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Office of the Assistance Secretary for Planning and Evaluation
Strategic Planning Team
Department of Health and Human Services
200 Independence Avenue, SW
Room 415F
Washington, DC 20201
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Re: Strategic Plan Comments

To whom it may concern:

Thank you for the opportunity to comment on the Department of Health and Human Services' draft strategic plan. The Administration undoubtedly will receive numerous comments that focus on various aspects of the draft plan. Our comments, therefore, will focus on two issues that appear throughout the draft plan and raise serious religious freedom concerns.

Americans United for Separation of Church and State has a particular expertise on issues of religious freedom. We are a nonpartisan educational and advocacy organization dedicated to advancing the constitutional principle of church-state separation as the only way to ensure freedom of religion, including the right to believe or not believe, for all Americans.

Accordingly, we object to the language in the draft strategic plan that would allow religion to be used to discriminate and undermine access to healthcare, especially for women and LGBTQ people. In addition, we oppose the inclusion of language that asserts that life begins at conception. The Constitution prohibits HHS from adopting this religious belief as government policy.

Sanctioning the Use of Religion to Discriminate

The draft agency objectives include improving Americans' access to health care, empowering people to make informed choices about their health, and strengthening the healthcare workforce to meet America's diverse needs. Yet, several draft strategies could undermine these very objectives and even cause people harm, especially women and LGBTQ people.

These draft strategies call for HHS to "remove barriers" and "affirmatively accommodate" religious beliefs of persons or organizations that partner with the agency, including those that apply for grants or contracts to deliver services on behalf of HHS. In doing this, HHS must follow the October 6 Department of Justice guidance, titled "Federal Law Protections for Religious Liberty," which sets out extreme interpretations of federal laws that govern

religion, including the Religious Freedom Restoration Act (RFRA). The guidance serves as a roadmap for using religion as an excuse to discriminate.

Religious freedom is a fundamental right, protected by our Constitution and federal law. It guarantees us all the right to believe (or not) as we see fit. But it doesn't give anyone the right to use religion as an excuse to harm others. This is especially true when the discrimination is funded by taxpayer dollars.

Under the DOJ guidance, HHS contractors and grantees could claim a right to use a religious litmus test to decide whom they will serve within agency-funded programs and which services they will provide, even if refusing to serve certain people or provide specified services conflicts with the law or the terms of the government grant or contract. As a result, organizations that partner with and get funding from HHS could claim a right to refuse to serve LGBTQ families or single mothers, or provide needed reproductive healthcare, gender-affirming care, PrEP, or counseling to interfaith couples or couples with a partner who is divorced.

HHS contractors and grantees could also claim a right to ignore bars against discrimination in hiring. A religiously affiliated organization could refuse to hire a doctor or nurse because she is the "wrong religion," or is a single mother based on its religious code of conduct.

These are just a few examples of the harm that could result from the draft strategies. In the end, these strategies will interfere with delivering evidence-based, quality medical services that meet the standard of care and with the patient-physician relationship by limiting the information, counseling, referral, and provision of critical services.

Allowing religion to be used to harm others is not just bad policy; it also violates the Constitution. Indeed, the Constitution limits the government's ability to create religious and moral exemptions like those envisaged under these strategies: "At some point, accommodation may devolve into [something] unlawful."[1] The constitutional requirements are straightforward: "an accommodation must be measured so that it does not override other significant interests"[2] or "impose unjustified burdens on other[s]."[3] The agency must not create exemptions that have a harmful, discriminatory impact on others[4] or give

[1] *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 334-35 (1986) (internal quotation marks omitted). Of course, in some instances exemptions may be constitutionally permissible but unwise public policy.
[2] *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005); *see also Estate of Thornton v. Caldor, Inc.* 472 U.S. 703, 709-10 (1985) ("unyielding weighting" of religious interests of those taking exemption "over all other interest" violates Constitution).
[3] *Cutter*, 544 U.S. at 726. *See also Texas Monthly, Inc. v. Bullock*, 480 U.S. 1, 18 n. 8 (1989) (religious accommodations may not impose "substantial burdens on nonbeneficiaries").
[4] *See Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2786 (Kennedy, J. concurring and controlling opinion) (no accommodation should "unduly restrict other persons . . . in protecting their own interests, interests the law deems compelling"); *id.* at 2760 (the religious accommodation would have "precisely zero" impact on third parties); *see also Holt v. Hobbs*, 135 S. Ct. 853, 867 (Ginsburg, J. concurring) (the accommodation "would not detrimentally affect others").

