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**SUBMITTED ELECTRONICALLY
VIA REGULATIONS.GOV**

Hon. Kathleen McHugh
Director, Policy Division, Children's Bureau
Administration on Children, Youth and Families
Administration for Children and Families
U.S. Department of Health and Human Services
330 C Street, S.W.
Washington, DC 20201

**Re: Safe and Appropriate Foster Care Placement Requirements for Titles IV-E and IV-B,
RIN 0970-AD03**

Dear Ms. McHugh:

Tennessee, joined by 16 co-signing States, welcomes the chance to comment on the Administration for Children and Families' ("HHS") "Safe and Appropriate Foster Care Placement Requirements for Titles IV-E and IV-B," 88 Fed. Reg. 66,752 (Sept. 28, 2023). The Placement Rule would condition continued federal foster-care-program funding on States' satisfying detailed rules for "[a]ffirm[ing] LGBTQI+ [y]outh" in their charge. *Id.* at 66,757. The Placement Rule would pair these novel requirements with a new notification regime, as well as expand avenues for legal action against foster providers who deviate from HHS's dictates.

Tennessee, working through the State's Department of Children's Services, takes seriously its duty to promote case plans to serve each foster child's best interests and special needs. *See* 42 U.S.C. § 675(1), (5). Indeed, HHS already has promoted Tennessee as providing compassionate care and calibrated policies for the youth population the Placement Rule covers.¹ Layering on the Placement Rule's burdensome regime would hinder rather than help States' ability to ensure appropriate foster placements for all vulnerable youth by driving dedicated foster providers out of the system.

¹ *See* 88 Fed. Reg. at 66,755 & n.35 (discussing 2023 Child Welfare Information Gateway Report at 2–4).

Tennessee and the co-Signing States thus respectfully urge HHS to reconsider the Placement Rule. HHS's approach not only reflects misguided federal policy, it suffers from multiple legal flaws that would render the Placement Rule invalid if finalized in its current form:

First, the Placement Rule's novel mandates sweep far beyond HHS's statutory authority. The relevant provisions of the Adoption Assistance and Child Welfare Act of 1980 (CWA) require federally funded foster-care providers to craft case plans that provide "safe and proper care" and serve the "best interest[s] and special needs" of each child for which foster placement is made. *See* 42 U.S.C. §§ 675(1)(B), (5)(A). Properly read, those longstanding family-law terms do not license the Placement Rule's attempt to mandate particular federal conceptions of "proper" foster care for LGBTQI+ youth, let alone support requiring agencies to restructure sex-segregated facilities and programs to instead align around foster children's gender identity. Any interpretative doubt about HHS's authority resolves in light of the major-questions doctrine, as well as federalism and nondelegation principles, which uniformly foreclose the Placement Rule's unprecedented top-down regime.

Second, the Placement Rule presents significant constitutional problems. Reading the statute to confer the rulemaking authority HHS posits would implicate nondelegation-doctrine limits on Congress's ability to outsource lawmaking to the Executive Branch. Nor does the Spending Clause allow HHS to tack on additional conditions to federal programs without clear congressional consent. Further, the Placement Rule's potential for punishing foster-care providers for their views on LGBTQI+ issues risks running afoul of core First Amendment protections of freedom of speech and religion.

Finally, the Placement Rule's ill-reasoned and burdensome approach violates the Administrative Procedure Act (APA). Most critically, by heaping more regulatory burdens onto an already stretched foster-care field, the Placement Rule irrationally risks driving out qualified care providers and hampering States' ability to serve youth in need. The resulting restrictions would perversely undercut the Placement Rule's stated goal of promoting LGBTQI+ care by driving up the compliance costs and legal exposure associated with taking in LGBTQI+ foster children. HHS's proposal moreover gives short shrift to the heavy costs States will face to comply with its mandates, particularly when it comes to investigating and notifying youth of the Placement Rule's new requirements.

I. HHS Lacks Statutory Authority to Issue the Placement Rule's Mandates.

Because agencies' power to act "is authoritatively prescribed by Congress," an agency may only regulate "within the bounds of its statutory authority." *City of Arlington v. FCC*, 569 U.S. 290, 297 (2013). At issue here is the CWA, which makes federal funds available to States for use in implementing foster-care programs. Specifically, the Placement Rule rests on provisions requiring that grantee States maintain plans ensuring that their foster providers (i) create "case plans" aimed at providing "safe and proper care" and "appropriate" placements that serve the "best interests" of each child in their charge, 42 U.S.C. § 675(1)(B), (5)(A), and (ii) are "prepared adequately with appropriate knowledge and skills to provide" for children's needs, *id.* § 671(a)(24). *See* 88 Fed. Reg. at 66,752.

