contraception or abortion. Counseling is only nondirective if the medical professional is not suggesting or advising one option over another.²⁹ 84 Fed. Reg. 7716

²⁹ Statute, regulations, industry practice, and HHS’s own “Quality Family Planning” recommendations all state that referrals are part of counseling. *See State v. Azar*, 385 F. Supp. 3d 960, 988-91 (N.D. Cal. 2019); *see also Louisiana Pub. Serv. Comm’n v. F.C.C.*, 476 U.S. 355, 357 (1986) (articulating “the rule of construction that technical terms of art should be interpreted by reference to the trade or industry to which they apply”) (citing *Corning Glass Works v.*

(March 9, 2019). When faith-based providers willingly provide referrals for certain services, but refuse to provide referrals for others—like abortion or to obtain contraception—this omission of safe, legal, and relevant medical options flies in the face of the nondirective mandate.

B. Removing the Referral Requirement Clashes with the Provisions of the Affordable Care Act and the Establishment Clause

By permitting entities to decline to provide information and referrals, the Proposed Rule clashes with several provisions of the Affordable Care Act, most notably section 1554, which prohibits the Secretary of HHS from creating barriers to healthcare, and section 1557, which prohibits discrimination in health programs or activities. 42 U.S.C. §§ 18114, 18116.

The Proposed Rule violates the Establishment Clause by accommodating religious beliefs to such an extent that it places an undue burden on third parties—patients. *See, e.g., Estate of Thornton v. Caldor*, 472 U.S. 703, 710 (1985); *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005) (“[A]n accommodation must be measured so that it does not override other significant interests”). The Constitution also prohibits government conduct that, as a primary effect, advances a particular religious practice. When there is no “exceptional government-created burden[] on private religious exercise,” or when the government goes beyond what is needed to alleviate burdens that it, itself, has imposed (*see Cutter*, 544 U.S. at 720), its action crosses the line of permissible religious accommodation and “devolve[s] into ‘an unlawful fostering of religion,’” *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 334–35 (1987). There is no substantial burden here, *see supra* Section III(A), yet the Proposed Rule seeks to unlawfully foster the religious views of some over the lives of patients and the public health.

III. The Proposed Rule is Arbitrary and Capricious Because It Eliminates Critical Patient Protections Without Adequate Justification

HHS offers several justifications for why, despite the harm that will follow, the Proposed Rule must (1) eliminate the referral requirement, (2) eliminate the notice requirement, and (3) revise the definition of “indirect Federal financial assistance.” None, however, is adequate.

A. Referral Requirement

i. First Amendment Law, RFRA, and the Attorney General Memorandum Do Not Justify the Proposed Rule

HHS justifies the removal of the referral requirement as necessary to bring the regulations into accord with recent Supreme Court decision *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), the requirements under the Religious Freedom Restoration Act (RFRA), and the Attorney General’s Memorandum for All Executive

Brennan, 417 U.S. 188, 201–02 (1974)); *Alabama Power Co. v. E.P.A.*, 40 F.3d 450, 454 (D.C. Cir. 1994) (“[W]here Congress has used technical words or terms of art, it is proper to explain them by referring to the art or science to which they are appropriate.”).

Departments and Agencies, “Federal Law Protections for Religious Liberty,” 82 Fed. Reg. 49,668 (October 26, 2017) (“AG Memo”).

As to the *Trinity* decision, HHS argues that because the alternative provider requirement applies to faith-based organizations, it is treating faith-based providers unequally based on religion in violation of the Free Exercise Clause. 85 Fed. Reg. 2976. However, the policy at issue in *Trinity* explicitly disqualified churches and other religious organizations from receiving grants under a playground resurfacing program, thus requiring religious organizations to essentially “disavow” their religious character in order to qualify for the benefit. 137 S. Ct. at 2021–22. The Court held that this violated the Free Exercise Clause. Here, by contrast, the referral requirement does not categorically disqualify faith-based organizations from receiving a benefit, it merely ensures that patient interests are also considered. The referral requirement, further, does not require disavowal of an organization’s religious character. The referral requirement merely requires that faith-based organizations provide accurate medical information to a patient who does not agree with the organization’s religious beliefs, or who may need a level of care that extends beyond the services provided by the organization. This is a far cry from the explicit exclusion of faith-based organizations at issue in *Trinity*.

In the same vein, HHS contends that requiring a referral be provided to a patient upon request is a “substantial burden” to the exercise of religion under RFRA. *See* 42 U.S.C. 2000bb-1(a). But HHS offers no reason for concluding that referring a patient to another provider imposes a *substantial* burden on the exercise of religion. A “‘substantial burden’ is imposed [] when individuals are . . . coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions . . .” *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1070 (9th Cir. 2008). Providers who refuse to refer risk not qualifying for the receipt of federal funds, but they are certainly not coerced “by the threat of civil or criminal sanctions.” *Id.*

Moreover, eliminating the referral requirement would impose substantial harm on third parties by limiting the care options available to patients. And, courts typically do not permit discrete groups of citizens to be singled out to bear the costs of another’s religious exercise. For example, in a Free Exercise case, the Court rejected religious claims that would “impose the employer’s religious faith on the employees.” *United States v. Lee*, 455 U.S. 252, 260–61 (1982) (refusing to exempt Amish employer and his employees from social security taxes). Conversely, courts have invoked the Establishment Clause to invalidate accommodations which “would require the imposition of significant burdens on other employees . . .” *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 710 (1985) (invalidating Connecticut statute which gave Sabbath observers an absolute and unqualified right not to work on the Sabbath). The Proposed Rule completely fails to acknowledge that patients’ care will be delayed or denied if providers do not refer patients upon request. HHS’s failure to take into account this third-party harm is unlawful. *Burwell v. Hobby Lobby*, 573 U.S. 682, 729 n.37 (2014) (explaining that “courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries”).

