

22-1174

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

FAMILY EQUALITY, TRUE COLORS UNITED, INC., SERVICES AND ADVOCACY
FOR GLBT ELDERS,

Plaintiffs-Appellants,

v.

XAVIER BECERRA, in his official capacity as Secretary, United States
Department of Health and Human Services, THE UNITED STATES
DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

KAREN L. LOEWY
SASHA BUCHERT
LAMBDA LEGAL DEFENSE &
EDUCATION FUND, INC.
1776 K Street, NW, 8th Fl.
Washington, DC 20006
(202) 804-6245

KRISTEN P. MILLER
ROBIN THURSTON
DEMOCRACY FORWARD FOUNDATION
P.O. Box 34553
Washington, DC 20043
(202) 701-1782

MARSHALL CURREY COOK
LAMBDA LEGAL DEFENSE &
EDUCATION FUND, INC.
120 Wall Street, 19th Fl.
New York, NY 10005
(212) 809-8585

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**U.S. District Court
Southern District of New York (Foley Square)
CIVIL DOCKET FOR CASE #: 1:20-cv-02403-MKV**

Family Equality et al v. Azar et al
Assigned to: Judge Mary Kay Vyskocil
Case in other court: U.S. Court of Appeals, 2nd Circ., 22-01174
Cause: 05:551 Administrative Procedure Act

Date Filed: 03/19/2020
Date Terminated: 03/30/2022
Jury Demand: None
Nature of Suit: 899 Other Statutes:
Administrative Procedures Act/Review or
Appeal of Agency Decision
Jurisdiction: U.S. Government Defendant

Plaintiff

Family Equality

represented by **Karen Loewy**
Lambda Legal Defense & Education Fund
1776 K Street NW, 8th floor
Washington, DC 20006-2304
202-804-6245
Email: kloewy@lambdalegal.org
ATTORNEY TO BE NOTICED

Kristen Paige Miller
Democracy Forward Foundation
PO Box 34553
Washington, DC 20043
202-448-9090
Email: kmiller@democracyforward.org
ATTORNEY TO BE NOTICED

Puneet Cheema
Lambda Legal
1776 K St. NW
Ste 722
Washington, DC 20006
202-492-7948
Email: pcheema@lambdalegal.org
TERMINATED: 07/10/2020

Robin Thurston
Democracy Forward Foundation
P.O. Box 34553
Washington, DC 20043
202-448-9090
Email: rthurston@democracyforward.org
ATTORNEY TO BE NOTICED

Sasha Buchert

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Lambda Legal Defense and Education
Fund, Inc.
1776 K. Street NW
Ste 8th Floor
Washington, DC 20006
202-429-2057
Email: sbuchert@lambdalegal.org
ATTORNEY TO BE NOTICED

Sean Lev
Democracy Forward Foundation
PO Box 34553
Washington, DC 20043
202-701-1771
Email: slev@democracyforward.org
ATTORNEY TO BE NOTICED

Jeffrey Benjamin Dubner
Democracy Forward Foundation
PO Box 34553
Washington, DC 20043
202-488-9090
Email: jdubner@democracyforward.org
ATTORNEY TO BE NOTICED

Plaintiff

True Colors United, Inc.

represented by **Karen Loewy**
(See above for address)
ATTORNEY TO BE NOTICED

Kristen Paige Miller
(See above for address)
ATTORNEY TO BE NOTICED

Puneet Cheema
(See above for address)
TERMINATED: 07/10/2020

Robin Thurston
(See above for address)
ATTORNEY TO BE NOTICED

Sasha Buchert
(See above for address)
ATTORNEY TO BE NOTICED

Sean Lev
(See above for address)
ATTORNEY TO BE NOTICED

Jeffrey Benjamin Dubner
(See above for address)
ATTORNEY TO BE NOTICED

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Plaintiff

Services & Advocacy for LGBT Elders

TERMINATED: 04/03/2020

represented by **Robin Thurston**

(See above for address)

ATTORNEY TO BE NOTICED

Sasha Buchert

(See above for address)

ATTORNEY TO BE NOTICED

Sean Lev

(See above for address)

ATTORNEY TO BE NOTICED

Jeffrey Benjamin Dubner

(See above for address)

ATTORNEY TO BE NOTICED

Plaintiff

Services & Advocacy for GLBT Elders

represented by **Karen Loewy**

(See above for address)

ATTORNEY TO BE NOTICED

Kristen Paige Miller

(See above for address)

ATTORNEY TO BE NOTICED

Puneet Cheema

(See above for address)

TERMINATED: 07/10/2020

Sasha Buchert

(See above for address)

ATTORNEY TO BE NOTICED

Jeffrey Benjamin Dubner

(See above for address)

ATTORNEY TO BE NOTICED

V.

Defendant

Alex M. Azar, II

in his official capacity as Secretary, United States Department of Health and Human Services

represented by **Jennifer C. Simon**

New York State Office of The Attorney General

28 Liberty Street, 19th Floor

New York, NY 10005

212-416-8086

Email: jennifer.simon@ag.ny.gov

TERMINATED: 11/29/2021

LEAD ATTORNEY

Lucas Estlund Issacharoff

United States Attorney's Office

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Southern District Of New York
 86 Chambers Street, Third Floor
 New York, NY 10007
 212-637-2737
 Fax: 212-637-2702
 Email: Lucas.Issacharoff@usdoj.gov
 ATTORNEY TO BE NOTICED

Defendant

**United States Department of Health and
 Human Services**

represented by **Jennifer C. Simon**
 (See above for address)
 TERMINATED: 11/29/2021
 LEAD ATTORNEY

Lucas Estlund Issacharoff
 (See above for address)
 ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
03/19/2020	1	COMPLAINT against Alex M. Azar, II, United States Department of Health and Human Services. (Filing Fee \$ 400.00, Receipt Number ANYSDC-19162658) Document filed by Family Equality, Services & Advocacy for LGBT Elders, True Colors United, Inc... (Dubner, Jeffrey) (Entered: 03/19/2020)
03/19/2020	2	CIVIL COVER SHEET filed..(Dubner, Jeffrey) (Entered: 03/19/2020)
03/19/2020	3	FILING ERROR - DEFICIENT PLEADING - SUMMONS REQUEST As To - REQUEST FOR ISSUANCE OF SUMMONS as to Alex M. Azar II, U.S. Department of Health and Human Services, re: 1 Complaint,. Document filed by Family Equality, Services & Advocacy for LGBT Elders, True Colors United, Inc...(Dubner, Jeffrey) Modified on 3/20/2020 (jgo). (Entered: 03/19/2020)
03/19/2020	4	FILING ERROR - DEFICIENT PLEADING - SUMMONS REQUEST As To - REQUEST FOR ISSUANCE OF SUMMONS as to Alex M. Azar II, U.S. Department of Health and Human Services, re: 1 Complaint,. Document filed by Family Equality, Services & Advocacy for LGBT Elders, True Colors United, Inc...(Dubner, Jeffrey) Modified on 3/20/2020 (jgo). (Entered: 03/19/2020)
03/19/2020	5	REQUEST FOR ISSUANCE OF SUMMONS as to Alex M. Azar II, re: 1 Complaint,. Document filed by Family Equality, Services & Advocacy for LGBT Elders, True Colors United, Inc...(Dubner, Jeffrey) (Entered: 03/19/2020)
03/19/2020	6	FILING ERROR - DEFICIENT PLEADING - SUMMONS REQUEST As To - REQUEST FOR ISSUANCE OF SUMMONS as to U.S. Department of Health and Human Services, re: 1 Complaint,. Document filed by Family Equality, Services & Advocacy for LGBT Elders, True Colors United, Inc...(Dubner, Jeffrey) Modified on 3/20/2020 (jgo). (Entered: 03/19/2020)
03/19/2020	7	RULE 7.1 CORPORATE DISCLOSURE STATEMENT. No Corporate Parent. Document filed by Family Equality..(Dubner, Jeffrey) (Entered: 03/19/2020)
03/19/2020	8	RULE 7.1 CORPORATE DISCLOSURE STATEMENT. No Corporate Parent. Document filed by Services & Advocacy for LGBT Elders..(Dubner, Jeffrey) (Entered: 03/19/2020)
03/19/2020	9	RULE 7.1 CORPORATE DISCLOSURE STATEMENT. No Corporate Parent. Document

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		filed by True Colors United, Inc...(Dubner, Jeffrey) (Entered: 03/19/2020)
03/20/2020		CASE OPENING INITIAL ASSIGNMENT NOTICE: The above-entitled action is assigned to Judge Mary Kay Vyskocil. Please download and review the Individual Practices of the assigned District Judge, located at https://nysd.uscourts.gov/judges/district-judges . Attorneys are responsible for providing courtesy copies to judges where their Individual Practices require such. Please download and review the ECF Rules and Instructions, located at https://nysd.uscourts.gov/rules/ecf-related-instructions ..(jgo) (Entered: 03/20/2020)
03/20/2020		Magistrate Judge Sarah Netburn is so designated. Pursuant to 28 U.S.C. Section 636(c) and Fed. R. Civ. P. 73(b)(1) parties are notified that they may consent to proceed before a United States Magistrate Judge. Parties who wish to consent may access the necessary form at the following link: https://nysd.uscourts.gov/sites/default/files/2018-06/AO-3.pdf .(jgo) (Entered: 03/20/2020)
03/20/2020		Case Designated ECF. (jgo) (Entered: 03/20/2020)
03/20/2020		***NOTICE TO ATTORNEY REGARDING DEFICIENT REQUEST FOR ISSUANCE OF SUMMONS. Notice to Attorney Jeffrey Benjamin Dubner to RE-FILE Document No. 6 Request for Issuance of Summons, 4 Request for Issuance of Summons, 3 Request for Issuance of Summons,. The filing is deficient for the following reason(s): party name on 'as to' docket entry text does not exactly match as it appears on the pleading caption (U.S. Department of Health and Human Services). Re-file the document using the event type Request for Issuance of Summons found under the event list Service of Process - select the correct filer/filers - and attach the correct summons form PDF. (jgo) Modified on 3/20/2020 (jgo). (Entered: 03/20/2020)
03/20/2020	10	ELECTRONIC SUMMONS ISSUED as to Alex M. Azar, II.(jgo) (Entered: 03/20/2020)
03/20/2020	11	REQUEST FOR ISSUANCE OF SUMMONS as to United States Department of Health and Human Services, re: 1 Complaint,. Document filed by Family Equality, Services & Advocacy for LGBT Elders, True Colors United, Inc...(Dubner, Jeffrey) (Entered: 03/20/2020)
03/20/2020	12	REQUEST FOR ISSUANCE OF SUMMONS as to Alex M. Azar II, in his official capacity as Secretary, United States Department of Health and Human Services, and the United States Department of Health and Human Services, re: 1 Complaint,. Document filed by Family Equality, Services & Advocacy for LGBT Elders, True Colors United, Inc...(Dubner, Jeffrey) (Entered: 03/20/2020)
03/20/2020	13	REQUEST FOR ISSUANCE OF SUMMONS as to Alex M. Azar II, in his official capacity as Secretary, United States Department of Health and Human Services, and the United States Department of Health and Human Services, re: 1 Complaint,. Document filed by Family Equality, Services & Advocacy for LGBT Elders, True Colors United, Inc...(Dubner, Jeffrey) (Entered: 03/20/2020)
03/23/2020	14	ELECTRONIC SUMMONS ISSUED as to Alex M. Azar, II, United States Department of Health and Human Services..(jgo) (Entered: 03/23/2020)
03/23/2020	15	ELECTRONIC SUMMONS ISSUED as to Alex M. Azar, II, United States Department of Health and Human Services..(jgo) (Entered: 03/23/2020)
03/23/2020	16	ELECTRONIC SUMMONS ISSUED as to United States Department of Health and Human Services..(jgo) (Entered: 03/23/2020)
03/25/2020	17	MOTION for Robin F. Thurston to Appear Pro Hac Vice . Filing fee \$ 200.00, receipt number ANYSDC-19225666. Motion and supporting papers to be reviewed by Clerk's Office staff. Document filed by Family Equality, Services & Advocacy for LGBT Elders,