According to HHS, these generalized provisions empower federal officials to mandate detailed treatment of LGBTQI+ youth by the state-run, private-facility, and family-based foster care providers that comprise Tennessee and other States' foster-care systems. Under the Placement Rule, States' entitlement to continued funding would turn on their ability to ensure enough foster-care providers

are willing to provide sufficiently “affirming” care to LGBTQI+ youth, as defined by HHS officials. Among other things, qualifying foster-care providers would need to grant children (i) ready access to LGBTQI+ reading materials, (ii) opportunities to socialize with LGBTQI+ peers, (iii) an ability to dress in line with “self-identified gender identity and expression,” and (iv) provision of medical treatments “generally accepted” by organizations like the American Psychological Association and American Academy of Pediatrics—*i.e.*, hormone therapy and gender-reassignment surgeries. *See* 88 Fed. Reg. at 66,757-58, 66,760. Denying these measures may constitute “hostility, mistreatment, or abuse” under the Placement Rule. *Id.* at 66,757. Further, the Placement Rule would require state agencies and foster providers operating sex-segregated foster facilities to place children on the basis of their self-identified gender identity rather than biological sex, upending longstanding state policies. HHS claims the statute’s reference to “safe and proper care” and the “most appropriate” foster placement compel this gender-identity dynamic. *Id.* at 66,760.

For several reasons, the open-ended CWA provisions the agency cites cannot support the Placement Rule’s novel LGBTQI+ foster-care regime.

First, courts have not read the relevant provisions as “provid[ing] guidance on the particularities” that “need to be included in a case plan [for it] to be compliant with” the Act. *Shane v. Cnty. of San Diego*, No. 22-cv-1309, 2023 WL 4055706, at *8 (S.D. Cal. June 16, 2023). Rather, requirements like the “best interests of the child” benchmark are familiar state family-law standards that typically give judges broad discretion to determine where is best to place a child based on a confluence of factors. *See Bryan C. v. Lambren*, 340 F.R.D. 501, 529–30 (D. Me. 2021). In Tennessee, for example, “[t]he best interest of the child is the polestar, the *alpha and omega*,” in child placement determinations, *Bab v. Bab*, 668 S.W.2d 663, 665 (Tenn. App. 1983) (emphasis in original), and the legislature has crafted a long, non-exhaustive list of factors for determining what placement is in a child’s best interest, *see* Tenn. Code. Ann. 36-1-113(i)(1). Tennessee is not the only State to recognize that the “best interest standard . . . is inherently flexible and fact specific.” *In re Shanaira C.*, 1 A.3d 5, 19 (Conn. 2010) (citation omitted); *see also Berger v. Van Winsen*, 743 N.W.2d 136, 138 (S.D. 2007). Yet the Placement Rule would establish a provider’s stance on LGBTQI+ issues as the dispositive consideration in whether a placement is appropriate. Nothing in the CWA suggests that Congress meant to grant HHS this federal veto power over foster children’s placements.

Second, and relatedly, accepting the Placement Rule’s reading of the CWA would contravene federalism principles. The U.S. Constitution leaves significant swaths of family, health, and safety regulation to the States’ exercise of their constitutionally reserved police powers. Indeed, the field of domestic relations “has long been regarded as a virtually exclusive province of the States.” *Sosna v. Iowa*, 419 U.S. 393, 404 (1975). Tennessee, for its part, has reticulated rules for ensuring and policing safe and appropriate placements of all foster children in the state system. *Cf., e.g., supra* n.1. The Placement Rule would shift the balance of power from States to the federal government in this area of foster-care regulation.