HHS’s reliance on the AG Memo to justify the Proposed Rule is also misplaced. The AG Memo at issue was released by the Attorney General on October 6, 2017 under the direction of President Trump’s Executive Order 13798. The AG Memo lists 20 principles of religious liberty

and includes interpretive guidance of federal law protections for religious liberty. Whether an Attorney General memorandum is binding on executive agencies “is not a settled issue of law.” *County of Santa Clara v. Trump*, 267 F. Supp. 3d 1201, 1212 (N.D. Cal. 2017) (holding that the government had not persuasively demonstrated that Attorney General Jeff Sessions’ memorandum interpreting an executive order was binding legal opinion); *see also City of Seattle v. Trump*, 2017 WL 4700144, at *5 (W.D. Wash. 2017) (finding that statutes and regulations were “silent on whether such advice [from the Attorney General] would bind other agencies”). HHS not only relies on the AG Memo as justification to change the 2016 Rule, in revising the regulations, it seeks to include explicit references to the AG Memo. *See* 85 Fed. Reg. 2976, 2986 (to be codified at Section 87.3(a) and note 1 to Section 87.3(c)). Because Attorney General memoranda have questionable legal authority, baking references to such memoranda directly into the proposed regulations confers undue authority to the AG Memo, and will cause unnecessary confusion.

ii. The Regulatory Impact Analysis Does Not Adequately Consider Patient Harm

The Proposed Rule is also arbitrary and capricious because it fails to consider the evidence before it and fails to justify the change. HHS notes that the Proposed Rule’s overall economic impact will be “de minimis.” 85 Fed. Reg. 2983. While HHS acknowledges an “opportunity cost” of finding an alternative provider that will be “borne by beneficiaries who request such a referral, but who do not receive one,” HHS summarily dismisses this concern. *Id.* (“However, nothing in this proposed rule would prevent a faith-based social service provider from making such a referral.”). That a provider is not prevented from making a referral does not mean that the provider will make a referral, as demonstrated by the pervasiveness of denials of care to LGBTQ patients and women seeking reproductive services. *See supra* Section I. HHS’s circular reasoning acknowledges, yet fails to adequately consider, the harms and costs to patients as a result of not receiving a referral. *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–43 (1983) (failure to consider a key aspect of the problem is arbitrary and capricious).

In concluding that the 2016 Rule’s estimate that providers would receive approximately 1,372 requests for referrals annually was overblown, HHS states that it “is not aware of having received any reports of any providers’ inability to provide referrals to beneficiaries.” 85 Fed. Reg. 2983-84. A provider’s “inability” to give a referral is starkly different from whether patients requested referrals in the first place, much less whether the provider simply refused to give one. The absence of evidence must not be confused with the evidence of absence. *See Sierra Club v. EPA*, No. 15-1487, slip op. 12-13 (D.C. Cir. July 6, 2018). The Proposed Rule does not account for the possibility that, under the Proposed Rule, providers will be empowered to refuse to provide referrals, and disempowered patients will not realize it is within their rights to request one. Moreover, if there is no evidence of “inability” to provide referrals, as HHS states, then presumably the burden on providers to give referrals is low, and the Proposed Rule’s changes are not justified.

B. Notice Requirements

As to the remaining notice requirements, HHS states that there is “no need for prophylactic protections that create administrative burdens on faith-based providers that are not imposed on similarly situated secular providers.” 85 Fed. Reg. 2977. As an initial matter, the Proposed Rule does not explain why secular providers would need to provide such notices, which were put in place to protect patients from coercion along *religious* lines. *See* 80 Fed. Reg. 47,275 (Aug. 6, 2015); 81 Fed. Reg. 19,363. Moreover, the Proposed Rule acknowledges that providing notices and referrals would only require minimal costs. *See* 85 Fed. Reg. 2984 (noting that previous estimations of the costs of adhering to the notice requirements were no more than \$100 per organization per year). Finally, HHS makes no attempt in its Regulatory Impact Analysis to quantify the harms to patients that will flow from the Proposed Rule.

C. Definition of Indirect Federal Financial Assistance

The 2016 Rule clarified the distinction between “direct” and “indirect” federal financial assistance so as to draw a clear division between when a faith-based organization could and could not use federal funding for explicit religious activities such as worship or proselytization. *See* 80 Fed. Reg. 47,274. Programs that receive direct federal financial assistance may not use direct funding to support explicitly religious activities. Programs that receive indirect federal financial assistance, on the other hand, do not have the same limitation because the indirect funding—typically provided to patient beneficiaries in the form of vouchers or certificates—places the choice of service provider in the hands of the beneficiary, not the federal government. In defining “indirect Federal financial assistance” in the 2016 Rule, HHS considered the Supreme Court opinion *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), which required that beneficiaries be given a “true private choice” that offered adequate secular options for beneficiaries to choose from. *See* 80 Fed. Reg. 47,274; 81 Fed. Reg. 19,362. HHS established specific criteria for funding to qualify as “indirect Federal financial assistance:” (1) that the government program that provided the funding was neutral toward religion, (2) that the organization receiving funding was chosen by the beneficiary, not the government, and (3) that the beneficiary had “at least one adequate secular option to choose from” in using his or her voucher or certificate. *See* 45 C.F.R. §§ 87.1(c)(1)(i)–(iii).

The Proposed Rule removes these criteria from the definition of “indirect Federal financial funding,” making it substantially easier for faith-based organizations to use federal funding while simultaneously engaging in explicit religious activities. HHS contends that it must modify the definition of “indirect Federal financial assistance” to comport with *Zelman*. 85 Fed. Reg. 2977. But, HHS does not explain why it is necessary for HHS to re-interpret *Zelman*, when the 2016 Rule explicitly adopted the *Zelman* framework in creating the definition for “indirect federal Financial assistance.” *See* 81 Fed. Reg. 19,361-62; *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (“Unexplained inconsistency” between agency actions is “a reason for holding an interpretation to be an arbitrary and capricious change.”).

In fact, removing the “secular option” criteria shifts the definition of “indirect Federal financial assistance” further away from the Supreme Court’s reasoning in *Zelman*. In *Zelman*, while 46 of the 56 private schools were religious schools, the fact that certain of the private schools were secular, and that students could also choose to remain in public school, constituted a “true private choice,” and was not a violation of the Establishment Clause. *Zelman*, 536 U.S. at 2469. Here, removal of the secular option requirement permits a scenario where a patient may have *no* secular options on which to expend his or her voucher. This would allow a faith-based organization to use federal funding to encourage, or even require, explicit religious activity, further degrading the mandate that federal funding not be used for explicit religious activity. This would not provide patients with a “true private choice.”

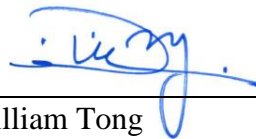
III. Conclusion

The Proposed Rule is symptomatic of the Administration’s continued onslaught on the rights of women and LGBTQ patients in the name of favoring religious providers. Indeed, the Proposed Rule is one of eight total NPRMs issued on January 17, 2020—National Prayer Day—that roll back the referral and notice requirements for faith-based organizations that receive funding from various federal administrative agencies. This latest salvo from HHS ignores research establishing harms that befall patients that are denied referrals, and relies on narrow interpretations of case law and other legal authority that simply cannot support the Proposed Rule’s changes. The consequences—which will include the undermining of public health initiatives—will not only be felt by directly-affected patients, but by the States’ residents as a whole. For these reasons, the States oppose the Administration’s continued unlawful and cruel targeting of vulnerable populations, including women, LGBTQ, and lower-income persons. The States thus urge HHS to withdraw the Proposed Rule.