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		True Colors United, Inc.. (Attachments: # 1 Text of Proposed Order, # 2 Affidavit, # 3 Exhibit Certificate of Good Standing).(Thurston, Robin) (Entered: 03/25/2020)
03/25/2020	18	MOTION for Sean A. Lev to Appear Pro Hac Vice . Filing fee \$ 200.00, receipt number ANYSDC-19225740. Motion and supporting papers to be reviewed by Clerk's Office staff. Document filed by Family Equality, Services & Advocacy for LGBT Elders, True Colors United, Inc.. (Attachments: # 1 Exhibit Certificate of Good Standing, # 2 Affidavit, # 3 Text of Proposed Order).(Lev, Sean) (Entered: 03/25/2020)
03/25/2020		>>>NOTICE REGARDING PRO HAC VICE MOTION. Regarding Document No. 18 MOTION for Sean A. Lev to Appear Pro Hac Vice . Filing fee \$ 200.00, receipt number ANYSDC-19225740. Motion and supporting papers to be reviewed by Clerk's Office staff., 17 MOTION for Robin F. Thurston to Appear Pro Hac Vice . Filing fee \$ 200.00, receipt number ANYSDC-19225666. Motion and supporting papers to be reviewed by Clerk's Office staff.. The document has been reviewed and there are no deficiencies. (ad) (Entered: 03/25/2020)
03/26/2020	19	ORDER Plaintiff is GRANTED leave to file an Amended Complaint to correct the spelling of one partys name. Any other changes to the Complaint will result in the amendment constituting the Plaintiffs amendment as of right. (HEREBY ORDERED by Judge Mary Kay Vyskocil) (Text Only Order) (ab) (Entered: 03/26/2020)
03/27/2020	20	ORDER granting 18 Motion for Sean A. Lev to Appear Pro Hac Vice (HEREBY ORDERED by Judge Mary Kay Vyskocil)(Text Only Order) (rz) (Entered: 03/27/2020)
03/27/2020	21	FILING ERROR - FILER ERROR - AMENDED COMPLAINT amending 1 Complaint, against Alex M. Azar, II, United States Department of Health and Human Services.Document filed by Family Equality, Services & Advocacy for LGBT Elders, True Colors United, Inc.. Related document: 1 Complaint,..(Dubner, Jeffrey) Modified on 3/30/2020 (jgo). (Entered: 03/27/2020)
03/30/2020		***NOTICE TO ATTORNEY REGARDING DEFICIENT PLEADING. Notice to Attorney Jeffrey Benjamin Dubner to RE-FILE re: Document No. 21 Amended Complaint. The filing is deficient for the following reason(s): all of the parties listed on the pleading were not entered on CM ECF. Add party Services & Advocacy for GLBT Elders; the wrong filer/filers were selected for the pleading;. Docket the event type Add Party to Pleading found under the event list Complaints and Other Initiating Documents.. Re-file the pleading using the event type Amended Complaint found under the event list Complaints and Other Initiating Documents - attach the correct signed PDF - select the individually named filer/filers - select the individually named party/parties the pleading is against. (jgo) (Entered: 03/30/2020)
03/30/2020		ADD PARTY FOR PLEADING. Plaintiffs/Petitioners Services & Advocacy for GLBT Elders added. Party added pursuant to 21 Amended Complaint,.Document filed by Services & Advocacy for GLBT Elders. Related document: 21 Amended Complaint,.. (Dubner, Jeffrey) (Entered: 03/30/2020)
04/01/2020	22	FILING ERROR - FILING ERROR - AMENDED COMPLAINT amending 21 Amended Complaint, against Alex M. Azar, II, United States Department of Health and Human Services.Document filed by Services & Advocacy for GLBT Elders, Family Equality, True Colors United, Inc.. Related document: 21 Amended Complaint,..(Dubner, Jeffrey) Modified on 4/2/2020 (jgo). (Entered: 04/01/2020)
04/02/2020		***NOTICE TO ATTORNEY REGARDING DEFICIENT PLEADING. Notice to Attorney Jeffrey Benjamin Dubner to RE-FILE Document No. 22 Amended Complaint,. The filing is deficient for the following reason(s): the pleading must be linked to the initial pleading. Re-file the pleading using the event type Amended

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		Complaint found under the event list Complaints and Other Initiating Documents - attach the correct signed PDF - select the individually named filer/filers - select the individually named party/parties the pleading is against. (jgo) (Entered: 04/02/2020)
04/02/2020	23	AMENDED COMPLAINT amending 1 Complaint, against Alex M. Azar, II, United States Department of Health and Human Services. Document filed by Services & Advocacy for GLBT Elders, Family Equality, True Colors United, Inc.. Related document: 1 Complaint,..(Dubner, Jeffrey) (Entered: 04/02/2020)
04/03/2020	24	SUMMONS RETURNED EXECUTED. Alex M. Azar, II served on 4/1/2020, answer due 6/1/2020; United States Department of Health and Human Services served on 4/1/2020, answer due 6/1/2020. Service was made by Mail. Document filed by Services & Advocacy for GLBT Elders; Family Equality; True Colors United, Inc.. (Attachments: # 1 Affidavit). (Dubner, Jeffrey) (Entered: 04/03/2020)
04/24/2020	25	MOTION for Puneet Cheema to Appear Pro Hac Vice . Filing fee \$ 200.00, receipt number ANYSDC-19576234. Motion and supporting papers to be reviewed by Clerk's Office staff. Document filed by Family Equality, Services & Advocacy for GLBT Elders, True Colors United, Inc.. (Attachments: # 1 Affidavit, # 2 Exhibit Certificate of Good Standing, # 3 Text of Proposed Order).(Cheema, Puneet) (Entered: 04/24/2020)
04/24/2020		>>>NOTICE REGARDING PRO HAC VICE MOTION. Regarding Document No. 25 MOTION for Puneet Cheema to Appear Pro Hac Vice . Filing fee \$ 200.00, receipt number ANYSDC-19576234. Motion and supporting papers to be reviewed by Clerk's Office staff.. The document has been reviewed and there are no deficiencies. (laq) (Entered: 04/24/2020)
04/27/2020	26	ORDER granting 25 Motion for Puneet Cheema to Appear Pro Hac Vice; granting 17 Motion for Robin F. Thurston to Appear Pro Hac Vice. (HEREBY ORDERED by Judge Mary Kay Vyskocil)(Text Only Order) (ab) (Entered: 04/27/2020)
05/29/2020	27	NOTICE OF APPEARANCE by Karen Loewy on behalf of Family Equality, Services & Advocacy for GLBT Elders, True Colors United, Inc...(Loewy, Karen) (Entered: 05/29/2020)
06/02/2020	28	CONSENT LETTER MOTION for Extension of Time addressed to Judge Mary Kay Vyskocil from Jennifer C. Simon dated June 2, 2020. Document filed by Alex M. Azar, II, United States Department of Health and Human Services..(Simon, Jennifer) (Entered: 06/02/2020)
06/02/2020	29	ORDER granting 28 Letter Motion for Extension of Time. GRANTED. The Parties are reminded that requests for extension of time should be filed three days before the deadline in question. (Signed by Judge Mary Kay Vyskocil on 6/2/2020) (mro) (Entered: 06/02/2020)
06/02/2020		Set/Reset Deadlines: United States Department of Health and Human Services answer due 6/22/2020. (mro) (Entered: 06/02/2020)
06/22/2020	30	LETTER MOTION for Conference addressed to Judge Mary Kay Vyskocil from Jennifer C. Simon dated June 22, 2020. Document filed by Alex M. Azar, II, United States Department of Health and Human Services..(Simon, Jennifer) (Entered: 06/22/2020)
06/25/2020	31	LETTER RESPONSE in Opposition to Motion addressed to Judge Mary Kay Vyskocil from Robin Thurston dated 6/25/2020 re: 30 LETTER MOTION for Conference addressed to Judge Mary Kay Vyskocil from Jennifer C. Simon dated June 22, 2020. . Document filed by Family Equality, Services & Advocacy for GLBT Elders, True Colors United, Inc...(Thurston, Robin) (Entered: 06/25/2020)
06/30/2020	32	FILING ERROR - DEFICIENT PRO HAC VICE MOTION - MOTION for Kristen

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		Miller to Appear Pro Hac Vice . Filing fee \$ 200.00, receipt number ANYSDC-20482741. Motion and supporting papers to be reviewed by Clerk's Office staff. Document filed by Family Equality, Services & Advocacy for GLBT Elders, True Colors United, Inc.. (Attachments: # 1 Affidavit, # 2 Text of Proposed Order, # 3 Exhibit).(Miller, Kristen) Modified on 6/30/2020 (ad). (Entered: 06/30/2020)
06/30/2020		>>>NOTICE REGARDING DEFICIENT MOTION TO APPEAR PRO HAC VICE. Notice to RE-FILE Document No. 32 MOTION for Kristen Miller to Appear Pro Hac Vice . Filing fee \$ 200.00, receipt number ANYSDC-20482741. Motion and supporting papers to be reviewed by Clerk's Office staff.. The filing is deficient for the following reason(s): missing Certificate of Good Standing from DC; The affidavit is not notarized;. Re-file the motion as a Corrected Motion to Appear Pro Hac Vice - attach the correct signed PDF - select the correct named filer/filers - attach valid Certificates of Good Standing issued within the past 30 days - attach Proposed Order. (ad) (Entered: 06/30/2020)
07/01/2020	33	MOTION for Kristen Miller to Appear Pro Hac Vice . Motion and supporting papers to be reviewed by Clerk's Office staff. Filing fee \$ 200.00, receipt number ANYSDC-20482741 Document filed by Family Equality, Services & Advocacy for GLBT Elders, True Colors United, Inc.. (Attachments: # 1 Exhibit Miller Declaration, # 2 Exhibit NY Certificate of Good Standing, # 3 Exhibit DC Certificate of Good Standing, # 4 Text of Proposed Order Text of Proposed Order).(Miller, Kristen) Modified on 7/1/2020 (ad). (Entered: 07/01/2020)
07/01/2020		>>>NOTICE REGARDING PRO HAC VICE MOTION. Regarding Document No. 33 MOTION for Kristen Miller to Appear Pro Hac Vice . Motion and supporting papers to be reviewed by Clerk's Office staff.. The document has been reviewed and there are no deficiencies. (ad) (Entered: 07/01/2020)
07/02/2020	34	ORDER granting 33 Motion for Kristen Miller to Appear Pro Hac Vice (HEREBY ORDERED by Judge Mary Kay Vyskocil)(Text Only Order) (rz) (Entered: 07/02/2020)
07/06/2020	35	ORDER denying 30 Letter Motion for Conference. The Motion for a Pre-Motion Conference is DENIED and the Defendants are GRANTED leave to file the Motion to Dismiss. The Motion must be filed on or before July 24, 2020. Plaintiffs' opposition should be filed on or before August 7, 2020. Any reply is due on or before August 14, 2020. Requests for extension must be received at least 72 hours in advance of the deadline. (Signed by Judge Mary Kay Vyskocil on 7/6/2020) (mro) (Entered: 07/06/2020)
07/06/2020		Set/Reset Deadlines: Motions due by 7/24/2020. Responses due by 8/7/2020 Replies due by 8/14/2020. (mro) (Entered: 07/06/2020)
07/09/2020	36	MOTION for Puneet Cheema to Withdraw as Attorney . Document filed by Family Equality, Services & Advocacy for GLBT Elders, True Colors United, Inc...(Cheema, Puneet) (Entered: 07/09/2020)
07/10/2020	37	MEMO ENDORSED ORDER granting 36 Motion to Withdraw as Attorney. ENDORSEMENT: IT IS SO ORDERED. (Attorney Puneet Cheema terminated.) (Signed by Judge Mary Kay Vyskocil on 6/10/20) (yv) (Entered: 07/10/2020)
07/20/2020	38	CONSENT LETTER MOTION for Extension of Time addressed to Judge Mary Kay Vyskocil from Jennifer C. Simon dated July 20, 2020. Document filed by Alex M. Azar, II, United States Department of Health and Human Services..(Simon, Jennifer) (Entered: 07/20/2020)
07/21/2020	39	ORDER granting 38 Letter Motion for Extension of Time. Granted. (Signed by Judge Mary Kay Vyskocil on 7/21/2020) (mro) (Entered: 07/21/2020)

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07/21/2020		Set/Reset Deadlines: Motions due by 8/7/2020. Responses due by 8/24/2020 Replies due by 9/2/2020. (mro) (Entered: 07/21/2020)
08/07/2020	40	MOTION to Dismiss . Document filed by Alex M. Azar, II, United States Department of Health and Human Services..(Simon, Jennifer) (Entered: 08/07/2020)
08/07/2020	41	MEMORANDUM OF LAW in Support re: 40 MOTION to Dismiss . . Document filed by Alex M. Azar, II, United States Department of Health and Human Services..(Simon, Jennifer) (Entered: 08/07/2020)
08/24/2020	42	MEMORANDUM OF LAW in Opposition re: 40 MOTION to Dismiss . . Document filed by Family Equality, Services & Advocacy for GLBT Elders, True Colors United, Inc... (Miller, Kristen) (Entered: 08/24/2020)
09/02/2020	43	REPLY MEMORANDUM OF LAW in Support re: 40 MOTION to Dismiss . . Document filed by Alex M. Azar, II, United States Department of Health and Human Services.. (Simon, Jennifer) (Entered: 09/02/2020)
09/18/2020	44	NOTICE OF CHANGE OF ADDRESS by Karen Loewy on behalf of Family Equality, Services & Advocacy for GLBT Elders, True Colors United, Inc.. New Address: Lambda Legal, 1776 K Street NW, 8th floor, Washington, DC, United States 20006-2304, 202-804-6245..(Loewy, Karen) (Entered: 09/18/2020)
09/29/2020	45	FILING ERROR - DEFICIENT DOCKET ENTRY - MOTION for Sasha Jean Buchert to Appear Pro Hac Vice <i>Sasha J. Buchert</i> . Motion and supporting papers to be reviewed by Clerk's Office staff. Document filed by Family Equality, Services & Advocacy for GLBT Elders, Services & Advocacy for LGBT Elders, True Colors United, Inc.. (Attachments: # 1 Affidavit, # 2 Text of Proposed Order, # 3 Certificate of Good Standing).(Buchert, Sasha) Modified on 9/29/2020 (bcu). (Entered: 09/29/2020)
09/29/2020		>>>NOTICE REGARDING DEFICIENT MOTION TO APPEAR PRO HAC VICE. Notice to RE-FILE re: Document No. 45 MOTION for Sasha Jean Buchert to Appear Pro Hac Vice <i>Sasha J. Buchert</i>. Motion and supporting papers to be reviewed by Clerk's Office staff... The filing is deficient for the following reason(s): missing Certificate of Good Standing from Supreme court of Oregon; the filing fee was not paid; Re-file the motion as a Corrected Motion to Appear Pro Hac Vice - attach the correct signed PDF - select the correct named filer/filers - attach valid Certificates of Good Standing issued within the past 30 days - attach Proposed Order. Pay the filing fee using the event Pro Hac Vice Fee Payment found under the event list Other Documents. (bcu) (Entered: 09/29/2020)
10/06/2020	46	MOTION for Sasha Jean Buchert to Appear Pro Hac Vice (<i>Corrected</i>). Filing fee \$ 200.00, receipt number ANYSDC-22005956. Motion and supporting papers to be reviewed by Clerk's Office staff. Document filed by Family Equality, Services & Advocacy for GLBT Elders, Services & Advocacy for LGBT Elders, True Colors United, Inc.. (Attachments: # 1 Certificate of Good Standing Supreme Court of Oregon, # 2 Affidavit, # 3 Text of Proposed Order).(Buchert, Sasha) (Entered: 10/06/2020)
10/06/2020		>>>NOTICE REGARDING PRO HAC VICE MOTION. Regarding Document No. 46 MOTION for Sasha Jean Buchert to Appear Pro Hac Vice (<i>Corrected</i>). Filing fee \$ 200.00, receipt number ANYSDC-22005956. Motion and supporting papers to be reviewed by Clerk's Office staff.. The document has been reviewed and there are no deficiencies. (vba) (Entered: 10/06/2020)
10/07/2020	47	ORDER granting 46 Motion for Sasha Jean Buchert to Appear Pro Hac Vice (HEREBY ORDERED by Judge Mary Kay Vyskocil)(Text Only Order) (rz) (Entered: 10/07/2020)
01/15/2021	48	LETTER addressed to Judge Mary Kay Vyskocil from Jennifer C. Simon dated January

