

FREEDOM FROM RELIGION *foundation*

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December 6, 2019

Department of Health and Human Services

**Re: Comment opposing HHS Proposed Rule
RIN 0991-AC16
Docket ID: HHS-OS-2019-0014-0001
45 CFR 75**

To Whom It May Concern:

We are writing on behalf of the Freedom From Religion Foundation, and our members in all 50 states, in response to the request for public comments regarding proposed rulemaking that will allow recipients of HHS funding to discriminate against LGBTQ individuals in the course of their government-funded services. FFRF is a national nonprofit organization with more than 30,000 members nationwide. Our purposes are to protect the constitutional principle of separation between state and church, and to educate the public on matters relating to nontheism.

FFRF strongly opposes the Department's regressive decision to remove LGBTQ anti-discrimination protections from its basic grant recipient requirements based on an organization's alleged religious beliefs. Besides the fact that organizations do not possess religious beliefs to exercise—humans have religious beliefs, not companies—Americans should never be forced to fund discrimination, which is precisely what happens when taxpayer funds are awarded to an organization that uses the funds to discriminate. No one is entitled to receive taxpayer funds, and there is no legitimate reason to allow religious exemptions to general grant recipient requirements.

It is particularly distressing that this proposed rule will allow adoption and foster child-placement agencies to refuse to help LGBTQ children or parents. When the Department must decide between either supporting needy children or safeguarding bigoted practices, it is shameful to choose the latter. If a religious organization is unwilling to serve all children and families, that organization is undeserving of government funds.

It is no defense that the Department claims the Religious Freedom Restoration Act (RFRA) requires this rule. As FFRF has pointed out to the U.S. Supreme Court, RFRA is an unconstitutional "super statute," the result of Congress' dissatisfaction with a Supreme Court case authored by Justice Antonin Scalia, *Emp't Div. v. Smith*, which held that neutral, generally applicable laws cannot be subject to religious exemptions. 494 U.S. 872 (1990). Congress cannot override the Supreme Court's interpretation of the Constitution without a constitutional amendment, and RFRA is an attempt to do just that. The Department must abide by the Free Exercise Clause according to *Smith*, but should not accept an expansive, unconstitutional interpretation of RFRA that

allows religious organizations to decide which laws apply to them. This unworkable standard is precisely what Scalia warned of in *Smith*.

In fact, when Congress passed RFRA in 1993, it did so nearly unanimously because RFRA was not intended to allow discrimination. Applying RFRA to deny equal treatment, under the guise of protecting a company's "religious liberty," is contrary to the intent of the law. Surely the Department would deny taxpayer funds to a racist child placement organization that refuses to help non-white children for religious purposes. There is no coherent reason to treat anti-LGBTQ discrimination differently, nor does RFRA require such an unacceptable result.

FFRF strongly opposes this proposed rule change and urges the Department to work toward serving more needy children and families rather than catering to the squeaky wheels of discriminatory religious organizations.

Thank you for the opportunity to comment on this proposal. If you should have any questions regarding FFRF's comments on this proposed rulemaking, please contact us at 608-256-8900 or via email at info@ffrf.org.

Very truly,

Handwritten signatures of Dan Barker and Annie Laurie Gaylor in blue ink. The signature for Dan Barker is on the left, and the signature for Annie Laurie Gaylor is on the right, separated by an ampersand.

Dan Barker and Annie Laurie Gaylor
Co-Presidents