contractors and grantees the right to refuse to provide services, which amounts to giving them "the right to use taxpayer money to impose [their beliefs] on others."[5]

Moreover, any arguments that RFRA permits or requires the government to allow religious providers to discriminate in hiring, against beneficiaries, or in the services they provide are misplaced.

First, as explained above, the Establishment Clause of the Constitution limits the application of RFRA only to situations where an exemption would not result in third-party harms.

Second, providers that seek to discriminate could not survive the RFRA test. RFRA asks whether the law places a "substantial burden" on religious exercise. If yes, the government regulation must "further a compelling government interest" by using the "least restrictive means."

Organizations that voluntarily enter into a contract or grant with the government to provide specific services cannot claim to be substantially burdened by because they—like all other contractors and grantees—must serve all beneficiaries, ensure equal employment opportunities, and abide by all salient work requirements. This does not arise to a "substantial burden" on religious exercise.[6] These organizations do not have a right to government funding and can engage in social services without government funding if they do not want to abide by the government's neutral rules.

Even if nondiscrimination provisions or other work requirements did cause a "substantial burden" on a contractor or grantee's religious exercise, the government clearly has a compelling interest both in not subsidizing discrimination and ensuring those who most need services are provided them. Discrimination has no place in government programs: it is contrary to our nation's laws and values.

Religiously affiliated institutions historically have played an important role in addressing many of our nation's most pressing social needs, as a complement to government-funded programs. However, effective government collaboration with faith-based groups does not require the sanctioning of taxpayer-funded religious discrimination or sweeping exemptions that allow these groups to deny certain services or deny services to certain people. Thus, the draft Strategic Plan's substantial emphasis on partnering with faith-based organizations raises significant concerns.

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[5] *ACLU of Mass. v. Sebelius*, 821 F. Supp. 2d 474, 488 n.26 (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] *See Locke v. Davey*, 540 U.S. 712 (2004) (distinguishing between coercive actions that substantially burden free exercise and a condition on funding that was "a relatively minor burden"); *see also Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2986 (2010) (student group seeking official university recognition ("effectively a state subsidy") "face[d] only indirect pressure to modify its membership policies" with university nondiscrimination policy); *see generally* Ira C. Lupu & Robert W. Tuttle, Roundtable on Religion & Social Welfare Policy, The State of the Law – 2008 33-37 (2008).

Adopting a Religious Belief as Government Policy
The United States Constitution "preclude[s] government from conveying or attempting to convey a message that . . . a particular religious belief is favored or preferred."[7] In addition, government policy cannot "be tailored to the principles or prohibitions of any religious sect or dogma"[8] and "one religious denomination cannot be officially preferred over another."[9]

Yet, the draft Strategic Plan does exactly that—it adopts the particular religious belief that life begins at conception. This tenet is not universally shared among all religious traditions, let alone by nonbelievers. And HHS's adoption of this religious belief violates the Constitution.

Furthermore, the agency's reliance on a religious, unscientific belief threatens women's access to critical healthcare services, including birth control, assisted reproductive technology, including in vitro fertilization (IVF), and abortion. It could also interfere with the provider-patient relationship and autonomous decision-making for all pregnant women.

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Thank you for your consideration of our comments. Please contact Dena Sher, (202) 466-3234 x. 281, sher@au.org, or Maggie Garrett, (202) 466-3234 x. 226, garrett@au.org, if you should have questions or want more information on these issues.

Sincerely,

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[7] *Wallace v. Jaffree*, 472 U.S. 38, 70 (O'Connor, J., concurring).
[8] *Epperson v. Arkansas*, 393 U.S. 97, 106 (1968).
[9] *Larson v. Valente*, 456 U.S. 228, 244 (1982).