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		15, 2021 Document filed by Alex M. Azar, II, United States Department of Health and Human Services..(Simon, Jennifer) (Entered: 01/15/2021)
01/19/2021	49	ORDER Plaintiffs are directed to file a letter responding to the Defendants' letter [ECF No. 48] on or before January 21, 2021. (HEREBY ORDERED by Judge Mary Kay Vyskocil) (Text Only Order) (ab) (Entered: 01/19/2021)
01/21/2021	50	LETTER addressed to Judge Mary Kay Vyskocil from Counsel for Plaintiffs dated 1/21/2021 re: Family Equality et al. v. Azar et al.. Document filed by Family Equality, Services & Advocacy for GLBT Elders, Services & Advocacy for LGBT Elders, True Colors United, Inc...(Miller, Kristen) (Entered: 01/21/2021)
02/02/2021	51	ORDER: The Court has received letters from the Parties regarding regulatory developments that may moot Plaintiffs' claims in this case [ECF Nos. 48, 50]. In light of those recent regulatory actions, IT IS HEREBY ORDERED that this case is STAYED pending further order of the Court. The Parties are directed to file a joint letter on the ECF docket on or before February 16, 2021 regarding whether the Final Rule referenced in the Parties letters has become effective, or whether there have been any other developments which impact this case. Following receipt of the Parties' letter, the Court will enter an order regarding next steps in this case. (Signed by Judge Mary Kay Vyskocil on 2/2/2021) (mro) (Entered: 02/02/2021)
02/16/2021	52	JOINT LETTER addressed to Judge Mary Kay Vyskocil from Jennifer C. Simon dated February 16, 2021 Document filed by Alex M. Azar, II, United States Department of Health and Human Services..(Simon, Jennifer) (Entered: 02/16/2021)
04/06/2021	53	ORDER The Court has reviewed the Parties' joint letter. The stay of this case is extended to June 1, 2021. On or before that date, the Parties must submit a further status update to the Court regarding any developments relevant to this litigation. (HEREBY ORDERED by Judge Mary Kay Vyskocil) (Text Only Order) (ab) (Entered: 04/06/2021)
04/27/2021	54	LETTER addressed to Judge Mary Kay Vyskocil from Jennifer C. Simon dated April 27, 2021 Document filed by Alex M. Azar, II, United States Department of Health and Human Services..(Simon, Jennifer) (Entered: 04/27/2021)
04/29/2021	55	MEMO ENDORSEMENT re: 54 Letter filed by United States Department of Health and Human Services, Alex M. Azar, II. ENDORSEMENT: GRANTED. The Parties should file their status report on May 3, 2021. (Signed by Judge Mary Kay Vyskocil on 4/29/2021) (nb) (Entered: 04/29/2021)
05/03/2021	56	JOINT LETTER addressed to Judge Mary Kay Vyskocil from Jennifer C. Simon dated May 3, 2021 Document filed by Alex M. Azar, II, United States Department of Health and Human Services..(Simon, Jennifer) (Entered: 05/03/2021)
05/05/2021	57	MEMO ENDORSEMENT re: 56 Letter filed by United States Department of Health and Human Services, Alex M. Azar, II. ENDORSEMENT: In light of the Parties' status update, the Clerk of Court respectfully is requested to lift the stay of this case entered on ECF. (Signed by Judge Mary Kay Vyskocil on 5/5/2021) (nb) (Entered: 05/05/2021)
05/05/2021		Case Stay Lifted. (nb) (Entered: 05/05/2021)
10/15/2021	58	NOTICE OF APPEARANCE by Lucas Estlund Issacharoff on behalf of Alex M. Azar, II, United States Department of Health and Human Services..(Issacharoff, Lucas) (Entered: 10/15/2021)
11/23/2021	59	LETTER addressed to Judge Mary Kay Vyskocil from Jennifer C. Simon dated November 22, 2021 re: Request for Termination of Appearance. Document filed by Alex M. Azar, II, United States Department of Health and Human Services..(Simon, Jennifer) (Entered: 11/23/2021)

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11/29/2021	60	MEMO ENDORSEMENT on re: 59 Letter filed by United States Department of Health and Human Services, Alex M. Azar, II. ENDORSEMENT: Granted. SO ORDERED. Attorney Jennifer C. Simon terminated. (Signed by Judge Mary Kay Vyskocil on 11/29/2021) (tg) (Entered: 11/29/2021)
03/30/2022	61	OPINION AND ORDER GRANTING MOTION TO DISMISS re: 40 MOTION to Dismiss . filed by United States Department of Health and Human Services, Alex M. Azar, II.For the reasons stated above, Defendants' Motion to Dismiss is GRANTED. Because the Court is without subject matter jurisdiction to adjudicate the dispute, the case is dismissed WITHOUT PREJUDICE. The Clerk of the Court respectfully is requested to terminate the motion at ECF No. 40 and close the case. SO ORDERED. (Signed by Judge Mary Kay Vyskocil on 3/30/2022) (tg) Transmission to Orders and Judgments Clerk for processing. (Entered: 03/30/2022)
03/30/2022	62	CLERK'S JUDGMENT re: 61 Memorandum & Opinion in favor of United States Department of Health and Human Services, Alex M. Azar, II against Family Equality, Services & Advocacy for GLBT Elders, True Colors United, Inc. It is hereby ORDERED, ADJUDGED AND DECREED: That for the reasons stated in the Court's Opinion and Order dated March 30, 2022, Defendants' Motion to Dismiss is GRANTED. Because the Court is without subject matter jurisdiction to adjudicate the dispute, the case is dismissed WITHOUT PREJUDICE; accordingly, the case is closed. (Signed by Clerk of Court Ruby Krajick on 3/30/2022) (Attachments: # 1 Right to Appeal) (km) (Entered: 03/30/2022)
05/27/2022	63	NOTICE OF APPEAL from 61 Memorandum & Opinion,, 62 Clerk's Judgment,, Document filed by Family Equality, Services & Advocacy for GLBT Elders, Services & Advocacy for LGBT Elders, True Colors United, Inc.. Form C and Form D are due within 14 days to the Court of Appeals, Second Circuit..(Miller, Kristen) Modified on 5/27/2022 (nd). (Entered: 05/27/2022)
05/27/2022		Appeal Fee Due: for 63 Notice of Appeal,,\$505.00 Appeal fee due by 6/10/2022..(nd) (Entered: 05/27/2022)
05/27/2022		Transmission of Notice of Appeal and Certified Copy of Docket Sheet to US Court of Appeals re: 63 Notice of Appeal..(nd) (Entered: 05/27/2022)
05/27/2022		Appeal Record Sent to USCA (Electronic File). Certified Indexed record on Appeal Electronic Files for 63 Notice of Appeal, filed by Services & Advocacy for LGBT Elders, True Colors United, Inc., Family Equality, Services & Advocacy for GLBT Elders were transmitted to the U.S. Court of Appeals..(nd) (Entered: 05/27/2022)
06/02/2022		USCA Case Number 22-1174 from the U.S. Court of Appeals, 2nd Circ. assigned to 63 Notice of Appeal, filed by Services & Advocacy for LGBT Elders, True Colors United, Inc., Family Equality, Services & Advocacy for GLBT Elders..(nd) (Entered: 06/02/2022)
06/02/2022		USCA Appeal Fees received \$ 505.00 receipt number 754 on 06/02/2022 re: 63 Notice of Appeal, filed by Services & Advocacy for LGBT Elders, True Colors United, Inc., Family Equality, Services & Advocacy for GLBT Elders..(nd) (Entered: 06/02/2022)

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**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

FAMILY EQUALITY; TRUE COLORS
UNITED, INC.; and SERVICES &
ADVOCACY FOR GLBT ELDERS,

Plaintiffs,

v.

ALEX M. AZAR II, in his official capacity
as Secretary, United States Department of
Health and Human Services; THE UNITED
STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES,

Defendants.

Civil Action No. _____

CORRECTED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiffs Family Equality, True Colors United, and Services & Advocacy for GLBT Elders (“SAGE”) (collectively “Plaintiffs”) bring this action under the Administrative Procedure Act (“APA”) to challenge the United States Department of Health and Human Services’ (“HHS”) unlawful Notice of Nonenforcement of Health and Human Services Grants Regulation, 84 Fed. Reg. 63809-01 (Nov. 19, 2019) (“Notice of Nonenforcement”). Issued in November 2019, the Notice of Nonenforcement announced that HHS will not, under any circumstances, enforce 45 C.F.R. § 75.300, which prohibits discrimination based on age, disability, sex, race, color, national origin, religion, sexual orientation, or gender identity in grant programs funded by HHS.

2. HHS administers approximately \$500 billion in grants. Those grants fund critically important programs that provide essential health and welfare services to millions of people around the country. Those people include some of the most vulnerable members of our society such as children in foster care, youth experiencing homelessness, and older people. Prior to the November 2019 Notice of Nonenforcement, a uniform and explicit regulatory prohibition against discrimination protected beneficiaries of, and participants in, these programs. As a result of HHS's unlawful decision to abandon enforcement of existing law, HHS sends a message that it intends to protect beneficiaries and participants under only a limited hodgepodge of non-discrimination requirements found in the programs' underlying statutes. That result, in effect, removes critical protections and introduces substantial confusion among grant recipients regarding their legal obligations and the right of the populations they serve to be free from discrimination.

3. In 2016, HHS revised its grants regulations in order to reflect existing law and previously uncodified agency policy. Among other things, the agency codified a policy that prohibited discrimination on the basis of age, disability, sex, race, color, national origin, religion, sexual orientation, or gender identity. Health and Human Services Grants Regulation, 81 Fed. Reg. 89393 (Dec. 12, 2016) ("2016 Grants Rule"). The agency explained at the time that it had already adopted the non-discrimination policy and codified it into regulation for all HHS service contracts under which contractors deliver services for HHS programs directly to the public. HHS stated that, by codifying the same policy in its grants regulations, it made explicit that the provision applied equally to grant recipients. The agency also codified a provision that would implement two Supreme Court decisions regarding the constitutional rights of same-sex couples: *United States v. Windsor*, barring discrimination by the federal government against same-sex

couples under the Fifth Amendment, and *Obergefell v. Hodges*, holding unconstitutional laws barring same-sex couples from marriage under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Following a comment period that yielded universal support for the proposed non-discrimination provisions, the agency finalized the rule in December 2016 without any changes to those provisions.

4. Now, several years later, Defendants have, in their Notice of Nonenforcement, unlawfully adopted a substantive rule that guts the anti-discrimination provisions. By categorically refusing to enforce the 2016 non-discrimination regulation, no matter how egregious the discrimination, Defendants have altered the regulatory obligations imposed upon grant recipients. As its sole rationale, the Administration has offered a legally incorrect assertion—that the 2016 rulemaking was likely promulgated in violation of the Regulatory Flexibility Act.

5. At the same time that it issued the Notice of Nonenforcement, HHS also released a notice of proposed rulemaking that would permanently weaken the anti-discrimination protections. The proposed rule would eliminate the comprehensive and inclusive list of protected classes in the existing rule and leave only those protections that exist in statutes authorizing grant programs. In the accompanying press release, Defendants asserted that the broader purpose for both actions was to “eliminat[e] regulatory burden, including burden on the free exercise of religion,” signaling it would allow religion to be weaponized to discriminate against lesbian, gay, bisexual, transgender, queer and questioning (“LGBTQ”) youth, families, and older people and ignoring other constitutional constraints on such discrimination.