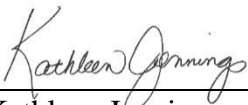
Sincerely,



Xavier Becerra
California Attorney General



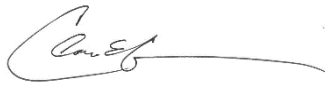
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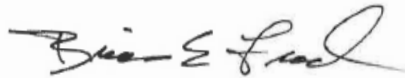
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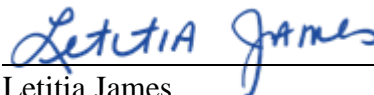
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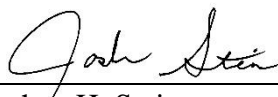
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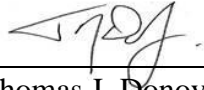
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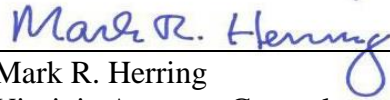
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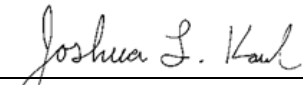
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ATTORNEY GENERAL

February 18, 2020

VIA Federal eRulemaking Portal & Mail

The Honorable Betsy DeVos
Secretary
U.S. Department of Education
400 Maryland Avenue S.W.
Washington D.C. 20202

RE: Comment on Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Direct Grant Programs, State Administered Formula Grant Programs, Developing Hispanic Serving Institution Programs, and Strengthening Institutions Program – Docket ID ED-2019-OPE-0080 (85 Fed. Reg. 3190) (Jan. 17, 2020)

Dear Secretary DeVos:

On behalf of California, Colorado, Connecticut, Delaware, Hawai'i, Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Carolina, Oregon, Pennsylvania, Vermont, Virginia, and the District of Columbia (States), we write to express our strong opposition to the *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Direct Grant Programs, State Administered Formula Grant Programs, Developing Hispanic Serving Institution Programs, and Strengthening Institutions Program*, published by the Department of Education (Department) in the Federal Register on January 17, 2020. 85 Fed. Reg. 3190 (proposed Jan. 17, 2020) (NPRM). For purposes of this letter, "proposed rule" refers to the portion of the NPRM that would substantially expand the criteria for granting a religious exemption to the anti-discrimination requirements of Title IX of the Education Amendments of 1972 (Title IX).¹ 85 Fed. Reg. 3207.

Congress passed Title IX and similar civil rights laws "to eliminate discrimination from our society by ending federal subsidies of such discrimination . . . [and] to make certain, in the areas of Federal funding, that taxpayer's dollars were not used to initiate or perpetuate . . . bias and prejudice . . ." Sen. Rep. 100-64 (1987), at 7, 9 (internal citation and quotation marks omitted). The Department is required to "effectuate" Title IX's anti-discrimination mandates by issuing "rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute." 20 U.S.C. § 1682. By substantially expanding the

¹ 20 U.S.C. § 1681(a).



bases for which schools can receive an exemption from providing students with protection against discrimination on the basis of sex, the Department has issued a rule that is contrary to both the text and objectives of Title IX.

Moreover, the proposed rule fails to account for the harm it will inflict on students subjected to discrimination—including sexual harassment and violence—and fails to provide basic due process protections for students enrolling in or enrolled in a school that is exempt from Title IX. The States have an interest in protecting our students and residents from the short and long term detrimental effects that result from discrimination. We also have an interest in providing our students with a learning environment free from such harmful discrimination. Finally, the proposed rule represents arbitrary and capricious rulemaking as it lacks both evidentiary support and adequate and consistent justification.

I. STATES HAVE AN INTEREST IN MAINTAINING TITLE IX'S PROTECTIONS AGAINST THE DISCRIMINATION OF STUDENTS.

Title IX requires schools to provide educational programs and activities free from sex discrimination, sexual harassment, and sexual violence. Congress intended broad interpretation and enforcement of the statute to ensure all students, regardless of sex, are free from discrimination,² but provided an intentionally narrow statutory carve out for “an educational institution which is controlled by a religious organization if the application of [Title IX] would not be consistent with the religious tenets of such organization.” 20 U.S.C. § 1681(a)(3). The Supreme Court has already held that Title IX’s prohibition on sex discrimination is a reasonable condition on disbursing federal funds, and “infringes no First Amendment rights of [a school] or its students.” *Grove City Coll. v. Bell*, 465 U.S. 555, 576 (1984). Nevertheless, under the proposed rule, the Department drastically expands the types of educational institutions, programs, and activities permitted to receive federal funds to support unlawful discrimination on the basis of sex.³

² *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

³ The remainder of the NPRM is symptomatic of the federal Administration’s radical expansion of religious exemptions and continued onslaught on the health and well-being of women and lesbian, gay, bisexual, transgender, and queer individuals. Indeed, the NPRM is one of eight total Notices of Proposed Rulemaking issued on January 17, 2020 that also seek to roll back the requirements that faith-based organizations that receive funding from various federal administrative agencies provide notice about and referral information to alternative secular service providers, including education providers. This is especially important, if, for example, the faith-based service provider is refusing based on religious belief to provide a service or protection required by another federal non-discrimination or equal access to education law. Some of the proposed requirements, among other things, would allow a faith-based organization to use federal funding to encourage, or even require, explicit religious activity, further degrading the mandate that federal funding not be used for explicit religious activity. Other aspects of the NPRM unlawfully advance religion by favoring religion at the expense of the rights, beliefs, and education of others. *Corp. of Presiding Bishop of Church of*

The Department proposes to exempt from Title IX's anti-discrimination mandate any school that can provide a statement that the school: (1) "subscribes to specific moral beliefs or practices" and may subject members of the institution community "to discipline for violating those beliefs or practices;" (2) "includes, refers to, or is predicated upon religious tenets, beliefs, or teachings;" (3) engages in "religious practices" that members of the community "must engage in" or "espouse a personal belief in;" or (4) "includes, refers to, or is predicated upon religious tenets, beliefs, or teachings." 85 Fed. Reg. 3226. On its face and in its application, the Department's proposed criteria eviscerates the statutory requirement that schools be "controlled" by a religious organization in order to receive an exemption. 85 Fed. Reg. 3207. Indeed, under this criteria, schools do not need to be even loosely-affiliated with a religious organization to receive an exemption. Any moral belief or practice, no matter how discriminatory, biased, prejudiced, or untethered to religion, would be sufficient to avoid Title IX's anti-discrimination mandate, so long as members of the school community can be disciplined for failing to follow the belief or practice.

Under the expanded criteria proposed for religious exemptions, by its own admission, the Department creates a potential unquantifiable "expansion" of schools that can claim religious exemptions. 85 Fed. Reg. 3219. This increases the likelihood that the States' students and residents will attend schools where discrimination on the basis of sex is permitted. In reviewing and rejecting an analogous attempt to expand the religious exemption exception in 1988, Congress recognized that "any loosening of the standard for application of the religious exemption could open a giant loophole and lead to widespread sex discrimination in education." S. Rep. 100-64 at 23. The consequences of the Department's proposed rule for the States' students and residents are potentially dire and long-lasting.

