



## *Office of the General Counsel*

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### *Submitted Electronically*

September 5, 2023

U.S. Department of Health and Human Services  
Office for Civil Rights  
Attention: HHS Grants Rulemaking (RIN-0945-AA19)  
200 Independence Avenue, SW  
Washington, D.C. 20201

Subj: Health and Human Services Grants Regulation (RIN-0945-AA19)

Dear Sir or Madam:

On behalf of the United States Conference of Catholic Bishops, we respectfully submit the following comments on the proposed rule, published in 88 Fed. Reg. 44750 (Jul. 13, 2023), on nondiscrimination requirements applicable to grants programs under the U.S. Department of Health and Human Services (HHS).

I. What Catholic health and social service ministries believe

The Catholic Church teaches each person is created by God in his image, and therefore that each person has immeasurable dignity, and that we should all treat each other accordingly. As Pope Francis wrote:

The world exists for everyone, because all of us were born with the same dignity. Differences of color, religion, talent, place of birth or residence, and so many others, cannot be used to justify the privileges of some over the rights of all. As a community, we have an obligation to ensure that every person lives with dignity and has sufficient opportunities for his or her integral development.

St. John Paul II observed that “Human persons are willed by God; they are imprinted with God’s image. Their dignity does not come from the work they do, but from the persons they are.”

Accordingly, the Church stands firmly against all unjust discrimination, including against those among us who experience same-sex attraction or gender discordance, who are equally loved by God. They bear the full measure of human dignity we each have received through our Creator and must therefore be treated with kindness and respect.

Another fundamental tenet of our faith is that there is an order in the natural world that was designed by its Creator and that this created order is good (Gen 1:31; Ps 19:1ff.). The Church has always affirmed the essential goodness of the natural order and called on us to respect it. Pope Benedict XVI explained that the natural world has an “inbuilt order,” a “grammar” that “sets forth ends and criteria for its wise use, not its reckless exploitation.”

What is true of creation as a whole is true of human nature in particular: there is an order in human nature that we are called to respect. In fact, human nature deserves utmost respect since humanity occupies a singular place in the created order, being created in the image of God (Gen. 1:27). To find fulfillment as human persons, to find true happiness, we must respect that order. We did not create human nature; it is a gift from a loving Creator. Nor do we “own” our human nature, as if it were something that we are free to make use of in any way we please.

A crucial aspect of the order of nature created by God is the body-soul unity of each human person. Throughout her history, the Church has opposed dualistic conceptions of the human person that do not regard the body as an intrinsic part of the human person, as if the soul were essentially complete in itself and the body were merely an instrument used by the soul. In opposition to dualisms both ancient and modern, the Church has always maintained that, while there is a distinction between the soul and the body, both are constitutive of what it means to be human, since spirit and matter, in human beings, “are not two natures united, but rather their union forms a single nature.” The soul does not come into existence on its own and somehow happen to be in this body, as if it could just as well be in a different body. A soul can never be in another body, much less be in the wrong body. This soul only comes into existence together with this body. What it means to be a human person necessarily includes bodiliness. “Human beings are physical beings sharing a world with other physical beings.”

Human bodiliness is, in turn, intrinsically connected with human sexual differentiation. Just as every human person necessarily has a body, so also human bodies, like those of other mammals, are sexually differentiated as male or female: “Male and female he created them” (Gen 1:27). St. John Paul II reminded us that, in the Book of Genesis, we learn that “Man is created ‘from the very beginning’ as male and female: the life of all humanity—whether of small communities or of society as a whole—is marked by this primordial duality.” The Catechism of the Catholic Church affirms: “Man and woman have been created, which is to say, willed by God: on the one hand, in perfect equality as human persons; on the other, in their respective beings as man and woman. ‘Being man’ or ‘being woman’ is a reality which is good and willed by God.”

