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September 29, 2022

Hon. Xavier Becerra, Secretary
U.S. Department of Health & Human Services
Washington, DC 20201
Submitted online via regulations.gov

RE: Docket No. HHS-OS-2022-0012

Dear Secretary Becerra:

I write on behalf of the Arkansas Department of Human Services (Arkansas DHS) in opposition to the Notice of Proposed Rulemaking (NPRM)[1] issued by the Department of Health and Human Services (Department). The NPRM presents an invalid rule regarding discrimination based on gender identity and sexual orientation. Arkansas DHS urges the Department to reconsider and rescind the proposed amendments. The Department incorrectly interprets the U.S. Supreme Court's holding in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020) and improperly expands the scope of Section 1557 of the Affordable Care Act based on that incorrect interpretation. With the threat of losing federal healthcare funding, the Department attempts to coerce the states into adopting a federal policy that is contrary to their own law and policy.

The NPRM discusses a wide range of healthcare disparities, attempting to set forth the compelling government interest for the proposed rule changes. Arkansas DHS agrees that addressing health disparities can be a compelling government interest, and that all persons, regardless of gender identity or sexual orientation, should receive appropriate, affordable, necessary healthcare. However, Arkansas DHS does not agree that Section 1557 of the Affordable Care Act can be interpreted as broadly as proposed by the Department.

With these proposed rules, the Department attempts to enact a radical policy agenda without legal authority to do so. The *Bostock* ruling is not applicable to Section 1557 of the Affordable Care Act nor the enabling statutes of the Centers for Medicare and Medicaid Services ("CMS") Medicaid, CHIP, and PACE programs. Additionally, *Bostock*'s limited holding would not support the scope of this proposed rule. Likewise, the Department does not have such authority through the CMS

[1] Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. 47824 (Aug. 4, 2022).

enabling statutes. As the Department does not have the authority to enact this rule, the proposed rule must be rescinded. To do otherwise, is clearly arbitrary and capricious.

Bostock **does not support the proposed regulations**

In direct contravention of the specific language of the *Bostock* decision, the Biden administration is determined to expand the scope of that case and adopt radical policy changes beyond its authority. The *Bostock* decision directly addressed the application of its decision to other federal statutes and did not apply that ruling to any other statutes beyond Title VII of the Civil Rights Act.[2] The Court specifically limited its decision to the question before it: whether an employer that fired a homosexual or transgender person on the basis of their sexual orientation or gender identity was in violation of Title VII.[3]

The Biden administration has ignored the limitations of the *Bostock* ruling[4] and sought to push through policies that directly conflict with state laws intended to protect vulnerable children.[5] Guidance from the Department "unequivocally [states] that gender affirming care for minors, when medically appropriate and necessary, improves their physical and mental health."[6] However, the policy of the State of Arkansas, as articulated by findings of the Arkansas General Assembly, is that gender transition procedures for children under the age of eighteen are neither "unequivocally" appropriate nor "unequivocally" medically necessary as their "risks … far outweigh any benefit at this stage of clinical study on these procedures."[7]

In the Affordable Care Act, Congress did not grant the Department the authority to expand the definition of discrimination on the basis of sex in such an expansive manner.[8] The Affordable Care Act specifically references existing equal protection statutes rather than providing its own list of protected classes. Congress did not intend to expand the protected classes beyond those recognized by settled law at the time Section 1557 was enacted. Specifically, in other statutes passed contemporaneously with the Act, Congress included the terms "gender identity" and "sexual

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[2] *Bostock*, 140 S. Ct. 1731, 1753 ("[W]e do not purport to address bathrooms, locker rooms, or anything else of the kind.").

[3] *Id.*

[4] Immediately after entering office, President Biden issued Executive Order 13988, Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, which set federal policy that *Bostock* applied to laws beyond Title VII.

[5] The Biden administration has recently proposed similar amendments to rules regarding education and nutrition programs receiving federal financial assistance.

[6] HHS Notice and Guidance on Gender Affirming Care, Civil Rights, and Patient Privacy (March 2, 2022).