Under the proposed rule, schools that receive federal financial assistance need only assert a moral belief or practice as sufficient reason to unlawfully discriminate on the basis of sex. Accordingly, with permission from the federal government, schools can refuse admission to, deny housing and financial aid to, or expel students who do not adhere to specific gender stereotypes, students who are pregnant or parenting a child out of marriage, and lesbian, gay, bisexual, or transgender (LGBT) students. *See, e.g.*, S. Rep. 100-64 at 22-23 (discussing the various request letters regarding practices sought to be exempt from Title IX); Hidden Discrimination: Title IX Religious Exemptions Putting LGBT Students at Risk, Human Rights Campaign, 3, <https://tinyurl.com/yx7xbv2q> (finding that 33 schools enrolling 73,000 students had obtained waivers that allow them to discriminate against LGBT students in admissions, housing, athletics, financial aid, and more). Schools have also requested exemptions to permit them to fire or refuse to hire married women because of a belief that the "husband is the head of the wife," or to deny women the ability to participate in sports, such as gymnastics or swimming, because of a belief that women may only be dressed in modest attire. S. Rep. 100-64 at 22.

Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 334-35 (1987) ("At some point, accommodation may devolve into 'an unlawful fostering of religion.'") (internal citation and quotation marks omitted).

A recent study shows that approximately forty percent of women have already faced gender discrimination.⁴ In a 2011 National Transgender Discrimination Survey, one-fifth of transgender students reported that they were denied gender-appropriate housing, and five percent reported outright denial of campus housing.⁵ Expanding the exemption only increases the likelihood and perpetuation of these discriminatory practices in more schools for more students.

Students who attend schools the Department deems exempt and are sexually harassed or assaulted could also face additional exposure to discrimination. Substantial and undisputed evidence shows that sexual harassment of students already occurs far too frequently—at all grade levels and to all types of students.⁶ Moreover, LGBT students face harassment and assault at an alarming rate: according to a 2010 study on LGBT students in higher education, lesbian, gay, and bisexual college students are nearly twice as likely to experience harassment when compared with their non-LGBT peers, and are seven times more likely to indicate the harassment was based on their sexual orientation.⁷ LGBT college students also suffer from higher rates of sexual assault and misconduct on campuses nationwide, and transgender and gender nonconforming students specifically report particularly high rates of sexual assault and misconduct.⁸

The harm to the States is compounded by another Notice of Proposed Rulemaking issued by the Department in November 2018 that would eliminate an educational institution's responsibility to submit a written request for religious exemption to the Assistant Secretary.⁹

⁴ Kim Parker and Cary Funk, *Gender Discrimination Comes in Many Forms for Today's Working Women*, Pew Research Center (Dec. 14, 2017), <https://tinyurl.com/yydy9c32>.

⁵ Jaime M. Grant, et al., National Center for Transgender Equality and National Gay and Lesbian Task Force, *Injustice At Every Turn: A Report of The National Transgender Discrimination Survey* 39 (2011), <https://tinyurl.com/yytzpbwl>.

⁶ Nat'l Women's Law Center, *Let Her Learn: Stopping School Pushout for Girls Who Have Suffered Harassment and Sexual Violence* 1 (Apr. 2017), <https://tinyurl.com/y453jp7q>; Catherine Hill & Elena Silva, *Drawing the Line: Sexual Harassment on Campus*, AAUW 17, 19 (2005), <https://tinyurl.com/y66hft2e>; Catherine Hill & Holly Kearl, *Crossing the Line: Sexual Harassment at School*, AAUW 11 (2011), <https://tinyurl.com/y6lbacgd>; David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, Association of American Universities 13-14 (Sept. 2015, reissued Oct. 2017), <https://tinyurl.com/yyoach3m>; Campus Climate Survey Validation Study, Final Technical Report (Jan. 2016), Appx. E, <https://tinyurl.com/y5dbu6tr>; see also Sofi Sinozich & Lynn Langton, *Rape and Sexual Assault Victimization Among College-Age Females, 1995–2013*, U.S. DOJ, Office of Justice Programs, Bureau of Justice Statistics (Dec. 2014), <https://tinyurl.com/y2kmcugj>.

⁷ Sue Rankin, et al., *2010 State of Higher Education for LGBT People: Campus Pride, 2010 National College Climate Survey*, Q Research Institute for Higher Education 10 (2010), <https://tinyurl.com/wwl6pyp>.

⁸ Cantor, *supra* at n. 6.

⁹ The Department's Office for Civil Rights (OCR) has delineated a two-part test for exemptions, wherein the institution must submit a written request that: (1) names the religious organization

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462 (Nov. 29, 2018); 85 Fed. Reg. 3206, fn. 77. No student should learn that after becoming a victim of sex discrimination, the school he or she attends considered itself exempt from the relevant requirements of Title IX. Yet, when this proposed rule and the Department's November 2018 proposed rules are read in tandem, it is apparent this is exactly what will occur. Both proposed rules create the situation where students may unknowingly enroll in schools that believe themselves to be exempt from Title IX but do not publicly claim exemption, only to learn of their school's position *after* they have been discriminated against and seek to assert their Title IX rights. A student could also be disciplined or expelled for engaging in conduct that would otherwise be protected under Title IX, even if the student was not on notice that he or she violated the school's beliefs, or if the school only sometimes chose to exercise the belief. Students are entitled to know *before* they matriculate whether (and to what extent) their school intends to comply with Title IX. They should be able to assume that they will enjoy Title IX's full anti-discrimination protections, unless the school has informed them otherwise. The Department's decision to eliminate any transparency for students denies them basic notice of whether they will be subject to discriminatory application of discipline and other rules, thereby impacting a student's constitutionally protected right to due process. *E.g.*, *Goss v. Lopez*, 419 U.S. 565, 583-84 (1975) (effective notice and opportunity for hearing is required prior to even short-term deprivation of education). Students must have the opportunity to make determinations about school attendance based on full information regarding a school's ability to legally discriminate against students, and whether they may be suspended or expelled for otherwise protected behavior, and the Department's proposed rules impermissibly deny students that opportunity.

The States have an interest in furthering Title IX's protections against discrimination and ensuring that students receive notice of whether the school in which they are enrolling can receive federal funding to not only support its education programs and activities, but also discriminate against students on the basis of sex. State students and residents who are subjected to discrimination and harassment on the basis of sex can suffer a number of harms, including lack of access to education¹⁰ and long term psychological and other health related consequences.¹¹ Research confirms that gender discrimination negatively impacts mental and

that controls the institution; (2) specifies the religious tenets of that organization; and (3) identifies the sections of the Title IX regulation that conflict with those tenets. U.S. Dep't. of Educ., Off. for Civ. Rights, Policy Guidance for Resolving Religious Exemption Requests 2 (Feb. 19, 1985) ("1985 Policy Memo"), <https://tinyurl.com/wnzbnfk>.

