



Freedom Network USA

November 21, 2017

Center for Faith-Based and Neighborhood Partnerships
Office of Intergovernmental and External Affairs
US Department of Health and Human Services
Attention: RFI Regarding Faith-Based Organizations
Hubert Humphrey Building
200 Independence Avenue, SW
Washington DC 20201
VIA EMAIL
CFBNP@hhs.gov

**RE: RFI Regarding Faith-Based Organizations
HHS-9928-RFI**

Center for Faith-Based and Neighborhood Partnerships:

Freedom Network USA (FNUSA), established in 2001, is a coalition of 51 non-governmental organizations and individuals that provide services to, and advocate for the rights of, trafficking survivors in the United States. Our members include former prosecutors, civil attorneys, criminal attorneys, immigration attorneys, and social service providers who have assisted thousands of trafficking survivors. Together, our members provide services to over 1,000 trafficking survivors annually, including legal representation, case management, and referrals for medical care. Trafficking survivors are a diverse community, including all gender identities, ages, and religious and cultural backgrounds.

FNUSA is committed to a human-rights based approach to services for human trafficking survivors. This includes ensuring that all survivors have unrestricted access to evidence-based, non-judgmental medical care, including comprehensive reproductive health services and mental health care. All survivors must be allowed to choose the services that are appropriate to their needs, and must be allowed to refuse services that conflict with the survivors' religious beliefs and access services that may conflict with the provider's religious beliefs. **The choice lies with the survivor, the recipient of HHS-funded services, not with the provider (the HHS grantee or contractor).**

The request for information (RFI) entitled "Removing Barriers for Religious and Faith-Based Organizations to Participate in HHS Programs and Receive Public Funding" indicates that the Department of Health and Human Services (HHS) is considering expanding religious exemptions in HHS programs and activities or eliminating recipient protections outright. Allowing taxpayer-funded providers to use a religious litmus test to determine whom they serve and which services they will provide would undermine HHS's mission and unconstitutionally entrench discrimination in social services and health care. This directly conflicts with HHS' mission, which is "to enhance and protect the health and

wellbeing of all Americans.”¹ In order to achieve that mission, one of the primary goals of HHS is to “eliminate[] disparities in health, as well as [to increase] health care access and quality.”² HHS programs exist to benefit the individual recipients of services, not to benefit contractors or grantees.

Religious beliefs are overriding standards of care, and HHS should not consider allowing such discrimination

Faith-based organizations have a long and successful history of partnership with HHS, playing an important role in delivering health and social services to communities in need. Yet some faith-based organizations have also used HHS funds to discriminate and withhold needed services—and HHS regulations have allowed this to happen. Religion has been invoked in countless ways to deny individuals access to social services and health care, including birth control, sterilization, certain infertility treatments, abortion,³ transition-related medical care for transgender patients,⁴ reproductive health care for trafficking victims,⁵ and end of life care.⁶ LGBT individuals have been denied appropriate mental health services and counseling⁷; a newborn was denied care because her parents were lesbians⁸; a woman suffering a miscarriage was denied prescription medication⁹; and an individual was denied his HIV medication,¹⁰ all because of someone else’s religious beliefs. A provider’s religious beliefs should never determine the services that an individual receives.

¹ STRATEGIC PLAN FY 2014-2018, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES (HHS), *available at*: <https://www.hhs.gov/about/strategic-plan/introduction/index.html#mission>.

² *Id.*

³ NAT’L WOMEN’S LAW CTR., HEALTH CARE REFUSALS HARM PATIENTS: THE THREAT TO REPRODUCTIVE HEALTH CARE (May 2014), http://www.nwlc.org/sites/default/files/pdfs/refusals_harm_patients_repro_factsheet_5-30-14.pdf. *See also* AMERICAN CIVIL LIBERTIES UNION, HEALTH CARE DENIED (May 2016), https://www.aclu.org/sites/default/files/field_document/healthcaredenied.pdf.

⁴ NAT’L WOMEN’S LAW CTR., HEALTH CARE REFUSALS HARM PATIENTS: THE THREAT TO LGBT PEOPLE AND INDIVIDUALS LIVING WITH HIV/AIDS (May 2014), http://www.nwlc.org/sites/default/files/pdfs/lgbt_refusals_factsheet_05-09-14.pdf.

⁵ *ACLU of Mass. v. Sebelius*, 821 F. Supp. 2d 474 (D. Mass. 2012), *vacated as moot sub nom.*, *ACLU of Mass. v. U.S. Conference of Catholic Bishops*, 705 F.3d 44 (1st Cir. 2013).