[7] Arkansas Saves Adolescents from Experimentation (SAFE) Act, No. 626, § 1, 2021 Ark. Acts __.

[8] 42 U.S.C. § 18116.

orientation" but did not do so in the Affordable Care Act.[9] This shows that Congress had the understanding that "sexual orientation" and "gender identity" were not included within the term "sex." As Congress had the ability to include "gender identity" and "sexual orientation" in Section 1557 and chose not to do so, it is clear that Congress did not intend for Section 1557 to include discrimination based on sexual orientation or gender identity.

As Congress did not intend to include "gender identity" and "sexual orientation" in the Affordable Care Act, the Department does not have authority to promulgate the proposed rules. The Department cannot legislate in the place of Congress though an administrative rulemaking. By doing so in this NPRM, the Department has proposed rules that are arbitrary and capricious.

Even if *Bostock* applies to Section 1557 (and Arkansas DHS does not concede that it does), the holding is very limited and does not support the Department's expansive application in the proposed rules. It is a very long step between *Bostock*'s prohibition against firing an individual based on sexual orientation and gender identity and the Department's expansive requirement for coverage for gender-affirming treatment. The Department's proposed regulations reach into nearly every aspect of healthcare in the United States and well beyond any prohibition against discrimination based in the holding of *Bostock*.

The Department has no basis to amend CMS Medicaid, CHIP, and PACE rules

The Department's basis for amending the CMS rules for Medicaid, CHIP, and PACE is even more flimsy than its reliance on *Bostock*. The Department bases those proposed rules on general provisions of the Social Security Act requiring that health assistance be provided in an "effective and efficient manner" in the "best interest of beneficiaries" (for Medicaid and CHIP programs), and to "ensure the health and safety of individuals enrolled in a PACE program."[10] Nowhere in the statutes cited by the Department does Congress indicate that these provisions are related to prohibiting discrimination, much less require that recipients of federal funds provide gender-affirming treatment in order to be "effective and efficient." It is not likely that Congress even contemplated such a specious interpretation.

The proposed rules will harm Arkansas's most vulnerable residents

The Department's motivation, intent, and guidance conflict with the law and policy of the State of Arkansas and puts the State's most vulnerable residents at risk of harm. The Arkansas General Assembly enacted Act 626 of 2021 which prohibits the provision of gender-transition treatment to children under the age of 18. If a state sets public policy through the legislative acts of its duly-

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[9] *See* Franciscan Alliance, Inc. v. Burwell, 227 F.Supp. 3d 660, 668-669, for a discussion of other statutes passed around the time of the Affordable Care Act that specifically incorporated the terms "gender identity" and "sexual orientation." This indicates that Congress understood the term "sex" would not include those terms and "gender identity" and "sexual orientation" must be specifically used in the statute.

[10] See NPRM at 47891-47893.

elected representatives, the executive branch of the state must act accordingly. However, if a state does not follow the Department's proposed rules, it is at risk of losing millions of dollars in federal healthcare funding that protects its most vulnerable residents. This is an untenable situation that attempts to coerce states such as Arkansas to follow federal policy determined by administrative fiat and not by Congressional action. Such coercion is unconstitutional and renders the proposed rules invalid.

The proposed rules can be compared to the Department's actions at issue in *Burwell v. Hobby Lobby*, 573 U.S. 682 (2014), and the Department clearly ignores the Court's decision in that case. In *Hobby Lobby*, the Court found that the government's compelling interest in protecting women's health could be accomplished in a less restrictive manner. Likewise, the Department is free to provide gender transition procedures without coercing the states to follow federal policy in conflict with their own laws and policies.

Conclusion

Arkansas Medicaid, CHIP, and PACE programs offer essential healthcare services to all eligible residents of Arkansas, regardless of sexual orientation or gender identity. Neither Section 1557 nor the statutes enacting Medicaid, CHIP, or PACE require that Arkansas provide gender transition procedures to children under 18. Despite the broad mandate that the Department seeks to find in the *Bostock* opinion, the proposed rules are without support in the law and must be rescinded.

Respectfully,

Mark White
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Arkansas Department of Human Services