Just as bodiliness is a fundamental aspect of human existence, so is either “being a man” or “being a woman” a fundamental aspect of existence as a human being, expressing a person’s unitive and procreative finality. The Congregation for the Doctrine of the Faith, the Vatican’s office that holds the primary responsibility to uphold and preserve Church doctrine, insists:

[T]he importance and the meaning of sexual difference, as a reality deeply inscribed in man and woman, needs to be noted. “Sexuality characterizes man and woman not only on the physical level, but also on the psychological and spiritual, making

its mark on each of their expressions.” It cannot be reduced to a pure and insignificant biological fact, but rather “is a fundamental component of personality, one of its modes of being, of manifestation, of communicating with others, of feeling, of expressing and of living human love.” This capacity to love – reflection and image of God who is Love – is disclosed in the spousal character of the body, in which the masculinity or femininity of the person is expressed.<sup>1</sup>

As Pope Francis has affirmed, “The acceptance of our bodies as God’s gift is vital for welcoming and accepting the entire world as a gift from the Father and our common home, whereas thinking that we enjoy absolute power over our own bodies turns, often subtly, into thinking that we enjoy absolute power over creation.” He has also taught that young people in particular:

need to be helped to accept their own body as it was created... An appreciation of our body as male or female is also necessary for our own self-awareness in an encounter with others different from ourselves. In this way we can joyfully accept the specific gifts of another man or woman, the work of God the Creator, and find mutual enrichment.<sup>2</sup>

The understanding that each person whom our social service ministries encounter is, him or herself, “the work of God the Creator,” is what makes Catholic charitable service Catholic – and what makes it especially effective.

From the Old Testament to the teaching of Jesus as written in the Gospels, the Judeo-Christian tradition has emphasized care for the stranger and care for the poor as essential ways of knowing God<sup>3</sup> and living a good and holy life. For centuries, the experience of the Church in the United States through her charitable works and institutions has emphasized these critical elements of Christianity, famously captures in the parable of the Good Samaritan and in the twenty-fifth chapter of St. Matthew’s Gospel. As Pope Francis said in his address to the U.S. Congress:

In recent centuries, millions of people came to this land to pursue their dream of building a future in freedom. We, the people of this continent, are not fearful of foreigners, because most of us were once foreigners. I say this to you as the son of immigrants, knowing that so many of you are also descended from immigrants...when the stranger in our midst appeals to us, we must not repeat the sins and the errors of the past. We must resolve now to live as nobly and justly as

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<sup>1</sup> Congregation for the Doctrine of the Faith, Letter on the Collaboration of Men and Woman in the Church and in the World (2004), no. 8 ([https://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20040731\\_collaboration\\_en.html](https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20040731_collaboration_en.html)); quotations from Congregation for Catholic Education, Educational Guidance in Human Love: Outlines for Sex Education (1983), no. 5 and no. 4, respectively.

<sup>2</sup> Pope Francis, Encyclical Letter *Amoris Laetitia*, no. 285; quotation from his Encyclical Letter *Laudato Si'*, no. 155.

<sup>3</sup> See, e.g., Lv. 19:34 (“...you shall love the alien as yourself; for you too were once aliens in the land of Egypt”); Deut. 10:19 (same); Mt. 25: 35-40 (“For I was hungry and you gave me food, I was thirsty and you gave me drink, a stranger and you welcomed me...”).

possible, as we educate new generations not to turn their back on our ‘neighbors’ and everything around us.<sup>4</sup>

Care for the hungry, the stranger, the sick, and the homeless are central components of how Christians have traditionally understood they will be judged by God at the conclusion of their lives and are what Pope Francis has referred to as the “Great Criterion.”<sup>5</sup> The Church has taught that these obligations flow from the inalienable dignity of each human person, based on the image and likeness of God in which every man and woman is created. A good society, then, upholds this dignity of each person by promoting the “common good,” a concept of Catholic social thought with ancient origins that requires society to support conditions that allow for the flourishing of its people. The “demands of the common good” include justice and peace, as well as “the provision of essential services to all, some of which are at the same time human rights: food, housing, work, education, and access to culture, transportation, basic health care, the freedom of communication and expression, and the protection of religious freedom.”<sup>6</sup>

## II. The statutes subject to the NPRM

The USCCB appreciates that HHS has structured the NPRM in a way that recognizes that the NPRM’s requirements must flow from statutes under HHS’s authority, in contrast to the 2016 Grants Rule, which imposed its nondiscrimination provision as a free-floating public policy requirement untethered to any statute. A result of this approach is that the NPRM does not appear to apply to adoption and foster care programs funded by HHS under Title IV-E. This would put an end to a running religious liberty conflict created by HHS for faith-based adoption and foster care providers, *see, e.g.*, 88 Fed. Reg. 2265-66, and should be retained in the final rule.