¹⁰ *E.g.*, Cecilia Mengo and Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18(2) JOURNAL OF COLL. STUDENT RETENTION: RESEARCH, THEORY & PRACTICE 234, 244 (2016), <https://tinyurl.com/y48qylq3>; Audrey Chu, *I Dropped Out of College Because I Couldn't Bear to See My Rapist on Campus*, VICE (Sept. 26, 2017), <https://tinyurl.com/usfnmrt>.

¹¹ *See, e.g.*, Chu, *supra* at n. 10; Monica Bucci et al., *Toxic Stress in Children and Adolescents*, 63 *Advances in Pediatrics* 403 (Aug. 2016), <https://tinyurl.com/uvgksls>; Am. Acad. of Pediatrics, Comm. on Psychosocial Aspects of Child and Family Health, *Early Childhood Adversity, Toxic*

physical health¹² and directly leads to reduced lifetime wages.¹³ Students who drop out can cost the States hundreds of thousands of dollars as a function of increased costs due to unemployment, health care, and other factors, and decreased income due to lower wages and capacity to pay taxes.¹⁴ Harms to students resulting from discrimination in our States redound to our communities and state agencies tasked with providing services to those in need.

The States also have an interest in enforcing our own laws to effectively address and prevent sex-based discrimination, including sexual harassment and assault. The proposed rule makes it more difficult for the States to properly identify and prevent discrimination if there are widespread and unknown claims of exemptions to Title IX by schools. Proper enforcement of Title IX is an issue of vital importance to our States, our resident students and families, our teachers, and our communities. The ability to learn in a safe environment free from harassment, violence, and discrimination is critical and something our States prioritize and value.

II. THE DEPARTMENT OF EDUCATION’S SWEEPING EXPANSION OF THE INSTITUTIONS ELIGIBLE FOR A “RELIGIOUS EXEMPTION” IS CONTRARY TO THE TEXT AND PURPOSE OF TITLE IX.

The Department’s proposed rule is a dramatic and unlawful departure from Title IX’s narrow exception in its broad anti-discrimination mandate, and is likely to significantly expand without legal basis the number of schools no longer required to abide by Title IX’s discrimination protections. This flouts Congressional intent and subverts the very purpose of the Title IX statute, and violates the Administrative Procedure Act (APA). *See* 5 U.S.C. §§ 706(2)(A) & (C); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-44 (1984) (a court must reject agency constructions that are contrary to clear congressional intent or that frustrate the policy that Congress sought to implement).

Stress, and the Role of the Pediatrician: Translating Developmental Science into Lifelong Health (Dec. 2011), <https://tinyurl.com/7rnxc6d>; Vincent J. Felitti et al., *Relationship of childhood abuse and household dysfunction to many of the leading causes of death in adults. The Adverse Childhood Experiences (ACE) Study*, 14 *Am. Journal Preventive Med.* 245 (May 1998), <https://tinyurl.com/wd9brtl> (children and adolescents who have suffered trauma are more likely to suffer from mental health problems, acute and chronic medical conditions, and poor social development).

¹² Hope Landrine, et al., *Physical and Psychiatric Correlates of Gender Discrimination – an Application of the Schedule of Sexist Events*, 19 *Psychology of Women Quarterly* 4, 408-425 (1995).

¹³ Jessica Schieder and Elise Gould, “*Women’s Work*” and the Gender Pay Gap: *How Discrimination, Societal Norms, and Other Forces Affect Women’s Occupational Choices – and Their Pay*, Economic Policy Institute (July 20, 2016), <https://tinyurl.com/y7ds7q42>.

¹⁴ Russell Rumberger and Daniel J. Losen, *The High Cost of Harsh Discipline and Its Disparate Impact*, UCLA Civil Rights Project (June 1, 2016), <https://tinyurl.com/hp5xblk>.

A. Title IX anti-discrimination mandate is intended to be broadly enforced.

Congress passed Title IX to serve the compelling government interest of eradicating discrimination on the basis of sex in our schools. The Senate Report of the enactment of the Civil Rights Restoration Act of 1987 (CRRA) makes this clear:

The inescapable conclusion is that Congress intended that Title VI as well as its progeny—Title IX, Section 504, and the ADA—be given the broadest interpretation. All four statutes were passed to assist in the struggle to eliminate discrimination from our society by ending federal subsidies of such discrimination. Congress understood that these goals could be achieved if the Federal government used its power and authority to end discrimination . . . Mr. Days was equally strong in his recollection of administration practice. . . . In his view, the “overall objective . . . [of these statutes] . . . was to make certain, in the areas of Federal funding, that taxpayer's dollars were not used to initiate or perpetuate . . . bias and prejudice . . .” . . . According to Mr. Days, a narrow reading of the law denigrates the historic work of . . . [Representative Emmanuel] Celler and . . . [Senator Hubert] Humphrey, whose vision in promoting the passage of Title VI pointed the way for later leaders in the Congress to address forcefully the shameful treatment of women, the handicapped, and the aged by recipients of Federal money.

S. Rep. 100-64 at 7, 9 (internal citations omitted, brackets and quotation marks in original).

The Department can only interpret the statute to enforce Congress’s intent, which was to create a robust law against anti-discrimination in schools and to prevent federal funds from subsidizing discrimination. By significantly expanding opportunity to receive an exemption, and therefore expanding the numbers of private, charter, and other schools legally permitted to not comply with Title IX’s requirements, the proposed rule plainly undermines Congress’s objective.

B. The religious exemption has, and should remain, narrowly circumscribed.

Since it was enacted in 1972, Title IX has included an exemption for educational institutions “*controlled* by a religious organization.”¹⁵ (Emphasis added.) The statute permits an education institution controlled by a religious organization to seek an exemption from Title IX’s prohibition on sex discrimination where the application of Title IX “would not be consistent with the religious tenets of such organization.”¹⁶ Dating back decades, the Department (and its

¹⁵ 20 U.S.C. § 1681(a)(3).

¹⁶ *Id.*

predecessor agency U.S. Department of Health, Education, and Welfare or HEW) has issued tailored guidance on criteria by which institutions may qualify for religious exemptions consistent with the Constitution.

For example, in March 1977, HEW requested every educational institution receiving federal assistance complete an Assurance of Compliance with Title IX, which included instructions for claiming a religious exemption. The Assurance form defined what HEW considered to be “control” for purposes of obtaining a religious exemption:

An application or recipient will normally be considered to be controlled by a religious organization if one or more of the following conditions prevail:

- (1) It is a school or department of divinity; or
- (2) It requires its faculty, students or employees to be members of, or otherwise espouse a personal belief in, the religion of the organization by which it claims to be controlled; or
- (3) Its charter and catalog, or other official publication, contains explicit statement that it is controlled by a religious organization or an organ thereof or is committed to the doctrines of a particular religion, and the members of its governing body are appointed by the controlling religious organization or an organ thereof, and it receives a significant amount of financial support from the controlling religious organization or an organ thereof.