6. HHS’s actions give recipients of federal funds a license to discriminate in their provision of government-funded services to millions of people. Among those most likely to be

impacted are LGBTQ children and youth. Those children and youth are particularly vulnerable when placed in out-of-home care or while experiencing homelessness, where they are dependent on grantees for care and services. In addition, LGBTQ families interacting with the child welfare system are likely to be subjected to discrimination. Finally, HHS's actions invite discrimination against vulnerable LGBTQ older people who depend on critical aging services to obtain nutrition, address social isolation, and receive holistic care.

7. The Notice of Nonenforcement is unlawful. Despite the sweeping impact of this substantive rulemaking, Defendants provided no opportunity for public comment. That omission violates their obligations under the APA. The Notice of Nonenforcement is also arbitrary and capricious. The only proffered explanation is an incorrect legal determination that the 2016 rulemaking violated the Regulatory Flexibility Act, which cannot support HHS's action. Finally, the Notice of Nonenforcement is also arbitrary and capricious because Defendants failed to provide a reasoned explanation for their actions and to consider important aspects of the problem, such as the harms that would result from this blanket policy of nonenforcement.

8. Plaintiffs respectfully request that the Court declare that the Notice of Nonenforcement violates the APA and vacate the Notice.

PARTIES

9. Plaintiff Family Equality (previously known as "Family Equality Council") is a nonprofit, nonpartisan organization that is headquartered at 475 Park Avenue South, New York, NY 10016. Founded in 1979, Family Equality's mission is to advance legal and lived equality for LGBTQ families. Recognizing that every LGBTQ person has a right to form and sustain a loving family, and that all children deserve a stable, loving forever family, Family Equality

advances its mission in part by working to ensure that adoption and foster care services, including those funded by HHS grant programs, are free from discrimination.

10. To further this mission, Family Equality's daily operations include several activities that are relevant here. First, Family Equality conducts outreach and education to LGBTQ families and support groups to ensure that those families understand their rights and are empowered to advocate for themselves. Second, Family Equality works on the federal and state levels to ensure that adoption and foster care services do not discriminate against LGBTQ youth in need of homes or LGBTQ adults seeking to become parents or guardians. This work involves securing affirmative protections at the federal and state level and working to stop or repeal policies that allow for discrimination, such as license-to-discriminate laws that allow providers to discriminate in the name of religion. To that end, Family Equality convenes and co-chairs the Every Child Deserves a Family Campaign, a national campaign of over 500 faith, child welfare, civil rights, LGBTQ, and allied organizations and individuals that come together in an effort to end anti-LGBTQ discrimination in the child welfare system and promote the best interests of all children in the foster care and adoption system by increasing their access to loving, stable forever homes.

11. Prior to the Notice of Nonenforcement, Family Equality had relied on HHS's 2016 Grants Rule to help ensure that adoption and foster care service providers do not discriminate against LGBTQ youth in the child welfare system or LGBTQ adults who are potential foster or adoptive parents. For example, Family Equality has relied upon the non-discrimination protections of the 2016 Grants Rule in its work to prevent discriminatory state legislation that affirmatively permits child welfare agencies to discriminate. As part of that work,

Family Equality was able to explain to state policymakers that HHS preempted any such license-to-discriminate laws for recipients of federal funds.

12. True Colors United is a nonprofit, nonpartisan organization that is headquartered at 311 West 43rd Street, New York, NY 10036. Founded in 2008, True Colors United is an advocacy and direct services organization. Its mission is to implement innovative solutions to youth homelessness that focus on the unique experiences of LGBTQ young people. Recognizing that LGBTQ youth are 120 percent more likely to experience homelessness than their non-LGBTQ peers, True Colors United furthers its mission by working to end youth homelessness and to ensure that homelessness services, many of which are funded through HHS grant programs, are safe for LGBTQ youth.

13. In its daily operations, True Colors United accomplishes these objectives through several activities. First, True Colors United offers free training, education, and technical assistance programs to homelessness service providers in order to ensure that LGBTQ youth experiencing homelessness have access to safe and supportive services, and to increase the likelihood that youth homelessness is rare and brief. Second, True Colors United works at the federal, state, and local levels to promote funding, policies, systems, and protections that meet the needs of LGBTQ youth experiencing homelessness, including protections from discrimination, as well as affirmation and support related to all aspects of these youths' identities, including sexual orientation, gender identity, and gender expression. Third, True Colors United provides LGBTQ youth experiencing homelessness with leadership development opportunities that elevate their voices so they can play an active role in creating solutions to homelessness and other related problems.

14. Prior to the Notice of Nonenforcement, True Colors United had relied on HHS's non-discrimination requirements in educating and training recipients of HHS's Runaway and Homeless Youth grant awards about the importance of providing services that are safe for LGBTQ youth. As described in more detail below, True Colors United has regularly relied on these requirements in its education and trainings for service providers. For example, True Colors United has educated service providers on the federal non-discrimination protections when presenting at conferences, such as True Colors United's annual Impact Summit. These presentations informed providers of their legal obligations under the federal regulations and helped the audience, including HHS grantees, to understand how the protections operate in practice, using hypotheticals and interactive question-and-answer sessions.

15. Plaintiff SAGE is a nonprofit, nonpartisan organization that is headquartered at 305 Seventh Avenue, New York, NY 10001. Founded in 1978, SAGE is a national advocacy and services organization whose mission is to allow LGBTQ older people to age with respect and dignity.

16. SAGE accomplishes this mission through a variety of actions. First, SAGE runs the National Resource Center on LGBT Aging, a technical assistance resource center aimed at improving the quality of services and supports offered to LGBTQ older people, which was established in 2010 through a grant from HHS under the Older Americans Act. The National Resource Center provides resources, training, and technical assistance to a federal network of elder service providers—including those who receive HHS funding—on issues such as LGBTQ inclusion, LGBTQ cultural competency, and elder abuse and neglect. Second, SAGE provides training to long-term care providers and senior housing providers in how to work effectively, respectfully, and in a non-discriminatory manner with LGBTQ older people. Third, SAGE

provides direct services to LGBTQ older people in New York City through its “SAGE Centers,” where LGBTQ older people may obtain meals, access social and cultural programming, and gain assistance with obtaining a variety of aging services (*e.g.*, health, financial, and social services; short-term counseling and support groups; care management; financial aid; and benefits and entitlements assistance). Similarly, SAGE coordinates a network of affiliates that provide various services nationwide, ranging from the organization of social gatherings to the provision of congregate meals (*i.e.*, meals served at group sites such as senior centers). Fourth, SAGE has established a housing initiative under which it has partnered with other organizations to support the construction of LGBTQ-friendly elder housing across the country and to build the first LGBTQ-friendly elder housing in New York. Fifth, SAGE works at the federal- and state-levels to ensure that policies, systems, and protections are in place to meet the needs of LGBTQ older people.

17. Prior to the Notice of Nonenforcement, SAGE had relied on HHS’s non-discrimination requirements to help ensure that service providers who receive funds under the Older Americans Act do not discriminate against LGBTQ older people. Recipients of those grant programs provide services designed to ensure that older people can age with dignity in their own homes. Such services include meal delivery services, chores assistance, and financial assistance. When HHS’s non-discrimination protections were in place, SAGE relied on those protections to ensure that age-in-place services were safe for LGBTQ older people. This allowed SAGE to focus its policy efforts on securing affirmative protections for LGBTQ older people in other contexts, such as long-term care facilities.

18. Defendant Alex Azar is sued in his official capacity as the U.S. Secretary of Health and Human Services. His official address is 200 Independence Avenue, S.W., Washington, D.C. 20201.

19. Defendant United States Department of Health and Human Services (“HHS”) is a federal agency headquartered in Washington, D.C., at 200 Independence Avenue, S.W., Washington, D.C. 20201. HHS is an “agency” within the meaning of the APA. 5 U.S.C. § 551(1).

JURISDICTION AND VENUE

20. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because this action arises under federal law.

21. Venue is proper in this district pursuant to 28 U.S.C. § 1391(e).

22. This Court has authority to grant the requested relief in this case pursuant to the APA, 5 U.S.C. § 706, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202.

LEGAL BACKGROUND

A. The Administrative Procedure Act

23. The APA allows a person “suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action” to seek judicial review of that action. 5 U.S.C. § 702. Under the APA, a reviewing court may “compel agency action unlawfully withheld or unreasonably delayed,” *id.* § 706(1), and “hold unlawful and set aside agency action, findings, and conclusions” that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” *id.* § 706(2)(A).

24. Under the APA, an agency is required to provide the public with notice of a proposed rule, 5 U.S.C. § 553(b), and give “interested persons an opportunity to participate in the

rule making through submission of written data, views, or arguments.” *Id.* § 553(c). This requirement applies whenever an agency promulgates a substantive rule, which is an agency action with a present binding effect. Agencies may not evade this requirement by mischaracterizing a rule as a statement of policy. Although the APA exempts grants from notice and comment requirements generally, HHS has agreed to abide by these requirements in its actions related to grants. *See* Public Participation in Rule Making, 36 Fed. Reg. 2532-01 (Feb. 5, 1971).

25. While individual enforcement decisions are presumptively unreviewable under the APA, *Heckler v. Chaney*, 470 U.S. 821, 832 (1985), general statements of enforcement policy are reviewable agency action in certain circumstances, such as when they are based on legal reasoning, *Crowley Caribbean Transport, Inc. v. Pena*, 37 F.3d 671, 677 (D.C. Cir. 1994); *cf. Batalla Vidal v. Duke*, 295 F.Supp.3d 127, 150 (E.D.N.Y. 2017).

26. On review, an agency’s action must be upheld, if at all, on the basis articulated by the agency itself. When an agency’s stated rationale rests on a determination of law, the action may not stand if the agency has misconceived the law—even if the action might have been justified on some other ground.

27. The APA also requires an agency to provide a reasoned explanation for its action, including a rational connection between the facts found and the choices made. An agency action shall be set aside as arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

B. The Regulatory Flexibility Act

28. The RFA generally requires agencies to complete an analysis—referred to as a regulatory flexibility analysis—of the potential effects a proposed rule may have on small business entities and to consider alternatives that would minimize the economic impacts of the rule on such entities. 5 U.S.C. §§ 603, 604. Congress found that regulations designed for large scale entities can place “disproportionate burden[s] ... upon small businesses” and “create entry barriers” when applied uniformly to small businesses. Regulatory Flexibility Act, Pub. L. No. 96-354, § 2, 94 Stat. 1164 (1980). By requiring agencies to undertake the regulatory flexibility analysis, the RFA ensures that agencies consider the size and nature of the businesses that would be regulated when proposing regulation. *See id.*

29. However, the RFA also recognizes that not all regulations will substantially impact small entities. In those instances, preparing a full regulatory flexibility analysis would be inefficient. Accordingly, the RFA provides that agencies may forgo the regulatory flexibility analysis if the head of the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. § 605(b). If it makes such a determination, the agency “shall publish [the] certification in the Federal Register, at the time of publication of general notice of proposed rulemaking for the rule or at the time of publication of the final rule, along with a succinct statement explaining the reasons for such certification.” *Id.*

30. An agency need not follow a set format or include specific words to satisfy the certification requirements. The D.C. Circuit has upheld a certification, for example, that lacked the word “certify” and relied on analysis that appeared throughout the rule’s preamble. *Council for Urological Interests v. Burwell*, 790 F.3d 212, 226-27 (D.C. Cir. 2015).

31. Similarly, where a rule maintains the status quo or does not impose additional burdens beyond pre-existing regulations, an agency may satisfy the requirement for a statement of factual basis by explaining succinctly that the rule will not impose additional burdens. *See Associated Builders & Contractors, Inc. v. Herman*, 976 F. Supp. 1, 15-16 (D.D.C. 1997).

FACTUAL ALLEGATIONS

A. HHS Adopted the Uniform Administrative Requirements Pursuant to a Government-Wide Grantmaking Reform Effort.

32. HHS adopted its grantmaking regulations as part of a government-wide effort to reform and standardize the federal grantmaking process. The goal of that reform was for federal agencies such as HHS to incorporate the Office of Management and Budget's ("OMB") Uniform Administrative Requirements ("UAR") into their respective regulations. Federal Awarding Agency Regulatory Implementation of OMB's Uniform Administrative Requirements, 79 Fed. Reg. 75871 (Dec. 19, 2014).

33. The UAR standardized federal grantmaking regulations to ensure that federal grant programs are run more efficiently and effectively. 79 Fed. Reg. at 75873. HHS adopted the UAR in 2014 with certain amendments intended to accommodate pre-existing agency-specific guidance. *See id.* at 75873, 75875.

B. The 2016 Grants Rule Clarified the Scope of HHS Anti-Discrimination Policies.

34. On July 13, 2016, HHS proposed a rule that would modify HHS's adoption of the UAR, 45 C.F.R. Part 75, to reflect existing law and HHS policy that had not previously been codified in regulation. Health and Human Services Grants Regulation, 81 Fed. Reg. 45270-01 (July 13, 2016) ("2016 Proposed Rule"). Among other things, the agency proposed to clarify certain aspects of its grants regulations, to implement two Supreme Court decisions barring

discrimination against same-sex couples, and to “codif[y] long-standing [HHS] policies.” 81 Fed. Reg. at 45271, 45272.