⁶ Directive 24 denies respect for advance medical directives. U.S. CONFERENCE OF CATHOLIC BISHOPS, ETHICAL AND RELIGIOUS DIRECTIVES FOR CATHOLIC HEALTH CARE SERVICES (5th ed. 2009), <http://www.usccb.org/issues-and-action/human-life-and-dignity/health-care/upload/Ethical-Religious-Directives-Catholic-Health-Care-Services-fifth-edition-2009.pdf>.

⁷ *Ward v. Wilbanks*, 09-CV-11237, 2010 WL 3026428 (E.D. Mich. July 26, 2010), *rev’d and remanded sub nom.* *Ward v. Polite*, 667 F.3d 727 (6th Cir. 2012), *dismissed with prej.* by *Ward v. Wilbanks*, 09-CV-11237 (E.D. Mich. Dec. 12, 2012) (case settled).

⁸ Abby Phillip, *Pediatrician Refuses to Treat Baby with Lesbian Parents and There’s Nothing Illegal About It*, WASH. POST, Feb. 19, 2015, <https://www.washingtonpost.com/news/morning-mix/wp/2015/02/19/pediatrician-refuses-to-treat-baby-with-lesbian-parents-and-theres-nothing-illegal-about-it/>.

⁹ *Denied Care When Losing a Pregnancy: Pharmacies Refuse to Fill Needed Prescriptions*, NAT’L WOMEN’S LAW CTR. (Apr. 16, 2015), <http://www.nwlc.org/our-blog/denied-care-when-losing-pregnancy-pharmacies-refuse-fill-needed-prescriptions>.

¹⁰ *Complaint, Simoes v. Trinitas Reg’l Med. Ctr.*, No. UNNL-1868-12 (N.J. Super. Ct. Law Div. May 23, 2012).

HHS should not consider allowing entities to discriminate in hiring

This RFI and other actions the Administration has taken, such as the so-called “religious liberty” guidance issued by Attorney General Sessions, indicate that the Administration is poised to allow government-funded organizations to refuse to hire someone who does not act in accordance with particular religious beliefs. This could include someone who doesn’t regularly attend religious services, is married to a person of the same sex, undergoes a gender transition, gets divorced, uses birth control, or is pregnant and unmarried. The Department should reject such efforts—HHS grantees and contractors should not be allowed to discriminate against those they serve and employ.

The use of religion to discriminate has been rejected in other contexts and should not be expanded in social services and health care

Attempts to discriminate in the name of religion are nothing new. Faith-based organizations have long tried to deny individuals the services they need or opt out of nondiscrimination requirements in the name of religious beliefs. Shortly after the enactment of the Civil Rights Act of 1964, prohibiting discrimination based on race in public accommodations, the owner of a restaurant chain argued that the Act violated his religious beliefs opposing integration and that he should therefore be allowed to exclude African-Americans from his restaurant.¹¹ Two decades later, Bob Jones University used the same argument. It wanted to maintain its policy denying admission to “applicants engaged in an interracial marriage or known to advocate interracial marriage or dating” but still get special tax status reserved for institutions that don’t discriminate—all justified by reference to religious belief.¹² Other entities have argued that they should be allowed to pay women less or give them inferior benefits based on religious beliefs that “the husband is the head of the house.”¹³ When faced with equal pay and employment discrimination laws that require employers to treat women equally, these institutions argued those laws were an infringement of their religious liberty.¹⁴ Just as courts have rejected these attempts to discriminate in the name of religious beliefs, HHS must abandon any consideration of expanding discrimination in social services and health care.

The U.S. Constitution and federal law prohibit HHS from creating religious accommodations that will harm third parties

The RFI solicits comments on whether to provide accommodations to entities with religious objections, but the RFI fails to ask about the effect any accommodation would have on program effectiveness, program beneficiaries, or the entities’ employees. The U.S. Constitution and federal law require HHS to consider the impact any accommodation would have.

The Constitution bars HHS from crafting “affirmative” accommodations within its programs if the accommodations would harm program beneficiaries. The Constitution commands

¹¹ See *Newman v. Piggie Park Enters., Inc.*, 256 F. Supp. 941, 944 (D. S.C. 1966), aff’d in part and rev’d in part on other grounds, 377 F.2d 433 (4th Cir. 1967), aff’d and modified on other grounds, 390 U.S. 400 (1968).

¹² See *Bob Jones Univ. v. United States*, 461 U.S. 574, 581 (1983).

¹³ *Id.* at 580.