See S. Rep. 100-64 at 23.

In discussions over the CRRA in 1987, the Committee considered and debated the issue of whether to broaden the religious tenet provision. Proponents of an expanded religious exemption urged that the language “controlled by a religious organization” be changed to include educational institutions “closely identified with the tenets of a religious organization.” S. Rep. 100-64 at 27 (internal quotation marks omitted). But, concerned that such proposals would defeat Title IX’s anti-discrimination purpose, Congress rejected the proposed changes stating that the existing exemption was an appropriately narrow provision. *See* 134 Cong. Rec. S209 (1988) (Sen. Danforth) (Senate’s rejection of amendment to broaden exemption supports “a very narrow scope of the religious exemption”). Indeed, the Report states, “The committee is concerned that any loosening of the standard for application of the religious exemption could open a giant loophole and lead to widespread sex discrimination in education.” *Id.* at 23 (emphasis added); *see also* 134 Cong. Rec. H589 (1988) (Rep. Fish) (“The key in the religious tenet exemption is the control test. A Government inquiring into the nature of a religious tenet asserted by an institution is fraught with difficulties. Therefore, the assurance that an institution is actually controlled by the religious organization whose tenets it relies upon is essential to keep

this exemption from becoming an escape hatch from Title IX.”); *id.* at E499 (March 3, 1988) (Rep. Bonker) (“The bill would maintain stringent criteria to insure that this religious exemption is not used as a loophole for institutions to circumvent our antidiscrimination statutes.”); *id.* at S205 (Jan. 28, 1988) (Sen. Kennedy) (“the control test is, and should be, a difficult one”); *id.* (Sen. Danforth) (Senate’s rejection of amendment to broaden exemption supports “a very narrow scope of the religious exemption”).

With deference to Congress, the interpretation of “control” has remained largely consistent through decades of the Department’s policy. *See* S. Rep. 100-64 at 21; *see also* 1985 Policy Memo at 26. Presently, OCR’s website contains a virtually identical definition of “controlled by religious institution” as HEW’s in 1977 and the Department’s in 1985:¹⁷

An institution will generally be considered to be controlled by a religious organization if one or more of the following conditions is true:

- (1) It is a school or department of divinity, defined as an institution or a department or branch of an institution whose program is specifically for the education of students to prepare them to become ministers of religion or to enter upon some other religious vocation, or to prepare them to teach theological subjects; or
- (2) It requires its faculty, students or employees to be members of, or otherwise espouse a personal belief in, the religion of the organization by which it claims to be controlled; or
- (3) Its charter and catalog, or other official publication, contains explicit statement that it is controlled by a religious organization or an organ thereof or is committed to the doctrines of a particular religion, and the members of its governing body are appointed by the controlling religious organization or an organ thereof, and it receives a significant amount of financial support from the controlling religious organization or an organ thereof.

OCR evaluates a religious exemption claim consistent with the requirements of the First Amendment to the U.S. Constitution and the Religious Freedom Restoration Act.

Exemptions from Title IX, supra n. 17 (citing 1985 Policy Memo).

¹⁷ U.S. Dep’t of Educ., Off. for Civil Rights, *Exemptions from Title IX*, <https://tinyurl.com/y5fl2c4m>. The Department relies on additions made in a 1989 internal Policy Memo that are ambiguous and not specifically tied to the prong-one religious organization control requirement, and therefore, inappropriate to be cited as evidence of consistent policy as to the issue here. *See* U.S. Dep’t. of Educ., Off. for Civ. Rights, Title IX Religious Exemption Procedures and Instructions for Investigating Complaints at Institutions with Religious Exemptions Memorandum 1-2 (1989), <https://tinyurl.com/shb3kvw>.

The proposed rule is a significant departure from the established religious exemption test established in 1977, reiterated again in 1985, and currently used by the Department. As discussed in further detail below, proposed Section 106.12(c) inconsistently and inexplicably broadens the criteria for exempt institutions from previous guidance and puts students at increased risk of discrimination. Proposed subsections (c)(5) and (c)(6) would expand the means by which institutions could qualify for the religious exemption, and subsection (c)(7) would invite further expansion of such means. Moreover, the proposed rule's precatory language blurs or removes the statutory requirement for the Department to engage in a separate analysis to identify the specific religious tenets that create a conflict with Title IX. These exceptions swallow the rule and are contrary to the purpose of Title IX.

C. The proposed rule contains impermissibly large loopholes for schools to claim religious exemptions from Title IX.

In proposed 34 CFR § 106.12(c), the Department states that “any of the following [criteria] shall be sufficient to establish that an educational institution is eligible to assert an exemption to the extent application of this part would not be consistent with its religious tenets or practices,” most notably adding subsections (c)(4)-(7). 85 Fed. Reg. 3226. The proposed rule makes any of the following sufficient for an educational institution to claim a religious exemption from Title IX:

(c)(4) A statement that the educational institution has a doctrinal statement or a statement of religious practices, along with a statement that members of the institution community must engage in the religious practices of, or espouse a personal belief in, the religion, its practices, or the doctrinal statement or statement of religious practices.

(c)(5) A statement that the educational institution subscribes to specific moral beliefs or practices, and a statement that members of the institution community may be subjected to discipline for violating these beliefs or practices.

(c)(6) A statement that is approved by the governing body of an educational institution and that includes, refers to, or is predicated upon religious tenets, beliefs or teachings.

(c)(7) Other evidence establishing that an educational institution is controlled by a religious organization.

Id.

The proposed rule rejects the two pillars of the statute's exemption – “controlled by” and “religious organization.” Though the section is entitled “Educational institutions ‘controlled’ by religious organizations,” the proposed rule fundamentally strips the word “control” of its intended meaning, and virtually adopts the expanded religious exemption for schools “closely

identified with the tenets of a religious organization” rejected by Congress as antithetical to Title IX thirty years ago. *See* S. Rep. 100-64 at 27.¹⁸ Subsections 106.12(c)(1), (4), (5), and (6) all negate the critical statutory element that there must be a “religious organization.” The plain text of the statute requires two entities: the religious organization (which holds tenets) and the educational institution (which is controlled by the organization). If Congress had intended to allow exemptions for educational institutions without regard to the existence of a religious organization, it had a ready model in Title VII of the Civil Rights Act of 1964.¹⁹ Instead, Congress chose to restrict the exemption to schools “controlled by” a “religious organization.”