The statutes subject to the NPRM govern a wide array of health and social service programs, including the following areas:

- programs and projects within a state that are designed to prevent incidents of family violence, domestic violence, and dating violence; to provide immediate shelter, supportive services, and access to community-based programs for victims; and to provide specialized services for children exposed to family violence (42 U.S.C. 10406)
- programs providing assistance to refugees and similarly authorized noncitizens (8 U.S.C. 1522)<sup>7</sup>
- services for individuals who are suffering from serious mental illness and substance use disorders, or are homeless or at imminent risk of becoming homeless (42 U.S.C. 290cc-22)

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<sup>4</sup> Pope Francis, Address to U.S. Congress (Sept. 24, 2015).

<sup>5</sup> *See Gaudete et Exultate*, no. 95 (2018).

<sup>6</sup> *See Compendium of the Social Doctrine of the Church*, no. 165-166 (2004).

<sup>7</sup> Reinterpretation of the sex nondiscrimination provision in 8 U.S.C. 1232 would likely also capture programs governed by 8 U.S.C. 1232, via its reference to 8 U.S.C. 1522. *See* 8 U.S.C. 1232(c)(2)(A) (“Placement of child trafficking victims may include placement in an Unaccompanied Refugee Minor program, pursuant to section 412(d) of the Immigration and Nationality Act (8 U.S.C. 1522(d)), if a suitable family member is not available to provide care.”).

- comprehensive community mental health services to children with a serious emotional disturbance (42 U.S.C. 290ff)
- health education programs (42 U.S.C. 295m)
- development, evaluation, and dissemination of research, demonstration projects, and model curricula for cultural competency, prevention, public health proficiency, reducing health disparities, and aptitude for working with individuals with disabilities training for use in health professions schools and continuing education programs (42 U.S.C. 296e-1)
- preventative health services, comprehensive health services, emergency medical services, and services programs (as well as services to victims of sex offenses and for prevention of sex offenses) (42 U.S.C. 300w-3)
- community mental health services for adults with a serious mental illness and children with a serious emotional disturbance (42 U.S.C. 300x)
- relief for those affected by major disasters or emergencies (42 U.S.C. 5151)
- training by institutions of higher learning for personnel for health care and related services for mothers and children; research or maternal and child health or programs for children with special health care needs for research projects relating to maternal and child health services or services for children with special health care needs (42 U.S.C. 702)
- assistance to low-income households, particularly those with the lowest incomes (42 U.S.C. 8621)
- Head Start early education programs focused upon children from low-income families who have not reached the age of compulsory school attendance (42 U.S.C. 9833)
- programs for reduction of poverty, revitalization of low-income communities, and empowerment of low-income families and individuals in rural and urban areas to become self-sufficient (42 U.S.C. 9901)

### III. Application of *Bostock* to the statutes at issue in the NPRM

In 2021, President Biden issued an executive order directing civil rights offices to interpret sex discrimination statutes to prohibit sexual orientation and gender identity (SOGI) discrimination unless the statutes contain “sufficient indications to the contrary.” E.O. 13988 (Jan. 20, 2021). The NPRM follows suit.

The NPRM observes that no court has held that any of the subject statutes does *not* prohibit discrimination on the basis of sexual orientation or gender identity. It fails to note that no court has held that any of the subject statutes *do*. Weighing evidence in favor of an outcome without weighing evidence against that outcome is the definition of arbitrary and capricious.

Noting that each of the subject statutes uses the phrase “on the basis of sex” or something semantically similar, and claiming that the statutes “contain [no] indicia—such as statute-specific definitions, or any other criteria—to suggest that these prohibitions on sex discrimination should be construed differently,” the NPRM concludes that these statutes thus prohibit SOGI

discrimination as well. That is to say, the NPRM looks to the text of the statutes in light of *Bostock*'s textual analysis of Title VII, and ignores the contexts in which they apply. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

However, when the Supreme Court explicitly stated in *Bostock* that its reasoning would not necessarily apply to any other statute, or even any other set of facts, it made clear that context matters:

The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say *sex-segregated bathrooms, locker rooms, and dress codes* will prove unsustainable after our decision today. But...we do not purport to address *bathrooms, locker rooms, or anything else of the kind*. The only question before us is whether *an employer who fires someone simply for being homosexual or transgender* has discharged or otherwise discriminated against that individual "because of such individual's sex." *Id.* at 1753 (emphasis added).

*Bostock* provides no basis for HHS's attempt to shift the burden of proof to those who hold that a given sex nondiscrimination statute does not prohibit SOGI discrimination; *Bostock* creates no presumption that any other sex nondiscrimination statute prohibits SOGI discrimination, much less a presumption that sex nondiscrimination statutes prohibit SOGI discrimination in the context of single-sex spaces. That HHS is attempting to do so because of an executive order makes it no less unlawful.