The apparent requirement that foster parents facilitate risky medical treatments for youth is a particularly problematic case in point. After careful consideration, Tennessee prohibited gender-transition hormone and surgical treatments for minors because the State determined that those treatments are unproven and unsafe. *See* Tenn. Code Ann. 68-33-101, *et seq.* The Sixth Circuit recently upheld Tennessee’s law as a permissible exercise of the State’s power to regulate medicine, including by prohibiting unproven and potentially irreversible treatments for minors. *See L.W. ex rel. Williams v. Skermetti*, 83 F.4th 460, 472-77 (6th Cir. 2023). The Placement Rule nonetheless appears to condition

Tennessee’s continued funding on foster parents’ providing certain gender-affirming treatments that it and other States have permissibly banned. Or perhaps HHS would require foster parents to take children on costly out-of-state trips for medical visits and surgeries to avoid designation as “unsafe” foster providers. Either way, HHS’s conception of its statutory authority veers far outside any reasonable reading of the delegation effectuated by Congress. *Cf. Alabama Ass’n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021) (rejecting rule in part because it “intrude[d] into an area that is the particular domain of state law” without a green light from Congress). If HHS does not intend for the Placement Rule to sweep this far, it should provide clarification in any final rule.

Third, the Placement Rule raises controversial questions of vast “political significance,” yet does not reflect the type of clear congressional authorization the major-questions doctrine requires. *West Virginia v. EPA*, 142 S. Ct. 2587, 2613 (2022) (quoting *FDA v. Brown & Williamson*, 529 U.S. 120, 160 (2000)). Take, for instance, the Placement Rule’s directive that any foster provider seeking to house a transgender youth must place that youth consistent with his or her gender identity rather than biological sex. 88 Fed. Reg. at 66,760. This mandate overrides state policies governing sex-segregated childcare institutions, which heed the privacy and safety interests in maintaining sex-segregated spaces—particularly for children. Courts, too, have routinely recognized that “[t]he need for privacy justifies separation and the differences between the genders demand a facility for each gender that is different.” *Faulkner v. Jones*, 10 F.3d 226, 232 (4th Cir. 1993); *see also United States v. Virginia*, 518 U.S. 515, 550 n.19 (1996) (“Admitting women to [Virginia Military Institute] would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements.”).

The rationale for sex-segregated spaces is even stronger in facilities—like congregate child-settings—where people regularly are partially or completely undressed to shower, change, or use the restroom. Sex-segregated spaces lower the potential for harassment, voyeurism, or even violent crime. *See* Brief for the Women’s Liberation Front as *Amicus Curiae* 9, *Adams v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791 (11th Cir. 2022) (arguing that allowing men in women’s private spaces “inherently threatens women’s physical safety in the places previously preserved exclusively for women and girls”). Given the longstanding practice of maintaining sex-segregated spaces in light of these privacy and safety justifications, it is implausible that Congress permitted HHS to disapprove such placements using terms like “safe and proper care” or “appropriate setting[s] . . . consistent with the best interests and special needs of the child.”

Fourth, principles of constitutional avoidance resolve any doubt that the Placement Rule exceeds HHS’s statutory authority. When faced with a statutory interpretation that presents constitutional problems, courts are to adopt any “fairly possible” alternative that avoids the issue. *Jennings v. Rodriguez*, 583 U.S. 281, 296 (2018) (citation omitted). That canon cuts against HHS’s expansive reading of the CWA, which, as discussed next, suffers constitutional defects in spades.

II. The Placement Rule Violates the Constitution.

In addition to exceeding HHS’s statutory authority, the Placement Rule also is “contrary to” the Constitution’s protection for the separation-of-powers and individual rights of free exercise and free speech. 5 U.S.C. § 706(2)(B).

Nondelegation Doctrine. Rooted in separation-of-powers principles, the nondelegation doctrine requires Congress to “lay down” an “intelligible principle” in an authorizing statute for the

agency to follow. *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (citation omitted). Put simply, the Constitution’s vesting of the lawmaking power in Congress precludes those federal lawmakers from writing regulatory blank checks to agencies. *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting) (“The framers understood . . . that it would frustrate ‘the system of government ordained by the Constitution’ if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals.”) (citation omitted). Instead, the framers meant to keep the “power to enact laws restricting the people’s liberty” with the people and their representatives—not shift it to unelected administrators. *Id.* at 2134; *West Virginia*, 142 S. Ct. at 2624 (Gorsuch, J., concurring).

The Placement Rule’s expansive interpretation of HHS’s statutory authority cannot be squared with this foundational constitutional check. In HHS’s view, the open-ended terms “safe and proper care” and “best interests and special needs of the child” are empty vessels waiting to enshrine any number of highly controversial requirements favored by federal agency heads. So long as HHS concludes a particular belief or practice among foster providers is harmful to children’s emotional or mental “well-being,” 88 Fed. Reg. at 66,757, HHS’s power to cut off funding would trigger. There is no telling where HHS might go next with this claimed power to police foster placements it deems “unsafe” based on controversial social-issue stances. The nondelegation doctrine does not permit HHS to impress novel directives on States resting only on vague terms like “safe and proper.” *Mistretta*, 488 U.S. at 372-73. “If Congress could pass off its legislative power to the executive branch” so easily, the Constitution’s refined structure “would make no sense.” *Gundy*, 139 S. Ct. at 2134–35 (Gorsuch, J., dissenting) (citation omitted).