Further, proposed Section 106.12(c) states that an educational institution is eligible to assert an exemption when application of Title IX “would not be consistent with its tenets or practices.” 85 Fed. Reg. 3226 (emphasis added). The Department has no authority to rewrite the statute via regulation. Under Title IX, religious exemptions extend only to applications inconsistent with “tenets.” The statute grants no exemption for applications inconsistent with religious “practices,” which is vague, ambiguous, and broader than what is prescribed by Title IX. Further, the “moral beliefs and practices” language in subsection (c)(5) is also strikingly ambiguous and wholly unconnected to religion altogether. Moral beliefs are difficult to define and may not have grounding in religious practice; some may be indirectly inspired by religion but not tied to religion explicitly. By conflating moral beliefs with religion, the proposed rule opens the religious exemption to widespread abuse by institutions with no religious connection that want to limit their obligations and liability under Title IX.

Equally problematic is subsection (c)(6), which permits the claim of a religious exemption upon a statement that may be approved by a “governing body of an educational institution” itself, meaning, in the words of the Department, “the educational institution is asserting that the educational institution is itself the controlling religious organization,” provided that the statement “includes, refers to, or is predicated on religious tenets, beliefs, teachings.” 85 Fed. Reg. 3027. Proposed subsections 106.12(c)(5) and (6) render the phrase “controlled by a religious organization” utterly meaningless. Institutions no longer would be required to demonstrate any connection to a religious organization, let alone demonstrate that the religious organization exercises any control over the institution. Notably, none of these statements need to

¹⁸ Congress has provided for exemptions from non-discrimination for educational institutions requiring relationships that fall short of control in other statutes, *see, e.g.*, 20 U.S.C. § 1066c(d) (“No loan may be made to an institution under this part if the institution discriminates . . . except that the prohibition with respect to religion shall not apply to an institution which is controlled by or which is closely identified with the tenets of a particular religious organization.”).

¹⁹ Title VII does not provide a religious exemption for its prohibition on sex discrimination, but instead exempts some private schools from the prohibition on religious discrimination. It does so when the school “is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society” and also when “the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.” 42 U.S.C. § 2000e-2(e) (emphasis added).

be written, published, or otherwise made available to the institution's community, approved prior to a discriminatory act, or otherwise enforced by the school. As a result, with respect to subsection (c)(6), a single, post hoc board-approved statement referring to any religious beliefs would permit an institution to disregard Title IX's prohibitions against sex discrimination. With respect to subsection (c)(5), no governing body needs to approve the statement of moral beliefs or practices upon which federal authorization to discriminate is derived.

Subsection 106.12(c)(7) invites institutions to seek exemption even when they cannot meet the demonstrably low threshold of religious affiliation required by subsections (1)–(6) or identify religious tenets that conflict with Title IX. Specifically, proposed subsection 106.12(c)(7) is a catch-all provision, permitting institutions to establish religious control via “other evidence.” By failing to define or otherwise delineate what this other evidence may be, the proposed rule provides an avenue by which institutions can incorporate any religious or moral belief to justify non-compliance with Title IX regulations. The proposed rule's end result would likely be that institutions with little to no connection to religion would be empowered to engage in federally unchecked sex discrimination, with no federal recourse for harmed individuals.

The Department's proposed interpretation of “controlling religious organization” has no basis in the text of the statute. The Department has no authority to rewrite the Title IX exemption to include language that Congress did not. By doing so, it has impermissibly broadened the ability of schools claiming practices tangentially related to moral beliefs to obtain permission to discriminate against students. This is precisely what Congress safeguarded against when enacting Title IX. *See Natural Res. Def. Council v. U.S. Dep't of Interior*, 113 F.3d 1121, 1124 (9th Cir. 1997) (agency action expanding a statutory exception Congress intended to be “rare” contravened Congressional intent and was improper).

III. THE PROPOSED RULE IS ARBITRARY AND CAPRICIOUS BECAUSE ITS SWEEPING EXPANSION OF TITLE IX'S RELIGIOUS EXEMPTION ELIMINATES PROTECTIONS FOR STUDENTS WITHOUT ADEQUATE JUSTIFICATION AND CONSISTENT REASONING.

In promulgating the proposed rule, the Department also acted arbitrarily and capriciously, in violation of the APA, because it has offered explanations for its decisions that run counter to the evidence before it, issued a rule that is internally inconsistent, illogical and unsupported, and failed to consider important aspects of the problem it is addressing. *See Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Pac. Coast Fed'n of Fishermen's Ass'n v. Nat'l Marine Fisheries Serv.*, 265 F.3d 1028, 1034 (9th Cir. 2001).

A. The proposed rule runs counter to the evidence before the Department.

The Department's stated justification for the proposed rule largely appears to be: (1) Title IX's supposed lack of clarity regarding the qualifications for exemption, including how educational institutions demonstrate they are controlled by a religious organization or whether

they themselves may be the religious entity controlling their own operations; (2) the need to codify existing factors OCR uses when evaluating a request for religious exemption; and (3) to “address concerns that there may be other means of establishing the necessary control.” 85 Fed. Reg. 3206. The Department further states that the clarity the proposed rule purports to provide “would create more predictability, consistency in enforcement, and confidence for educational institutions asserting the exemption.” *Id.*

These stated justifications belie the evidence, however, and the Department’s reasoning for the changes from prior standards do not withstand even baseline scrutiny. The Department fails to present evidence that there was lack of clarity among institutions not sufficiently addressed by previous guidance. In fact, since Title IX’s passage through December 2015, none of the 285 religious exemptions requested were denied.²⁰ According to OCR’s own website detailing correspondence concerning religious exemptions requested and subsequent responses, only two of the 78 colleges or universities that received responses to their request for religious exemption from January 2016 through February 2020 were not granted exemptions. Therefore, more than 99% of the hundreds of schools that have requested religious exemptions in the nearly 50 years since Title IX’s enactment have received them, and there is simply no evidence that there is any lack of clarity about what the current standards require amongst applying schools.

B. The Department’s stated reasoning for the proposed rule is alternately illogical, inconsistent, and unsupported.

The Department also states as justification for the proposed rule that “its practices in the recent past regarding assertion of a religious exemption, including delays in responding to inquiries about the religious exemption, may have caused educational institutions to become reluctant to exercise their rights.” 85 Fed. Reg. 3206. On the other hand, the Department states in its four sentence regulatory impact analysis that it does not believe that its proposed changes “would substantially change the number or composition of entities asserting the exemption.” 85 Fed. Reg. 3219. It then goes on to acknowledge that there will, in fact, likely be an expansion of institutions seeking the exemption. *Id.* The Department has offered inconsistent and misleading reasoning for its actions.