#### IV. How the reinterpretation of these statutes affects Catholic social services

Catholic health and social service organizations either already receive funding or may plausibly seek funding under virtually every statute subject to the NPRM. Their operation of these charitable ministries presents numerous fact-patterns that could create conflicts between the NPRM's requirements and Catholic teaching.

For example, Catholic charitable agencies provide emergency shelter for victims of domestic violence, subject to 42 U.S.C. 10406. Some of those shelters are single-sex facilities for women, in order to offer an environment that is as safe and comfortable as possible for women who have been abused by men. Instead of offering agencies that operate these shelters flexibility to respond to the unique circumstances and needs of those in their care, the NPRM would arguably mandate them to house biological men who identify as women in single-sex facilities. Catholic charitable agencies will continue endeavoring to meet the needs of all who come to their doors and should be allowed the flexibility to provide shelter in a way that best serves those in their care and honors their Catholic beliefs, which include both the call to shelter those in need and the recognition of the immutable difference between, and dignity of, men and women.

Similar situations may arise in the context of the placement of unaccompanied migrant children (UC) and unaccompanied refugee minors (URMs) under 8 U.S.C. 1522. A UC or URM who identifies as the opposite of his or her biological sex may be referred for placement in a shelter designated for children of the child's non-biological sex. The NPRM could require

Catholic agencies serving UC and URMs to accept that referral, even when appropriate accommodations cannot be made, and thereby endorse a view of human embodiment and sexual difference contrary to Catholic teaching.

Likewise, it may be argued that placement of UC and URMs in foster care falls under 8 U.S.C. 1522, rather than Title IV-E, and that the NPRM would thus require Catholic organizations to place UC and URMs with same-sex couples as foster parents. *Cf. Marouf, et al. v. Azar, et al.*, No. 18-cv-00378 (D.D.C. Jul. 7, 2023) (on such a fact pattern, dismissing the couple's claims as moot, but observing that "this court cannot imagine that the Supreme Court would sanction what Plaintiffs propose here as a remedy: ordering the federal government to make as a condition of a religious organization's participation in a federal program that it violate its sincerely held religious beliefs on same-sex marriage").

The NPRM's requirements on various health programs and activities appear to be essentially redundant to the requirements of HHS's proposed rule on Section 1557 of the Affordable Care Act. The conflicts with religious exercise created by imposing a SOGI nondiscrimination requirement on health care workers and health care organizations are myriad, as detailed in our comments provided on the Section 1557 NPRM.

Other scenarios presenting conflicts between Catholic charities' religious beliefs and the NPRM's requirements could arise in any of the programs governed by the subject statutes. Any charity that has separate men's and women's bathrooms or changing areas could be required to allow men to use the women's facility and vice versa; any charity may be required to address an employee or beneficiary by pronouns that do not correspond with his or her biological sex.

Catholic ministries will always serve the least among us to the greatest extent we are able. The NPRM, by placing unconstitutional conditions on participation in government programs, threatens our capacity to carry out this service. In the end, those hurt the most will be those whom we serve: victims of domestic violence, refugees and newcomers, children, the homeless, the sick, and the poor.

#### V. The NPRM's impact on conscience and religious freedom

To its credit, HHS has included a provision in the proposed rule text, at paragraph 75.300(f), that provides for the application of religious freedom laws to the proposed rule's requirements. However, while this provision may be laudable in its intent, it fails in its execution, and may cause more problems than it solves.

First, the NPRM's religious exemption provisions are, with minor changes, essentially cut-and-pasted from HHS's recent proposed rule on Section 1557, even though the statutes at issue in this NPRM are different from Section 1557. In particular, at least nine of the statutes also prohibit discrimination on the basis of religion, and in some cases that prohibition may apply not only to discrimination by grantees against beneficiaries, but also to discrimination by HHS against grantees. *See, e.g.*, 8 U.S.C. § 1522(a)(5); 42 U.S.C. §§ 290cc-33(a)(2), 290ff-1(e)(2)(C), 300w-7(a)(2), 300x-57(a)(2), 708(a)(2), 5151(a), 9849(a), 10406(c)(2)(B); see also 42 U.S.C. §§ 290kk-290kk-3, 300x-65; 42 C.F.R. pts. 54 & 54a; 44 C.F.R. § 206.11.