35. First, the 2016 Proposed Rule would “codif[y] a prohibition in the provision of services of discrimination on the basis of age, disability, sex, race, color, national origin, religion, sexual orientation, or gender identity.” *Id.* at 45271. The agency explained that this non-discrimination policy had already been adopted for all HHS service contracts under which services for HHS programs are delivered directly to the public. By codifying the same policy in the grants regulations, HHS “ma[de] . . . explicit” “that this same provision applies equally to grants.” *Id.*

36. Second, HHS proposed to “codif[y] its implementation of the decisions in *U.S. v. Windsor*, [570 U.S. 744] (2013), . . . and *Obergefell v. Hodges*, [135 S. Ct. 2584] (2015)” to ensure that same-sex spouses are treated the same as different-sex spouses when determining beneficiary eligibility or participating in grant-related activities. *Id.* HHS characterized both changes as “non-controversial” because they were “proposed for consistency with law and current HHS policy,” but “nonetheless request[ed] public comment.” *Id.*

37. Recognizing the requirement to provide a final regulatory flexibility analysis or a certification as to no significant economic impact on a substantial number of small entities, HHS also addressed the RFA in the Proposed Rule. 81 Fed. Reg. at 45272. The agency concluded that: “[t]his NPRM aligns 45 CFR part 75 with various regulatory and statutory provisions, implements Supreme Court decisions, and codifies long-standing policies thus clarifying and enhancing [HHS’s implementing UAR regulations] . . . The proposed additions provide enhanced direction for the public and will not have a significant economic impact beyond HHS’s

current regulations.” *Id.* HHS received no comments to the contrary or that otherwise raised any concern about the impact of the proposed rule on small entities.

38. In response to the non-discrimination provisions, HHS received “twelve comments . . . , all of which were strongly supportive of the codification of the nondiscrimination provisions in HHS awards.” 81 Fed. Reg. 89393.

39. HHS issued the final rule on December 12, 2016, adopting the same non-discrimination requirements as in the proposed rule. *Id.*

40. Accordingly, 45 C.F.R. § 75.300 now includes the following subsections:

(c) It is a public policy requirement of HHS that no person otherwise eligible will be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services based on non-merit factors such as age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation. Recipients must comply with this public policy requirement in the administration of programs supported by HHS awards.

(d) In accordance with the Supreme Court decisions in *United States v. Windsor* and in *Obergefell v. Hodges*, all recipients must treat as valid the marriages of same-sex couples. This does not apply to registered domestic partnerships, civil unions or similar formal relationships recognized under state law as something other than a marriage.

45 C.F.R. § 75.300.

41. Consistent with the absence of any comments to the contrary, HHS certified that, for purposes of the RFA, the rule would not have a significant economic impact on a substantial number of small entities. 81 Fed. Reg. at 89394. Repeating its conclusion from the proposed rule, the Agency explained that the “final rule aligns 45 CFR part 75 with various regulatory and statutory provisions, implements Supreme Court decisions, and codifies long-standing policies thus clarifying and enhancing [HHS’s implementing UAR regulations].” *Id.* In light of these facts, and because the “additions provide enhanced direction for the public,” the agency

concluded that the rule would “not have a significant economic impact beyond HHS’s current regulations.” *Id.*

42. The effect of the 2016 Grants Rule was to make HHS’s non-discrimination requirements clear and universal across its many grant programs and to clarify for grant recipients their obligations pursuant to the Supreme Court’s decisions in *Windsor* and *Obergefell*. Previously, HHS’s grant programs were subject to a patchwork of statutory and regulatory non-discrimination requirements which provided protections as to various, but not necessarily all, of the non-merit factors protected by the 2016 Grants Rule (*i.e.*, age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation).

43. In addition to child welfare programs and services for youth experiencing homelessness and older people, the 2016 Grants Rule affected a wide range of other grant programs. Those programs include, but are not limited to major health initiatives (such as grants for HIV/AIDS prevention and support programs), early childhood programs (such as Head Start), nutrition assistance programs (such as Meals on Wheels), domestic violence prevention and response programs, and efforts to combat human trafficking.¹

C. HHS Has Gutted the 2016 Grants Rule.

44. In conflict with HHS’s established rules and policy, Defendants have engaged in systematic efforts to undermine the civil rights of, and non-discrimination protections for, LGBTQ people in the United States. HHS’s decision to walk away entirely from enforcing the still-valid 2016 Grants Rule is a glaring example.

¹ See 45 C.F.R. § 75.101 (identifying scope of grant programs governed by the UAR).

45. On November 1, 2019, HHS announced a pair of agency actions that limit the non-discrimination protections it will enforce.²

46. First, Defendants announced a Notice of Proposed Rulemaking that will, if finalized, permanently weaken the non-discrimination provisions found at 45 C.F.R. § 75.300. Specifically, the proposed rule would require grantees to comply only with statutory discrimination protections. *See* Office of the Assistant Secretary for Financial Resources; Health and Human Services Grants Regulation, 84 Fed. Reg. 63831, 63832 (Nov. 19, 2019) (“2019 Proposed Rule”) (proposing to amend 45 C.F.R. § 75.300(c) to prohibit discrimination “to the extent doing so is prohibited by federal statute”). In a corresponding press release, HHS claimed that the proposed rule would “better align its grant regulations with federal statutes,” which Defendants assert “require that the federal government not infringe on religious freedom in its operation of HHS grant programs and address the impact of regulatory actions on small entities.”³

47. Simultaneously, Defendants issued a Notice of Nonenforcement informing the public that HHS would no longer enforce any of the still-valid grants provisions at issue in the 2016 Grants Rule—including the non-discrimination provisions—pending the agency’s decision on the proposed rulemaking. Notice of Nonenforcement, 84 Fed. Reg. at 63809.

48. To support the effective elimination of the 2016 Grants Rule by the Notice of Nonenforcement, HHS proffers a single rationale—namely, that the 2016 Grants Rule raised “significant concerns about compliance with the Regulatory Flexibility Act.” *Id.* at 63809. The

² *See* Press Release, HHS, HHS Issues Proposed Rule to Align Grants Regulation with New Legislation, Nondiscrimination Laws, and Supreme Court Decisions (Nov. 1, 2019), <https://www.hhs.gov/about/news/2019/11/01/hhs-issues-proposed-rule-to-align-grants-regulation.html>.

³ HHS Press Release.

Notice asserted that the 2016 Grants Rule may have violated the RFA because it “neither performed the RFA analysis described in 5 U.S.C. 602–604, nor expressly certified that the rules ‘will not . . . have a significant economic impact on a substantial number of small entities’ and provided a statement with the factual basis for such certification as provided for by section 605(b).” *Id.* at 63809.

49. The Notice of Nonenforcement did not provide any meaningful analysis regarding the potential impact of the non-discrimination provisions specifically on small entities. Nor does the Notice provide any empirical analysis, or even a single example, of the impact of the Rule on small entities during the nearly three years during which it was operative.

50. Nevertheless, the Notice determined that the provisions promulgated in the 2016 Grants Rule will not be enforced “with respect to *any* grantees until the rules have been properly re-promulgated[.]” *Id.* at 63811 (emphasis added). The Notice asserted that “[a]pplying these rules differently to agency grantees depending on size would be unfair, create increased compliance costs for all entities as they seek to determine whether they are or are not still subject to the rules, and impose additional administrative burdens on the Department disproportionate to the benefit of enforcement.” *Id.*

51. The Notice does not discuss the costs and benefits of the decision to suspend enforcement of the Rule on such a blanket basis, such as whether continuing to enforce the Rule in whole or in part would be in the interests of the beneficiaries of and participants in its programs (or the public interest in general). The Notice is devoid of any discussion regarding the harms that may result from its appearing to give grantees a license to discriminate, or regarding the potential violation of the constitutional rights of LGBTQ people, such as those the Supreme Court recognized in *Obergefell* and *Windsor*. Nor does the Notice discuss the possibility of

continuing to enforce the Rule while engaging in a new RFA analysis. The Notice also does not provide any basis for its assertions that suspending enforcement of the Rule only as to small entities would create increased compliance costs for those entities and additional administrative burdens on the Department.

D. The Notice of Non-Enforcement Violates the APA.

52. The Notice of Nonenforcement is a reviewable agency action under the APA, notwithstanding Defendants' characterization of the action as an enforcement decision. The Notice established a categorical policy of nonenforcement that is grounded solely in a legal determination.

53. The Notice of Nonenforcement is a substantive rule with a present binding effect on the agency and grant recipients. The Notice provides in no uncertain terms that the 2016 Grants Rule will not be enforced "with respect to any grantees[.]" *Id.* at 63811. This affirmatively and categorically circumscribes HHS's authority to enforce the anti-discrimination provisions of that Rule and, as a result, alters the legal obligations HHS will enforce against grant recipients. At a more fundamental and alarming level, the Notice sends a clear message to children, individuals, and families that HHS is prioritizing unquantified, unidentified harms to some grant recipients over their wellbeing.

54. The Notice of Nonenforcement is procedurally invalid because it was promulgated without notice and the opportunity for public comment.

55. The Notice of Nonenforcement is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law in numerous ways, including:

56. Defendants' sole stated rationale for the action is legally incorrect. Contrary to the Notice of Nonenforcement's conclusions, HHS promulgated the 2016 Grants Rule in accordance

with the RFA. Consistent with that statute, it certified that the Rule would not have a significant economic impact on small entities. 81 Fed. Reg. at 89394. Further, the notice promulgating the 2016 Grants Rule explained that the rule would not have a significant economic impact beyond the effects of the agency's current regulations because it merely aligned 45 CFR Part 75 with existing law, implemented Supreme Court decisions, and codified long-standing policies. *Id.*

57. Further, even if the Rule's RFA analysis was flawed, the decision not to enforce the Rule at all is arbitrary and capricious. Defendants failed to provide a reasoned explanation for this decision or to consider important aspects of the problem. Instead, Defendants concluded without any meaningful analysis or support that HHS would abandon enforcement as to *all* grantees because to do otherwise would impose "administrative burdens . . . disproportionate to the benefit of enforcement." 84 Fed. Reg. at 63811. Defendants' reliance on this cost-benefit conclusion is fundamentally flawed as Defendants fail to name or even identify the nature of the benefits they are taking away or the costs that they are supposedly avoiding. *Id.* This omission is striking because, as shown further below, the anti-discrimination provisions that Defendants abandon provide protections for millions of people served by HHS-funded grant programs, including by clarifying the constitutional rights afforded to LGBTQ people, including those recognized by the Supreme Court in *Obergefell* and *Windsor*. HHS's Notice provides no explanation for its decision to step away from ensuring that these rights are protected. Nor does it acknowledge that a policy of blanket non-enforcement will directly harm many of those people that the 2016 Grants Rule intended to protect. And HHS's move flies in the face of years of its

own studies,⁴ bulletins,⁵ trainings,⁶ information memoranda,⁷ and policies or practices that have rightly emphasized how harmful discrimination is to wellbeing and, conversely, how important non-discrimination protections are to ensure all people receive maximum benefit from services and programs.

58. Nor did the agency meaningfully consider other approaches contemplated by the RFA. For example, HHS could have continued to enforce the Rule while revisiting the RFA analysis, an option that the RFA itself specifically provides for non-compliant rules subject to judicial review. 5 U.S.C. § 611(a)(4)(A). Indeed, the statute indicates that such an option is appropriate when “continued enforcement of the rule is in the public interest.” *Cf. id.* § 611(a)(4)(B). Or HHS could have determined to suspend enforcement only against small entities. *Id.* Yet HHS’s explanation omitted any discussion of the “benefit of enforcement” as to some or all entities. 84 Fed. Reg. at 63811.

⁴ See, e.g., HHS, *Advancing LGBT Health & Well-Being: 2016 Report of the HHS LGBT Policy Coordinating Committee* (2016), <https://www.hhs.gov/sites/default/files/2016-report-with-cover.pdf>; HHS, *OPRE Report #2014-79, Human Services for Low-Income and At-Risk LGBT Populations: An Assessment of the Knowledge Base and Research Needs* (2014), https://www.acf.hhs.gov/sites/default/files/opre/lgbt_hsneeds_assessment_reportfinal1_12_15.pdf.

⁵ See, e.g., HHS, *The Brooklyn Hospital Center Implements Non-Discriminatory Practices to Ensure Equal Care for Transgender Patients* (July 14, 2015), <https://www.hhs.gov/sites/default/files/ocr/civilrights/activities/agreements/TBHC/statement.pdf>.

⁶ See, e.g., Sylvia Berekyei et al., *Stopping Discrimination before it Starts: the Impact of Civil Rights Laws on Health Care Disparities*, MedEd PORTAL (2009), https://doi.org/10.15766/mep_2374-8265.7740 (a joint project between HHS’s Office for Civil Rights, Office of the General Counsel, and Stanford University School of Medicine).

⁷ See, e.g., Letter from HHS Office for Civil Rights Administration for Children and Families and U.S. Dep’t of Justice Civil Rights Division Federal Coordination and Compliance Section, <https://www.hhs.gov/sites/default/files/title-vi-child-welfare-guidance-10-19-16.pdf> (addressing implementation of Title VI of Civil Rights Act in child welfare system).

E. The Notice of Nonenforcement Invites Discrimination Against Already Vulnerable LGBTQ Youth in Foster Care and Experiencing Homelessness.