Spending Clause. “Spending Clause legislation” like Title IV-E and -B “operates based on consent: in return for federal funds, the recipients agree to comply with federally imposed conditions.” *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1570 (2022) (alteration and quotation marks omitted). As a result, “if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.” *Id.* (citation omitted); see *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). Yet as mentioned, the Placement Rule’s extensive mandates for placements of LGBTQI+ youth is absent from the statute. Tennessee has nearly 9,000 children in its foster care system, and that system annually relies on over \$56 million in federal Title IV funding. Congress would have spoken clearly had it meant to vest HHS with the power to link States’ funding with their accepting federal micromanagement of foster providers on LGBTQI+ issues. Because Congress did not expressly include such conditions in Titles IV-E and -B, HHS may not now do so through the Placement Rule. See *Kentucky v. Yellen*, 54 F.4th 325, 347 (6th Cir. 2022).

First Amendment. As Alabama’s comment letter explains in greater length, the Placement Rule also violates First Amendment protections for freedom of speech and religion. See Comment of Alabama *et al.* on Placement Rule 3–5 (Nov. 27, 2023). The “government may not compel a person to speak its own preferred message.” *303 Creative LLC v. Elenis*, 143 S. Ct. 2298, 2312 (2023). Nor may the federal government “burden” a person’s “religious exercise by putting [him] to the choice” of following federal law or “approving” behavior “inconsistent with [his] beliefs.” *Fulton v. City of Phila.*, 141 S. Ct. 1868, 1876 (2021). “[R]eligious groups” have long “take[n] the lead” in caring for vulnerable and abandoned children. *Id.* at 1885 (Alito, J., concurring); see Alabama Comment 2–3. Today, Tennessee contracts or otherwise maintains relationships with several faith-based agencies who together serve over 400 foster children in the State. Yet the Placement Rule risks compelling these and other foster-care providers to accommodate—and even facilitate—conduct that is contrary to

their sincerely held religious beliefs regarding sensitive topics like the enduring link between biological sex and gender or traditional values regarding sexual relations and marriage.

The Placement Rule, for its part, recognizes that it threatens religious liberty. 88 Fed. Reg. at 66,761-62. Yet while HHS gestures at the possibility of case-by-case protection under the Religious Freedom Restoration Act, it expressly leaves open the possibility that its asserted aim of furthering the foster-care rights of LGBTQI+ youth would outweigh foster providers' asserted claims of religious freedom. *See id.* at 66,762. This is cold comfort to foster providers who must now choose between following tenets of faith or providing much-needed care to vulnerable youth populations.

It is no answer that the Placement Rule mostly regulates the States, not individual providers. *Cf. id.* at 66,761. For one thing, Congress's spending power "may not be used to induce the States to engage in activities that would themselves be unconstitutional." *Dole*, 483 U.S. at 210. So to the extent the Placement Rule would coerce States to compel foster-care providers to act against their beliefs or else risk exclusion, that dynamic would not pass Spending Clause scrutiny. In addition, the Placement Rule erects a new apparatus permitting retaliation claims against foster-care providers based on allegations that they have not satisfied HHS's requirements for "affirming" foster children's LGBTQI+ status. *See* 88 Fed. Reg. at 66,759. In that way, the Placement Rule would directly penalize foster-care providers for acting pursuant to their deeply held religious beliefs, impermissibly burdening core free-exercise and free-speech rights. *Cf. Masterpiece Cakeshop, Ltd. v. Colorado Human Rights Comm'n*, 138 S. Ct. 1719, 1731-32 (2018); *303 Creative*, 143 S. Ct. at 2318.

III. The Placement Rule Is Arbitrary and Capricious.

The APA's arbitrary-and-capricious standard requires agency decision-making to be "reasonable and reasonably explained." *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021). Agency analysis cannot "run[] counter to the evidence before the agency," must show a "rational connection between the facts found and the choice made," and needs to "consider" all "important aspect[s] of the problem" the agency is addressing. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citation omitted). If finalized in its current form, the Placement Rule would violate these baseline APA rules against arbitrary agency action.