The clearest criteria for a religious exemption in the proposed rule come from the HEW and previous OCR guidance. The added criteria in proposed subsections (c)(4)-(7) are overly broad and ambiguous, exacerbating the very confusion the proposed rule was meant to clarify. There is no justification provided for why a departure from decades-long policy was needed or even advisable. Because the Department has departed from prior policy, a more “detailed justification” is necessary because there are “serious reliance interests” at stake. *Fed. Comm’n v. Fox Television Stations*, 556 U.S. 502, 515 (2009); *State Farm*, 463 U.S. at 47-51; *see also Immigration & Naturalization Serv. v. Yueh-Shaio Yang*, 519 U.S. 26, 32 (1996) (a department’s actions are arbitrary and capricious and in violation of the APA if they consist of “an irrational departure from [settled] policy”). Our students have, for decades, relied upon the

²⁰ Kif Augustine-Adams, *Religious Exemptions to Title IX*, 65 U. Kan. L. Rev. 327 (Dec. 2016).

federal government to adhere to its goal of providing them a learning environment free from discrimination. The proposed rule upends that expectation without basis.

Furthermore, in June of 2017, Department Secretary Elisabeth DeVos testified in Congress that the private schools with religious affiliations receiving federal funding through a private school choice program serving roughly 450,000 of the nation's students would be required to follow federal civil rights laws.²¹ Yet, now, in the proposed rule, the Department massively expands the narrow religious exemption exception, opening a giant loophole to permit any such private school entity to lawfully discriminate while taking federal funds.²² This is the essence of arbitrary action. *Pub. Citizen v. Heckler*, 653 F. Supp. 1229, 1237 (D.D.C. 1986) (“For an agency to say one thing . . . and do another . . . is the essence of arbitrary action.”) (citation omitted).

In its NPRM, the Department states that it “must also take into account [Religious Freedom Restoration Act (RFRA)] in promulgating its regulations and must not substantially burden a person’s exercise of religion through its regulations.” 85 Fed. Reg. 3207. A private school could potentially invoke RFRA if it can demonstrate that compliance with Title IX “substantially burden[s]” its “exercise of religion.” 42 U.S.C. § 2000bb-1(a). If it makes that showing, a court would then be required to determine whether prohibiting that school from discriminating is the least restrictive means of furthering the government’s compelling interests in eliminating sex discrimination in education (and in not subsidizing sex discrimination with federal funds). *Id.* § 2000bb-1(b). In a number of decisions, including ones cited by the Department in support of the proposed rule, the Supreme Court has repeatedly held that the government has a “compelling interest in eradicating discrimination” on the basis of sex and other protected characteristics, and that it is not obligated to provide state support to discriminatory institutions. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (government has “compelling interest in eradicating discrimination against its female citizens”); *see also Bob Jones Univ. v. United States*, 461 U.S. 574, 591, 604 (1983) (“Government has a fundamental, overriding interest in eradicating racial discrimination in education,” which warrants denial of tax exemptions to discriminatory private schools, because “[w]hen the Government grants exemptions or allows deductions all taxpayers are affected; the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious ‘donors’”); *Norwood v. Harrison*, 413 U.S. 455, 463 (1973) (“That the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination.”); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 733 (2014) (“The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are

²¹ Lauren Camera, *Devos Dodges Questions on Discrimination*, U.S. News & World Report (June 6, 2017), <https://tinyurl.com/uwl53sn>.

²² *See* Maggie Garrett, *Private School Vouchers Are a Threat to Religious Freedom*, Religion News Service (Feb. 14, 2018), <https://tinyurl.com/w3998sl> (vouchers supported by federal funding primarily fund private religious schools some of which teach discriminatory curriculum and discriminate in admission and hiring).

precisely tailored to achieve that critical goal.”). Thus, the Department’s purported rationale for expanding the statute beyond the express statutory limits that Congress has placed on the exemption is unsupported. Any analysis is necessarily fact-based and can be properly analyzed within the existing statutory structure.

C. The Department has failed to consider all relevant factors and important aspects of the problem before it.

The Department has also acted arbitrarily and capriciously because it has intentionally disregarded the harm resulting from discrimination (including sexual harassment and assault) to student survivors, as well as to the States. *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep’t of Agric.*, 499 F.3d 1108, 1117 (9th Cir. 2007) (an agency’s decision is arbitrary and capricious if, among other things, the agency failed to consider “all relevant factors”); *State Farm*, 463 U.S. at 43-44 (1983) (arbitrary and capricious to fail to consider “an important aspect of the problem”). In loosening the standards for school to receive exemptions from Title IX’s anti-discrimination mandate, the Department has failed to consider the costs of discrimination on individuals, communities, and States. Studies show that women who experience physical or psychological abuse (including on the basis of sex) utilize significantly more mental health services (2.5 and 2 times more, respectively) than non-abused women.²³ Also, women experiencing ongoing abuse have total annual health expenditures that are 42 percent higher than women who have never been abused.²⁴ In addition, victims of intimate partner violence, sexual violence, or stalking have been found to lose 741 million productive days (i.e., lost school or work days) and experience a \$110 billion loss in short-term productivity.²⁵ These are the types of costs that would accrue if the rate of sex-based discrimination increases, as it will likely do under the proposed rule, as more schools will be exempt from Title IX’s discrimination strictures. The States and its health care and public benefit systems will incur significant and immediate harms when students no longer protected by Title IX are subjected to discrimination and, as a result, reduce their attendance, drop out, and require additional State-provided counseling, health services, and other resources.

Moreover, while the Department claims that its changes protect schools seeking religious exemptions from “ridicule,” the Department completely fails to consider the costs associated with humiliation and suffering for the student who has been subjected to sex discrimination, harassment, or assault on campus—the actual intended beneficiary of the statute—but who cannot receive Title IX’s protections and any relief. 83 Fed. Reg. 61497.

²³ A.E. Bonomi, et al., *Health Care Utilization and Costs Associated with Physical and Nonphysical-Only Intimate Partner Violence*, 3 Health Services Research 44, 1052-67 (2009), <https://tinyurl.com/vrporlj>.

²⁴ *Ibid.*

²⁵ Cora Peterson et al., *Short-term Lost Productivity per Victim: Intimate Partner Violence, Sexual Violence, or Stalking*, 1 American Journal of Preventive Medicine 55, 106–110 (2018), <https://tinyurl.com/v8y3ha8>.

IV. CONCLUSION

Title IX requires schools to provide an education that is free from sexual harassment, violence, and discrimination. Proper enforcement of Title IX has an immense impact on our States, our colleges and universities, our K-12 schools, and most importantly, our students. The proposed rule is a step backward in achieving Title IX's goals and is contrary to the statute. The increased number of schools that could potentially (and improperly) be granted religious exemptions from the mandates in Title IX under the vague and overbroad criteria of the proposed rule represents a devastating roll back of the protections against discrimination Congress so consistently and carefully guarded against. The proposed rule should be withdrawn.

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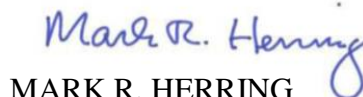
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