59. LGBTQ youth are overrepresented in both the foster care setting and among youth experiencing homelessness. In foster care, for example, LGBTQ youth represent 30.4 percent of the population, even though they comprise only 11.2 percent of youth overall.⁸ Similarly, LGBTQ youth are 120 percent more likely to experience homelessness than their non-LGBTQ peers and comprise 40 percent of all youth experiencing homelessness.⁹

60. One 2019 study by researchers at the University of Texas at Austin explained that LGBTQ youth are overrepresented in both settings due to a pattern of discrimination. When LGBTQ youth disclose their sexual orientation or gender identity to family members, they can face verbal and physical harassment, which in turn can result in their entry into the child welfare and foster systems, or in homelessness.¹⁰ This pattern of discrimination continues in the child welfare and foster systems, where “LGBTQ youth are more likely to experience victimization and abuse by social work professionals, foster parents, and peers,” which result in “poorer functional outcomes,” including youth running away from the foster system.¹¹

61. These problems are compounded when foster care and adoption agencies refuse to place children in the homes of LGBTQ prospective parents and guardians. Such discrimination harms LGBTQ youth in two ways. First, it signals to LGBTQ youth that families with LGBTQ parents are less deserving of dignity and equal protection under the law. Second, by excluding

⁸ Laura Baams et al., *LGBTQ Youth in Unstable Housing and Foster Care*, 143 *Pediatrics* 3 (2019), <https://pediatrics.aappublications.org/content/pediatrics/143/3/e20174211.full.pdf>.

⁹ Michael Santos and Justin T. Rush, True Colors United and the National Law Center on Homelessness & Poverty, State Index on Youth Homelessness 13, 19 (2018), available at <https://drive.google.com/file/d/14hCgF6gwxF7At2kanWLulciE1NPN-Z5C/view>.

¹⁰ *LGBTQ Youth in Unstable Housing and Foster Care* at 2.

¹¹ *Id.*

LGBTQ adults from eligibility, the total pool of potential homes, and particularly LGBTQ-affirming homes, for kids who desperately need those homes, is diminished.

62. Such harms contribute to “an overlapping issue: homelessness,”¹² where LGBTQ youth continue to encounter discrimination and other barriers to “care and support from programs that are not designed to serve them.”¹³ These realities “stymie[] their ability to exit homelessness.”¹⁴

63. The anti-discrimination provisions in the 2016 Grants Rule provided clear and uniform protections for LGBTQ youth and families receiving HHS-funded services, as well for the millions of people who receive services across all HHS grant programs. By abandoning these protections, the Trump Administration affirmatively invites discrimination, especially on the basis of sexual orientation and gender identity.

64. In the child welfare and foster systems, HHS grant recipients include child welfare agencies that receive grant money under the Social Security Act Title IV-E program. Those grants are intended to support those agencies’ work in providing foster care, adoption assistance, and kinship guardian assistance. LGBTQ youth have historically suffered from various forms of discrimination at the hands of many child welfare agencies, including conversion therapy, verbal and physical abuse, a refusal to place LGBTQ youth with LGBTQ parents, and other forms of discrimination. These kinds of harms are exactly what HHS’s non-discrimination protections were designed to prevent. By issuing the Notice of Nonenforcement, HHS has explicitly invited child welfare agencies that receive HHS grant funding to continue to discriminate in these ways.

¹² *Id.*

¹³ State Index on Youth Homelessness at 13.

¹⁴ *Id.*

65. The Notice of Nonenforcement also increases the likelihood of discrimination by recipients of grant money under the Runaway and Homeless Youth Street Outreach, Basic Center, and Transitional Living programs. Under those programs, grant recipients provide youth experiencing homelessness with emergency shelter, crisis intervention, food, clothing, and medical care, as well as longer-term interventions to support them in achieving better outcomes in employment, housing, health, and education. But many of those providers have also historically been known to discriminate against LGBTQ youth. For example, some providers impose discriminatory conditions on their services, forcing LGBTQ youth to choose between forgoing services altogether or accepting housing arrangements, clothing, and other services that deny their sexual orientation or gender identity.¹⁵ Providers also subject LGBTQ youth to messages condemning their sexual orientation or gender identity, including dangerous and harmful conversion therapy practices that attempt to change their identity. HHS's Notice of Nonenforcement invites homelessness service providers to engage in such discrimination.

66. That invitation is especially harmful because it compounds the agency's decisions to abandon other efforts to prevent discrimination against LGBTQ youth in the Runaway and Homeless Youth grant programs. While those programs include their own regulatory non-discrimination protections for sexual orientation and gender identity, HHS has abandoned efforts to ensure that Runaway and Homeless Youth grantees understand and comply with the program-specific non-discrimination requirements.

¹⁵ Caitlin Rooney et al., Center for American Progress, *Discrimination Against Transgender Women Seeking Access to Homeless Shelters* (2016), <https://www.americanprogress.org/issues/lgbtq-rights/reports/2016/01/07/128323/discrimination-against-transgender-women-seeking-access-to-homeless-shelters/>.

67. Promulgated in 2016, the Runaway and Homeless Youth non-discrimination provisions require grantees to provide services that are “language appropriate, gender appropriate . . . , and culturally sensitive and respectful of the complex social identities of youth[.]” 45 C.F.R. § 1351.22(a). These provisions further state that “[n]o runaway youth or homeless youth shall . . . be excluded from participation in, be denied the benefits of, or be subject to discrimination under, any program or activity funded in whole or in part under the Runaway and Homeless Youth Act” on the basis of “race, ethnicity, nationality, age, religion/spirituality, gender identity/expression, sexual orientation, socioeconomic status, physical or cognitive ability, language, beliefs, values, behavior patterns, or customs.” *Id.*

68. Recognizing that service providers need education and support to bring their services into alignment with all grant program requirements, HHS’s Runaway and Homeless Youth regulations require grantees to “participate in technical assistance, monitoring, and short term training as a condition of funding, as determined necessary by HHS, in such areas as . . . [LGBTQ] and intersex youth[.]” *Id.* § 1351.23(a).

69. Consistent with its regulations, HHS has previously required grantees to participate in LGBTQ training and to certify that their programs are non-discriminatory and take LGBTQ needs into account.¹⁶ Further, the agency ensured that LGBTQ youth training was available through the Runaway and Homeless Youth Technical Assistance and Training Center

¹⁶ See, e.g., Administration on Children, Youth, and Families, 2014 Basic Center Program Funding Opportunity Announcement 5, 20, 56 (May 12, 2014), https://ami.grantsolutions.gov/files/HHS-2014-ACF-ACYF-CY-0792_0.pdf; Administration on Children, Youth, and Families, 2016 Street Outreach Program Funding Opportunity Announcement 6, 7, 22, 59 (July 5, 2016), https://ami.grantsolutions.gov/files/HHS-2016-ACF-ACYF-YO-1124_0.pdf.

(“RHYTTAC”), which is operated by a private contractor, but funded and overseen by HHS.¹⁷ On information and belief, RHYTTAC has provided non-discrimination and other LGBTQ trainings at its annual conference since as early as 2012. These trainings have typically been provided by organizations like True Colors United, who submit applications to present at the conference.

70. However, HHS has abandoned these efforts to ensure that grant recipients understand and comply with the LGBTQ non-discrimination requirements for the Runaway and Homeless Youth grant programs. Since 2017, funding opportunity announcements for Runaway and Homeless Youth grants no longer require grant applicants to participate in LGBTQ training or to certify that their programs do not discriminate against LGBTQ youth.¹⁸ Likewise, HHS provided no LGBTQ youth training at the 2019 annual RHYTTAC conference despite the fact that organizations such as True Colors United submitted applications to present such training. True Colors United’s application was denied without explanation.

71. By ceasing its LGBTQ technical assistance and training and by no longer including LGBTQ non-discrimination requirements in its Runaway and Homeless Youth funding opportunity announcements, HHS has effectively forsaken the LGBTQ non-discrimination protections and the proactive development and distribution through training of affirming practices specific to those grant programs.

¹⁷ *Homepage*, Family & Youth Services Bureau, Runaway and Homeless Youth Training and Technical Assistance Center, <https://www.rhyttac.net/>.

¹⁸ *See, e.g.*, Administration on Children, Youth, and Families, 2017 Street Outreach Program Funding Opportunity Announcement (July 11, 2017), https://ami.grantsolutions.gov/files/HHS-2017-ACF-ACYF-YO-1241_0.pdf; Administration on Children, Youth, and Families, 2019 Street Outreach Program Funding Opportunity Announcement (July 1, 2019), https://ami.grantsolutions.gov/files/HHS-2019-ACF-ACYF-YO-1554_0.pdf.

72. Against this background, the agency's decision to abandon the non-discrimination protections in the 2016 Grants Rule leaves LGBTQ youths experiencing homelessness without effective federal statutory or regulatory protection from discrimination. HHS's failure even to acknowledge the conflict between the RHY Rule and its work to support LGBTQ youth is yet another example of its failure to conduct a rational analysis and its taking action contrary to its own findings and technical assistance.

F. The Notice of Nonenforcement Invites Discrimination Against LGBTQ Older People.

73. LGBTQ older people are highly vulnerable to the consequences of systemic discrimination. In order to age successfully, older people require competent healthcare, economic security, and strong family and social support.¹⁹ But due to the cumulative effect of a lifetime of discrimination and stigma, LGBTQ older people face significant disparities in these areas when compared to their non-LGBTQ peers—disparities that profoundly impact their quality of life.²⁰ Many LGBTQ older people, for example, live with serious economic insecurity after experiencing a lifetime of housing and employment discrimination.²¹ They are also often socially isolated and vulnerable, having relied largely on a smaller circle of chosen family and friends throughout their lives, as a result of family rejection and legalized discrimination.²² And for most of their lives, LGBTQ older people have been unable to take advantage of the financial security

¹⁹ SAGE and Movement Advancement Project, Understanding Issues Facing LGBT Older Adults6 (2017), <https://www.sageusa.org/wp-content/uploads/2018/05/sageusa-understanding-issues-facing-lgbt-older-adults.pdf> (“SAGE Report”).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

and other protections afforded by marriage.²³ These vulnerabilities are compounded by the fact that LGBTQ older people continue to face discrimination as they age.²⁴

74. Against this background, LGBTQ older people are particularly likely to rely on the support and social services provided by non-profits and government-funded programs. Among other critical services, LGBTQ older people rely on programs that are funded by HHS under the Older Americans Act, which aims to enable older people to age with dignity and remain independent as long as possible. To that end, HHS administers programs that provide a wide range of home and community-based services, such as home-delivered nutrition services (*i.e.*, Meals on Wheels), congregate nutrition services (*i.e.*, meals served at group sites such as senior centers), in-home chore assistance services, transportation services, legal services, and elder abuse prevention services.²⁵

75. HHS's Notice of Nonenforcement jeopardizes these already-vulnerable LGBTQ older people by abandoning the only codified non-discrimination protections available to most of them in this context. Unlike other grant programs, the Older Americans Act does not include explicit non-discrimination provisions, and most states lack explicit non-discrimination protections for the type of home and community-based services provided under the Act. Further, by grounding its Notice of Nonenforcement in a claimed need to advance religious liberty, HHS

²³ *Id.*

²⁴ *Id.* at 7, 17 (discussing discrimination faced by LGBTQ older people in housing, health care, and long-term care facilities).

²⁵ Congressional Research Service, R43414, Older Americans Act: Overview and Funding 1, 5 (2018), <https://crsreports.congress.gov/product/pdf/R/R43414>.

has explicitly invited providers of these services, many of whom are faith-based organizations,²⁶ to discriminate against LGBTQ older people.

G. Injuries to Plaintiffs.

76. The Notice of Nonenforcement directly harms Plaintiffs.

a. Family Equality

77. The Notice conflicts with, impairs, and frustrates Family Equality's mission and activities by impeding its ability to ensure that foster care and adoption services are safe for LGBTQ youth and non-discriminatory for LGBTQ potential parents and guardians.

78. First, the Notice introduces substantial confusion regarding the legal obligations of grant recipients and the right of the populations they serve to be free from discrimination. Under the 2016 Grants Rule, all HHS grant recipients were subject to the same anti-discrimination prohibitions, which protected against discrimination on the basis of age, disability, sex, race, color, national origin, religion, sexual orientation, or gender identity. In the absence of those anti-discrimination provisions, grant recipients are subject to a patchwork of federal and state statutory and regulatory protections, which vary from program to program, and from state to state.

79. Family Equality has responded to the confusion the Notice has caused by conducting a widespread and comprehensive education and outreach campaign to ensure that LGBTQ youths and families understand the full impact of HHS's nonenforcement action and that child welfare agencies receiving HHS grant funds understand their existing obligations not to discriminate against LGBTQ youth. Specifically, Family Equality has already spent

²⁶ See National Association of Area Agencies on Aging, Local Leaders in Aging and Community Living 11 (2017), <https://www.n4a.org/Files/LocalLeadersAAA2017.pdf> (noting that 66 percent of Area Agencies on Aging are faith-based organizations).

approximately 40 hours of staff time assessing the legal effect of the Notice of Nonenforcement, working with other organizations to identify and understand the anti-discrimination protections left in place for HHS's many grant programs. Family Equality has also spent at least 15 hours analyzing the Notice of Nonenforcement's impacts on youths and families, such as the likelihood that increased discrimination will lead to fewer placements and kinship care opportunities, including by conducting research, reading journal articles, and speaking with experts at other organizations. Additionally, Family Equality has spent approximately 10 hours identifying and interviewing LGBTQ families that have experienced discrimination in the foster care system to better understand the impacts of HHS's action. Relying on this research and analysis, Family Equality has spent approximately 70 hours creating and disseminating educational materials, including: email action alerts sent to Family Equality's full network of constituents and partner organizations; online resources for child welfare advocates, LGBTQ parents, and faith-based organizations; and various forms of social media. Family Equality has also spent at least another 22 hours preparing for and conducting informal briefings via conference call for its partner organizations, and approximately 23 hours on media relations, including press releases, securing interviewees for stories, responding to media inquiries, and providing press interviews.