First, the Placement Rule unlawfully fails to consider the countervailing consequences of its proposed approach, which are an "important aspect" of the regulatory problem. *Id.* Participants in the foster system already must navigate myriad administrative requirements at risk of legal liability. *See* Tenn. Code. Ann. § 37-2-401, *et seq.* Yet HHS now proposes to add more bureaucratic red tape while greenlighting more lawsuits against foster-care providers who take in LGBTQI+ youth.

Most notably, under the Placement Rule, all foster-care providers would be subject to retaliation claims based on any alleged failure to grant a child access to certain materials or social contacts or otherwise "affirm" their gender confusion. 88 Fed. Reg. at 66,759-60. The Placement Rule's expansive conception of what it means to be sufficiently affirming of LGBTQI+ youth make the possibilities for liability prolific. Any parent knows that teenagers will inevitably disagree with rules—like over what parties they may attend or what Internet content they can view—set by their authority figures. Yet now, these routine family conflicts may generate a federal retaliation claim should they involve denial of the Placement Rule's LGBTQI+ rights—like attending a party meant to "access" other LGBTQI+ youth or viewing Internet content that features support for the child's "gender identity[] or gender expression." *Id.* Nor would the Placement Rule's allowance for "age

appropriate” restrictions serve as a meaningful deterrent to retaliation claims, as confirmed by publicized disputes over the presence of highly sexualized LGBTQI+-themed books in schools or children’s attendance at LGBTQI+ events featuring sexualized drag performances.²

The consequences of transforming standard teenage-authority figure conflicts into federal litigation are obvious: foster families facing increased legal risks will either leave the system altogether or at a minimum stop serving LGBTQI+ populations. This would in turn reduce the number of safe placement options for all children, LGBTQI+ youth included. *See* Alabama Comment 7–8. The Placement Rule does not mention this patent downside of its approach, let alone justify these countervailing costs over other, narrower approaches like guidance or case-by-case assessment of youth’s treatment. Nor, similarly, has HHS considered how its separate requirement that state agencies investigate a caretaker’s failure to affirm a child’s sexual orientation or gender identity with the same urgency as physical child abuse, *see* 88 Fed. Reg. at 66,759, will further stretch state agencies’ already strained resources at the likely expense of physically abused children.

Second, and as Alabama’s comment also explains, *see* Alabama Comment 7–9, the Placement Rule fails to adequately consider the costs state agencies will incur to comply with its mandates. For example, state agencies will need to develop protocols and systems for implementing the rule’s new oral and written notification regimes. State agencies also face significant costs to enforce and monitor the retaliation regime, including the costs of preparing and providing materials to all foster-care providers regarding the Placement Rule’s procedural requirements and bases for retaliation charges. In addition, HHS entirely fails to account for the hefty costs of requiring foster providers to seek out-of-state care for particular gender-transition medical treatments prohibited for minors by Tennessee and other States—should such travel indeed be required. The Placement Rule recognizes that it is not free. 88 Fed. Reg. at 66,763. But it underestimates compliance costs significantly, creating an additional APA problem. *See State Farm*, 463 U.S. at 43.

Tennessee and the co-signing States are committed to adopting and enforcing rules to ensure every child in state foster systems receives the most appropriate placement available, no matter their challenges. Experience shows that even in light of the many difficulties involved in providing foster care, local members of each State’s foster-care ecosystem—not federal officials in Washington, D.C.—are best placed to address the complex and ever-changing dynamics among foster providers and the children they serve. The Placement Rule’s far-reaching approach, even if well intentioned, will perversely diminish the availability of safe placements for all children by driving dedicated foster-care providers out of foster care altogether. It will further divert resources away from protecting foster children from physical abuse and toward enforcing compliance with controversial gender ideology. The APA and common sense alike should cause HHS to reconsider before adopting requirements that would harm rather than help States’ ability to serve foster children in need.

² *See, e.g.*, Wayne Carter, *Parents Face-Off Over Graphic Content and LGBTQ Books in School Libraries*, NBC5DFW (Nov. 16, 2021), <https://tinyurl.com/3f4mmlhxp>; Samantha Kamman, *6 Times “Family-Friendly” Drag Shows Exposed Kids to Sexual Content*, Christian Post Reporter (Feb. 1, 2023), <https://tinyurl.com/denyvdcu>.

Sincerely,



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