¹⁴ *Dole*, 899 F.2d at 1393; *Fremont Christian Sch.*, 781 F.2d at 1367.

that “an accommodation must be measured so that it does not override other significant interests”;¹⁵ “impose unjustified burdens on other[s]”;¹⁶ or have a “detrimental effect on any third party.”¹⁷

The Administration may point to the Religious Freedom Restoration Act (RFRA),¹⁸ but that statute is triggered only when the government “substantially burdens” religion. It cannot be used to justify rules that further “respect for” religious exercise. Even then, if the government has a compelling interest and the law is narrowly tailored to further that interest, RFRA does not require a religious exemption. In *Hobby Lobby*, the Supreme Court made clear that the impact on third parties of any accommodation must be “precisely zero” because there was a way in which the federal government could ensure that employees received seamless contraception coverage, even if their employer objected to providing coverage.¹⁹ Additional religious exemptions that enable entities receiving taxpayer funding to refuse to provide critical social and health care services on the basis of religious objections would undoubtedly harm third parties—those they are intended to serve.

Expansion of accommodations for religious entities will most hurt those who already face barriers to services

Denying individuals the services they need undermines the very purpose of the taxpayer-funded service or program and will exacerbate the very health and wellness disparities HHS should be focused on alleviating. Expanding religious exemptions will fall hardest on those who already face barriers to accessing services. Women have been charged more for health care on the basis of sex and have continually been denied health insurance coverage for services that only women need.²⁰ Religiously affiliated organizations that receive federal grants to care for unaccompanied immigrant minors, many of whom are sexually assaulted before they reach HHS custody, have argued they are entitled to refuse to provide them critical reproductive health care, including access to or even referrals for abortion and contraception, as required by law.²¹

Far too many LGBTQ people are denied the care they need because of their sexual orientation, or gender identity. In a survey examining discrimination against LGBTQ people

¹⁵ *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005).

¹⁶ *Id.* at 726.

¹⁷ *Id.* at 720, 722; *See also* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 (2014); *Estate of Thornton v. Caldor*, 472 U.S. 703, 710 (1985) (“unyielding weighting” of religious exercise “over all other interests...contravenes a fundamental principle” by having “a primary effect that impermissibly advances a particular religious practice.”); *Texas Monthly, Inc. v. Bullock*, 480 U.S. 1, 18 n.8 (1989) (religious accommodations may not impose “substantial burdens on nonbeneficiaries”).

¹⁸ 42 U.S.C. § 2000bb.

¹⁹ 134 S. Ct. at 2760; *see also id.* at 2781–82.

²⁰ NAT’L WOMEN’S LAW CENTER, TURNING TO FAIRNESS: INSURANCE DISCRIMINATION AGAINST WOMEN TODAY AND THE AFFORDABLE CARE ACT (March 2012), <https://nwlc.org/resources/turning-fairness-insurance-discrimination-against-women-today-and-affordable-care-act/>.

²¹ Anna Merlan, *Religious Aid Groups: Raped Migrant Kids Should Not Get Plan B*, JEZEBEL (March 5, 2015), <https://jezebel.com/religious-aid-groups-raped-migrant-kids-should-not-get-1689602157/>; *See also*, AMERICAN CIVIL LIBERTIES UNION, RELIGIOUS ORGANIZATIONS OBSTRUCT REPRODUCTIVE HEALTH CARE FOR UNACCOMPANIED IMMIGRANT MINORS (April 3, 2015), <https://www.aclu.org/news/religious-organizations-obstruct-reproductive-health-care-unaccompanied-immigrant-minors>.

in health, more than half of respondents reported that they have experienced at least one of the following types of discrimination: being refused needed care; health care professionals refusing to touch them or using excessive precautions; health care professionals using harsh or abusive language; being blamed for their health care status; or health care professionals being physically rough or abusive.²² Further “accommodation” of religious entities threatens to increase discrimination against these and other communities and thereby worsen health care disparities that HHS should be working to reduce.

HHS should stop seeking to protect entities that use religion to discriminate and should reprioritize its mandate to serve the public

The focus of HHS programs should be to assist individuals in need of critical services and supports by increasing access, supporting individual decision making and informed consent, and prohibiting discrimination in the provision of human services. Given the significant threat posed to the health and well-being of millions of vulnerable individuals, as well as the lack of any statutory authority for doing so, HHS must abandon this attempt to allow providers, health plans, or other entities to be able to use religion to engage in taxpayer-funded discrimination. Instead, we urge HHS to turn its focus to addressing health disparities and ensuring equal access to services regardless of race, color, national origin, religion, sex, gender identity, sexual orientation, age, or disability.

I can be reached at jean@freedomnetworkusa.org if you have any questions or need any further information or explanation.

Sincerely,



Jean Bruggeman
Executive Director
Freedom Network USA

²² *When Health Care Isn't Caring: Lambda Legal's Survey of Discrimination Against LGBT People and People with HIV* (New York: Lambda Legal, 2010). Available at www.lambdalegal.org/health-care-report.