80. Collectively, Family Equality has diverted well over 170 hours of staff time responding to the Notice of Nonenforcement through its public outreach and education campaign, and it expects to continue to expend significant staff time on these efforts going forward. This diverts valuable staff time and resources away from Family Equality's state work and other projects on the federal level, including its work to promote the Every Child Deserves a Family Act—proposed legislation that would provide robust statutory protections for LGBTQ

families and youths in the child welfare and foster care systems—as well as its work on a variety of other policy issues important to its mission, such as paid leave, healthcare, and housing.

81. Second, Family Equality previously relied upon the 2016 Grants Rule in its work to defeat proposed legislation in states throughout the country, such as license-to-discriminate laws that affirmatively permit state-licensed child welfare agencies to refuse to provide services to and place children with LGBTQ people and same-sex couples if doing so conflicts with an agency’s religious belief. As part of that work, Family Equality works to educate state legislators and policymakers on the impacts such laws will have on LGBTQ families and youth. When the 2016 Grants Rule was in place, Family Equality was able to explain to state policymakers that HHS preempted any such license to discriminate laws for recipients of federal funds. Without that tool, Family Equality’s efforts to prevent discriminatory state legislation will be less effective.

b. True Colors United

82. The Notice conflicts with, impairs, and frustrates True Colors United’s mission and activities by impeding its ability to ensure that homelessness services are safe for LGBTQ youth and more broadly, to end youth homelessness. Specifically, the Notice of Nonenforcement impairs True Colors United’s ability to provide services related to youth experiencing homelessness in the following ways:

83. First, True Colors United previously relied upon the 2016 Grants Rule to educate service providers on the importance of not discriminating against LGBTQ youth. For example, when conducting trainings at conferences, such as the Youth Impact Summit,²⁷ True Colors

²⁷ True Colors United similarly presented information on HHS’s anti-discrimination protections at the 2017 RHYTTAC conference, the True Colors United 2019 D.C. Summit, four state-wide

United presented information on the federal prohibitions against such discrimination, and engaged in interactive question-and-answer sessions to help providers understand what discrimination looks like in practice, as well as its negative impacts on LGBTQ youth. Without that tool, True Colors United's efforts to ensure that services are safe and supportive for LGBTQ youth will be less effective. For some providers that merely lack awareness around LGBTQ issues, the Notice of Nonenforcement signals that providers do not need to improve their services for LGBTQ youth. For other service providers, HHS's Notice of Nonenforcement serves as an explicit invitation to discriminate.

84. In the absence of the 2016 Grants Rule's anti-discrimination protections, True Colors United will now have to obtain state-level protections to replace the defunct federal standards. As a direct response to the agency's actions, True Colors United has already begun these efforts in New Mexico and two other states, requiring its Public Policy and External Affairs Director to review those states' current regulations and programs, craft recommended policies, engage with the relevant state agencies, and travel to further meet with those agencies in person. To date, True Colors United has already spent approximately 135 hours of staff time on these three states, including holding 8 phone calls, taking 5 trips for in person meetings, and spending several hours in preparation for those meetings.

85. Because only 12 percent of states have protections in place for LGBTQ youth experiencing homelessness, True Colors United expects to continue this work to improve protections in as many states as possible. For each state, this will require True Colors United to conduct research on the unique issues facing LGBTQ youth experiencing homelessness in that

conferences for Runaway and Homeless Youth providers, and the 2018 National Alliance to End Homelessness Conference.

state, craft state-specific recommendations, engage with state agencies and stakeholders, and—to the extent new protections are adopted by state regulations—participate in the regulatory process by submitting public comments on proposed rulemakings.

86. Second, as discussed above, the Notice of Nonenforcement introduces substantial confusion regarding the legal obligations of grant recipients. In the absence of those anti-discrimination provisions, grant recipients are subject to a patchwork of federal and state statutory and regulatory protections, and a lack of guidance about the constitutional rights of program participants. This problem is compounded for youth homelessness service providers, which face additional confusion as a result of HHS's decision to abandon efforts to protect LGBTQ youth more broadly. While youth homelessness providers that receive HHS grants under the Runaway and Homeless Youth grant programs are technically subject to program-specific discrimination protections, the agency has ceased to provide LGBTQ technical assistance and training and no longer requires grant applicants to certify that their programs are non-discriminatory. These agency actions have strongly signaled that service providers need not concern themselves with understanding and preventing LGBTQ discrimination. That messaging is reinforced by the Notice of Nonenforcement and the concomitant 2019 Proposed Rule, which would require HHS grantees to comply only with statutory protections.

87. This confusion has required True Colors United to conduct an education and outreach campaign to ensure that service providers receiving Runaway and Homeless Youth grant funds understand their existing obligations not to discriminate against LGBTQ youth. Specifically, True Colors United staff have already conducted informal briefings with several partner organizations to explain the impact of the agency's Notice of Nonenforcement and to emphasize that, despite the lack of any enforcement, service providers are still subject to the non-

discriminations provisions specific to the Runaway and Homeless Youth grant programs. These partner organizations include A Way Home America, an organization that works directly with local communities and service providers across the United States, and Funders Together to End Homelessness, a funding roundtable for organizations dedicated to ending homelessness. These partner organizations will, in turn, ensure that the information in True Colors United's briefings will be distributed to local communities and service providers to the extent possible. True Colors United has already spent approximately 10 hours of staff time on these briefings and expects to hold further briefings in the future.

88. In order to combat the harm caused by HHS's actions with these responsive efforts, True Colors United has already expended valuable staff time and resources. As noted above, True Colors United's staff have already spent a total of approximately 145 hours on state-level work and its education and outreach campaign. Going forward, True Colors United expects to continue to divert a significant amount of its staff time and resources to both efforts. Indeed, the True Colors United Public Policy and External Affairs team will focus almost entirely on its new state-level work in 2020, which it estimates will take 65 percent of its staff time and over \$65,000.

89. These resources are being diverted from True Colors United's other work. Prior to the Notice of Nonenforcement, the Public Policy and External Affairs team had planned on a radically different "capacity-building" agenda, which would have included conducting regional summits to facilitate resource and information sharing between communities facing similar challenges and to empower and train local youth, providers, and advocates to organize their own grassroots campaigns, as well as a youth legislature project for transgender youth to receive hands-on training in state legislative advocacy. True Colors United's Public Policy team no

longer plans to pursue budgetary resources for those regional conferences because the team will not have enough time to plan or facilitate them. As a result, the youth legislative project is likely postponed until 2021. But for HHS's Notice of Nonenforcement, True Colors United would not have had to divert resources away from that work.

c. SAGE

90. Finally, the Notice also conflicts with, impairs, and frustrates SAGE's mission and activities by impeding its ability to ensure that LGBTQ older people are able to age with dignity.

91. First, SAGE previously relied upon the 2016 Grants Rule to help ensure that service providers did not discriminate against LGBTQ older people. By removing those protections, HHS's Notice of Nonenforcement serves as a signal to service providers that they may discriminate against LGBTQ older people with impunity. SAGE has already diverted, and will continue to divert, resources to combat these harms. SAGE has begun working to obtain state-level protections to fill the gap left by HHS's now-abandoned non-discrimination protections. SAGE's policy team, communications team, and executive leadership have already spent more than 20 hours designing a proposed new program to research and educate state policymakers on the need for state-level protections that cover the types of home and community-based services that are funded by HHS under the Older Americans Act (and, accordingly, previously were subject to the 2016 Grants Rule). SAGE anticipates spending 50 to 100 hours of staff time and \$50,000 to \$100,000 on this program in 2020.

92. Second, to combat the confusion caused by the Notice of Nonenforcement as described above, SAGE has begun and will continue to conduct an education and outreach campaign to ensure that aging advocacy organizations and LGBTQ older people understand the

full impact of the Notice, including its impact on the protections enjoyed by LGBTQ older people. For example, SAGE's policy staff have already spent 10-15 hours researching, drafting, and disseminating materials on the Notice of Nonenforcement to its partner organizations. Those organizations, including members of the Leadership Council of Aging Organizations, have in turn disseminated SAGE's materials to service providers and other stakeholders. Similarly, SAGE has already spent 12 hours discussing the impacts of HHS's actions at various conferences and roundtables, including the January 2020 Creating Change Conference, as well as a monthly National LGBT Aging roundtable and monthly SAGE affiliate calls.

93. Third, SAGE is also forced to respond to the Notice of Nonenforcement by ensuring that service providers continue to understand the importance of making their services inclusive and safe for LGBTQ older people. In the past, for example, SAGE has published guidance on how aging services agencies can provide inclusive services for LGBT adults.²⁸ Whereas the 2016 Grants Rule provided a new regulatory non-discrimination requirement applicable to home and community-based service providers funded by the Older Americans Act, the decision not to enforce it diminishes these providers' obligation to accommodate LGBTQ older people's unique needs. SAGE will continue to expend staff time and effort educating providers about these needs and encouraging them to continue to meet these needs despite the rollback of HHS's non-discrimination protections. Collectively, these responsive efforts have diverted valuable staff time and resources away from SAGE's other projects, including, for

²⁸ For example, through the National Resource Center on LGBT Aging SAGE published *Inclusive Services for LGBT Older Adults: A Practical Guide To Creating Welcoming Agencies* (2012), <https://www.sageusa.org/wp-content/uploads/2018/05/sageusa-welcoming-agency-guide-inclusive-services-for-lgbt-older-adults.pdf>.

example, its work to secure state-level non-discrimination protections in other contexts, such as in long-term care facilities.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

Agency Action Without Observance of Procedure Required by Law in Violation of 5 U.S.C. § 706(2)(D)

94. Plaintiffs repeat and incorporate by reference each of the foregoing allegations as if fully set forth herein.

95. HHS is an agency subject to the requirements of the APA. 5 U.S.C. § 701(b)(1).

96. Under 5 U.S.C. § 706(2), courts shall hold unlawful and set aside agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege or immunity; in excess of statutory jurisdiction, authority, or limitations; or without observance of procedure required by law.

97. The Notice of Nonenforcement constitutes final agency action that is reviewable by this Court.

98. The APA requires administrative agencies to follow notice-and-comment rulemaking procedures to promulgate substantive rules. *See* 5 U.S.C. § 553. The APA defines “rule” broadly to include:

The whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages

5 U.S.C. § 551(4).

99. HHS has bound itself to impose the notice and comment procedures required by the APA in its actions related to grants. 36 Fed. Reg. at 2532.

100. The Notice of Nonenforcement constitutes a substantive rule subject to APA's notice-and-comment requirements because it affirmatively and categorically circumscribes HHS's authority to enforce requirements that HHS grant recipients not discriminate against program beneficiaries and participants based on a variety of non-merit factors, including sex, gender identity, sexual orientation, and religion.

101. In issuing the Notice of Nonenforcement, Defendants impermissibly promulgated a new rule without undertaking notice-and-comment rulemaking.

102. Plaintiffs were harmed and continue to be harmed by this unlawful act.

SECOND CLAIM FOR RELIEF
Agency Action That Is Grounded in a Mistake of Law
in Violation of 5 U.S.C. § 706(2)(A)

103. Plaintiffs repeat and incorporate by reference each of the foregoing allegations as if fully set forth herein.

104. Under 5 U.S.C. § 706(2), courts shall hold unlawful and set aside agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege or immunity; in excess of statutory jurisdiction, authority, or limitations; or without observance of procedure required by law.

105. The Notice of Nonenforcement is arbitrary and capricious, an abuse of discretion, and not in accordance with law because Defendants grounded their action in a mistaken determination of law: that the 2016 Grants Rule did not comply with the Regulatory Flexibility Act.

106. Plaintiffs were harmed and continue to be harmed by this unlawful act.

THIRD CLAIM FOR RELIEF
Agency Action That Is Arbitrary and Capricious,
An Abuse of Discretion, or Otherwise Not in Accordance with Law
in Violation of 5 U.S.C. § 706(2)(A)

107. Plaintiffs repeat and incorporate by reference each of the foregoing allegations as if fully set forth herein.

108. Under 5 U.S.C. § 706(2), courts shall hold unlawful and set aside agency action that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; contrary to constitutional right, power, privilege or immunity; in excess of statutory jurisdiction, authority, or limitations; or without observance of procedure required by law.

109. The Notice of Nonenforcement is arbitrary and capricious, an abuse of discretion, and not in accordance with law because, among other things, Defendants failed to provide a reasoned explanation for their decision to cease enforcement with respect to all entities, failed to consider alternative remedies, failed to consider the costs and benefits of their decision, and failed to consider whether continued enforcement of the non-discrimination protections is in the public interest.

Prayer for Relief

WHEREFORE, Plaintiffs pray that this Court:

1. declare that Defendants' promulgation of the Notice of Nonenforcement violates the APA;
2. set aside and vacate the Notice of Nonenforcement;
3. enjoin Defendants from implementing the Notice of Nonenforcement;
4. award Plaintiffs costs, attorneys' fees, and other disbursements for this action; and
5. grant any other relief this Court deems appropriate.