Second, the proposed paragraph 75.300(f) does not acknowledge the potential application of any of the numerous federal statutes that protect conscience rights in health care, *cf.* proposed paragraph 92.302(a) at 87 Fed. Reg. at 47918, despite the fact that several of the statutes subject to the NPRM govern health programs and activities that fall under at least one of those conscience statutes, such as paragraph (d) of the Church Amendments.

Further, paragraph 75.300(f) offers covered entities no assurance in the form of either substance or process. Subparagraph (f)(2) appears to contemplate that recipients would wait until they are investigated or subject to an enforcement action before notifying HHS's Office for Civil Rights (OCR) of their "views" that federal religious freedom laws protect them—or that paragraph at least provides no incentive for recipients to notify OCR any earlier than that. While subparagraph (f)(2) requires OCR to "promptly consider" recipients' views, it imposes no obligation on OCR to actually respond to recipients with a determination about their claim for an exemption until such an investigation or enforcement action is at hand.

Subparagraph (f)(3) says that OCR will assess whether the factual record is sufficiently developed for OCR to make a decision, but it does not say what happens if the factual record is not fully developed, what sort of facts would assist OCR in making that determination, or how OCR might go about obtaining the facts. By omitting any discussion of a covered entity's potential recourse in the event of an adverse decision from OCR, the provision implies that the only choice is to file a lawsuit, but that is left unsaid.

The preamble seems to suggest that OCR's decisions would be case-specific and therefore would offer covered entities no guarantee of protection from a future enforcement action arising out of a separate set of facts. The preamble (88 Fed. Reg. at 44755) states:

Considering recipients' specific religious-based concerns in the context of an open case or a claim raised in the first instance by a particular recipient (i.e., when the Department first has cause to consider the recipient's compliance, whether through a complaint filed against the recipient, or through the recipient raising the exemption on their own initiative), would allow the awarding agency, working with ASFR, or OCR, in legal consultation with OGC, to make an informed, case-by-case decision and, where required by law, protect a recipient's religious freedom rights and minimize any harm an exemption could have on third parties.

If the rule only requires OCR to make an exemption determination with regard to a particular case—that is, a finding that a covered entity is exempt from a particular application of a rule provision against past or present conduct—it is unclear why paragraph (f)(1) invites religious entities to express their view that they are exempt from a certain provision of the rule, presumably with regard to present or *future* conduct. After all, the latter does not appear to be an exemption that OCR would be obligated to grant. So paragraph 75.300(f) seems to be based on two inconsistent positions on how religious exemptions work under the Religious Freedom Restoration Act ("RFRA") and other applicable religious freedom laws. This creates further confusion for religious entities trying to understand what the rule requires of them.



Lastly, and perhaps most significantly, aside from noting that OCR’s application of the federal religious freedom laws will consider third-party harms—which foes of religious freedom frequently assert as a basis for challenging the constitutionality of any protection for religious exercise—the proposed rule offers no guidance about what OCR thinks any of those laws mean, nor any guarantee that OCR’s understanding of those laws will remain the same from case to case. Of course, covered entities may glean some additional, albeit discouraging, insight based on positions that the Department of Justice has taken on HHS’s behalf in three separate cases where HHS has fought court rulings that its interpretation of Section 1557 violated RFRA.

In short, reliance on the proposed paragraph 75.300(f) is a high-risk, low-reward venture for covered entities with religious beliefs that forbid what the proposed rule would mandate, and paragraph 75.300(f)’s lack of both process and substance will tend to generate arbitrary and capricious applications of religious freedom protections.

## VI. Conclusion

The NPRM’s argument for reinterpreting the subject statutes to prohibit SOGI discrimination fails to consider meaningful aspects of the issue. Its religious exemption scheme offers no assurance to religious charities that they will be able to participate in HHS-funded programs without being made to violate their beliefs. And it fails to consider the impact that chilling religious charities’ participation in those programs would have on those whom the programs serve. Most fundamentally, though, the NPRM reflects anthropological premises that are simply not true.

We support the NPRM’s approach of limiting its scope to sex discrimination provisions under HHS’s authority, and its consequent removal of the unlawful SOGI requirements that HHS had previously imposed on Title IV-E adoption and foster care programs. Otherwise, however, we urge HHS to reconsider the NPRM’s reinterpretation of those sex discrimination provisions to include SOGI requirements, and to implement a religious exemption that properly respects religious charities’ statutory and constitutional rights.

Thank you for the opportunity to comment on this rulemaking.

Respectfully submitted,

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