DATED: April 2, 2020

Respectfully submitted,

/s/ Jeffrey B. Dubner

Kristen Miller (D.C. Bar No. 229627)*
Robin Thurston (D.C. Bar No. 1531399)*
Sean Lev (D.C. Bar No. 449936)*
Jeffrey B. Dubner (N.Y. Bar No. 4974341)
Democracy Forward Foundation
P.O. Box 34553
Washington, DC 20043
(202) 701-1782
kmiller@democracyforward.org*
rthurston@democracyforward.org*
slev@democracyforward.org*
jdubner@democracyforward.org

Puneet Cheema (CA Bar No. 268677)*
Lambda Legal Defense and Education Fund,
Inc.
1776 K Street N.W., 8th Floor
Washington, D.C. 20006
(202) 804-6245
pcheema@lambdalegal.org

Karen Loewy (N.Y. Bar No. 5145883)**
Lambda Legal Defense and Education Fund,
Inc.
120 Wall Street, 19th Floor
New York, NY 10005
(212) 809-8585
kloewy@lambdalegal.org

*Motions for admission *pro hac vice*
forthcoming.

** Petition for Admission pending.

Counsel for Plaintiffs



U.S. Department of Justice

*United States Attorney
Southern District of New York*

*86 Chambers Street, 3rd Floor
New York, New York 10007*

January 15, 2021

By ECF

Honorable Mary Kay Vyskocil
United States District Court
Southern District of New York
500 Pearl Street
New York, NY 10007

Re: *Family Equality, et al. v. Azar, et al.*, No. 20 Civ. 2403 (MKV)

Dear Judge Vyskocil:

This Office represents Defendants U.S. Department of Health and Human Services (“HHS”) and Alex M. Azar, sued in his official capacity as the Secretary of HHS, in the above-referenced matter. I write to advise the Court that, on January 12, 2021, HHS promulgated the anticipated final rule which, among other things, finalizes proposed changes to 45 C.F.R. § 75.300. *See* HHS, Final Rule, 86 Fed. Reg. 2257 (Jan. 12, 2021) (the “January 2021 Rule”), available at www.federalregister.gov/documents/2021/01/12/2021-00207/health-and-human-services-grants-regulation. As stated therein, the rule will take effect on February 11, 2021.

As Your Honor is aware, in this action brought pursuant to the Administrative Procedure Act (“APA”), Plaintiffs challenge a November 19, 2019, Notification of Nonenforcement of a Health and Human Services Grants Regulation. *See* 84 Fed. Reg. 63809. Among other things, the Notification of Nonenforcement stated that HHS would not enforce certain provisions of 45 C.F.R. 75.300, regulations which were promulgated in 2016 and govern awards of grants by HHS to non-federal entities, pending the agency’s anticipated amendments to those regulations. After Plaintiffs filed suit, Defendants moved to dismiss the Complaint on the grounds that Plaintiffs lack standing and, in the alternative, moved to stay the action pending the anticipated promulgation of an amended rule. *See* Dkt. Nos. 40-41.

As set forth in Defendants memorandum of law, as of the effective date of the January 2021 Rule, Plaintiff’s challenge to the Notice of Nonenforcement – which relates only to the soon-to-be obsolete 2016 rule – will be rendered moot as will be “impossible for a court to grant any effectual relief whatever to the prevailing party.” *Knox v. Serv. Emps. Int’l Union, Local 1000*, 567 U.S. 298, 307 (2012) (quotations omitted). The Court should accordingly grant Defendants’ motion to dismiss the Complaint, or, in the alternative, stay this action pending the effective date of the January 2021 Rule.

I thank the Court for its attention to this matter.

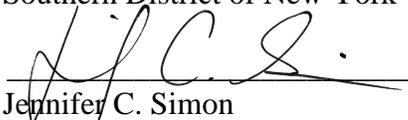
JA-53

Case 1:20-cv-02403-MKV Document 48 Filed 01/15/21 Page 2 of 2

Respectfully,

AUDREY STRAUSS
Acting United States Attorney for the
Southern District of New York

By:


Jennifer C. Simon

Assistant United States Attorney
86 Chambers Street, Third Floor
New York, New York 10007
Tel.: (212) 637-2746



January 21, 2020

By ECF

Honorable Mary Kay Vyskocil
United States District Court
Southern District of New York
500 Pearl Street
New York, NY 10007

Re: *Family Equality, et al. v. Azar, et al.*, No. 20-cv-2403 (MKV)

Dear Judge Vyskocil:

On January 15, 2021, Defendants notified the Court of a final rulemaking that—when it takes effect—will roll back the provisions currently found at 45 C.F.R. § 75.300 that prohibit grant recipients from discriminating against the beneficiaries of their services. *See* ECF No. 48 (citing HHS, Final Rule, 86 Fed. Reg. 2257 (Jan. 12, 2021)). Defendants argue that this case—which challenges their unlawful policy refusing to enforce the provisions at issue in the 2021 Grants Rule—will be moot when the Rule takes effect. Defendants request that the Court accordingly grant their earlier motion to dismiss the Complaint for lack of standing or stay this action pending the effective date of the 2021 Grants Rule. I submit this response on behalf of the Plaintiffs.

To begin, this case is not yet moot and may not be for some time, if ever. As Defendants recognize, the effective date of the Grants Rule has not yet come to pass. And while the Rule states that it will go into effect on February 11, 2021, that date will likely be extended to March 21, 2021 (or later) pursuant to a memorandum issued yesterday by the White House Chief of Staff.¹ Specifically, the memorandum requires agency heads to consider delaying the effective date for the purpose of “reviewing any questions of fact, law, and policy the rules may raise.”² Beyond this more general review, two other Executive Orders issued by President Biden may implicate agency review of the Grants Rule. One requires agency heads to review all agency actions that implicate statutory or regulatory sex discrimination prohibitions to ensure that they fully comply with the Supreme Court’s holding in *Bostock v. Clayton County*, 590 U.S. ____ (2020), that sex discrimination encompasses discrimination based on sexual orientation or

¹ Ronald A. Klain, Memorandum Regarding Regulatory Freeze Pending Review ¶ 3 (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/regulatory-freeze-pending-review/> (directing agency heads to consider postponing the effective dates of published rules that have not yet taken effect by sixty days or more from the date of the memorandum).

² *Id.*

transgender status.³ The other mandates that all agencies conduct an assessment of whether members of underserved communities (defined to include “Black, Latino, and Indigenous and Native American persons, Asian Americans and Pacific Islanders and other persons of color; members of religious minorities; lesbian, gay, bisexual, transgender, and queer (LGBTQ+) persons; persons with disabilities; persons who live in rural areas; and persons otherwise adversely affected by persistent poverty or inequality”) face systemic barriers in accessing federal benefits and programs and to develop plans, consistent with civil rights laws, to ensure “equitable delivery of government benefits.”⁴ Each of these Executive Orders should require HHS to reassess the 2021 Grants Rule, making its effective date uncertain.

Moreover, the 2021 Grants Rule will very likely be challenged in court, as evidenced by the overwhelming opposition expressed during the public comment period on the proposed rulemaking.⁵ Should such litigation succeed in vacating the 2021 Grants Rule, HHS’s nonenforcement policy regarding the current nondiscrimination protections would remain in effect, absent action by Defendants, and the instant challenge would be ripe for review. *See* Pls.’ Opp. to Defs.’ Mot. to Dismiss (“Opp.”) at 24 n. 14, ECF No. 42.

Plaintiffs acknowledge that if the rule goes into effect without challenge or should Defendants prevail in such litigation, this case may become moot. While the nonenforcement policy is in place, however, it continues to cause harm to Plaintiffs and HHS grant beneficiaries generally. Accordingly, Plaintiffs agree with Defendants that a brief stay of this action is appropriate.⁶ Plaintiffs respectfully propose that the instant litigation be stayed until the Rule’s currently scheduled effective date—February 11, 2021—and that fourteen days thereafter, along with Defendants, they file a status report and proposal for further proceedings in this matter. Should the effective date be delayed, Plaintiffs respectfully request that this litigation proceed in order to address the harms being experienced from the agency’s refusal to enforce existing non-discrimination requirements.

Sincerely,

/s/ Kristen P. Miller

Kristen Miller
Democracy Forward Foundation

³ *See* Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation/>.

⁴ Executive Order On Advancing Racial Equity and Support for Underserved Communities Through the Federal Government (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/>.

⁵ *See* Regulatory Docket for the Health and Human Services Grants Regulation, Docket ID HHS-OS-2019-0014, <https://www.regulations.gov/document?D=HHS-OS-2019-0014-0001> (showing more than 120,000 public comments on the proposed rule).

⁶ For the reasons already expressed in Plaintiffs’ opposition brief, the Court should reject Defendants’ renewed request that the Court dismiss the case for lack of standing. *See* Opp. at 9-20.

P.O. Box 34553
Washington, DC 20043
(202) 448-9090
kmler@democracyforward.org

Counsel for Plaintiffs

CC: All Counsel of Record (by ECF)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 2/2/2021

FAMILY EQUALITY, et al.,

Plaintiffs,

-against-

UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES, et al.,

Defendants.

1:20-cv-02403 (MKV)

ORDER

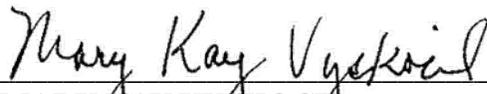
MARY KAY VYSKOCIL, United States District Judge:

The Court has received letters from the Parties regarding regulatory developments that may moot Plaintiffs' claims in this case [ECF Nos. 48, 50]. In light of those recent regulatory actions, IT IS HEREBY ORDERED that this case is STAYED pending further order of the Court.

The Parties are directed to file a joint letter on the ECF docket on or before February 16, 2021 regarding whether the Final Rule referenced in the Parties' letters has become effective, or whether there have been any other developments which impact this case. Following receipt of the Parties' letter, the Court will enter an order regarding next steps in this case.

SO ORDERED.

Date: February 2, 2021
New York, NY



MARY KAY VYSKOCIL
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

USDC SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #:
DATE FILED: 3/30/2022

FAMILY EQUALITY; TRUE COLORS UNITED,
INC.; and SERVICES & ADVOCACY FOR GLBT
ELDERS,

Plaintiffs,

-against-

XAVIER BECERRA, in his official capacity as
Secretary, United States Department of Health and
Human Services; and THE UNITED STATES
DEPARTMENT OF HEALTH AND HUMAN
SERVICES,

Defendants.

1:20-cv-2403 (MKV)

OPINION AND ORDER
GRANTING MOTION TO
DISMISS

MARY KAY VYSKOCIL, United States District Judge:

This case derives from a final rule promulgated by HHS in 2016 that espoused “a public policy requirement” that “no person otherwise eligible w[ould] be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services based on non-merit factors such as age, disability, sex, race, color, national origin, religion, gender identity, or sexual orientation.” 81 Fed. Reg. 89393-95 (Dec. 12, 2016) (codified at 45 C.F. R. § 75.300) (“2016 Grants Rule”). Plaintiffs Family Equality, True Colors United, Inc., and Services & Advocacy for GLBT Elders (“SAGE”) (collectively, “Plaintiffs”) filed this action asserting a violation of the Administrative Procedures Act after the Department of Health and Human Services (“HHS”) announced that it would no longer enforce certain provisions of the 2016 Grants Rule. Complaint ¶ 1 [ECF No. 1]; 84 Fed. Reg. 63809 (“Notice of Non-Enforcement”). Defendants Alex Azar II,¹ in his official capacity as the Secretary of the

¹ Secretary of the Department of Health and Human Services Xavier Becerra, in his official capacity, has now been automatically substituted as a Defendant pursuant to F.R.C.P. 25(d).

Department of Health and Human Services, and HHS moved to dismiss the Complaint for lack of standing and for failure to establish that Plaintiffs were within the zone of interests of any at-issue statute or regulation. Defendants' Motion to Dismiss [ECF No. 40]; Defendants' Memorandum in Support [ECF No. 41] ("Defs.' Mem."). Plaintiffs filed their Opposition to the Motion to Dismiss [ECF No. 42] ("Pls.' Opp."), and Defendants filed their Reply [ECF No. 43] ("Defs.' Reply").

In January 2021, the Court received a letter from Defendants [ECF No. 48] and Plaintiffs [ECF No. 50] advising that a pending final rulemaking could roll back the 2016 Grants Rule. Per the joint request of the Parties, this case was stayed in February 2021 pending the effective date of that anticipated new rule. [ECF No. 51]. The proposed new rulemaking was then challenged in a different action in the United States District Court for the District of Columbia. *See Facing Foster Care in Alaska, et. al., v. HHS, et. al.*, Civ. No. 21-cv-308 (D.D.C. Feb. 2, 2021) ("*Facing Foster Care*"). In *Facing Foster Care*, Defendants stipulated that the effective date of the pending rulemaking would be extended to August 2021. *See* Joint Letter dated Feb. 16, 2021 [ECF No. 52]. This Court then further stayed this case in light of *Facing Foster Care* and Executive Orders that directed agency heads to review all agency actions inconsistent with a policy of preventing discrimination. [ECF No. 53]. In a joint letter filed on May 3, 2021, the Parties asked that the Court lift the stay in this case, which the Court did.² [ECF No. 56]. The United States District Court for the District of Columbia subsequently further stayed through April 18, 2022 the effective date of the pending final rulemaking that would rescind the 2016

² In their moving papers, Defendants sought to stay the case pending the outcome of this final rulemaking. Defs.' Mem. at 14-15. Given the Parties prior joint request that the stay be lifted and joint statement that no further developments will impact the ability to decide the Motion, the Court does not consider whether a stay is further warranted in this case.

Grants Rule. *See Facing Foster Care in Alaska, et. al., v. HHS, et. al.*, Civ. No. 21-cv-308, ECF No. 30.

The Court will decide this Motion because there is a live controversy given the stay of the rulemaking that would roll back the 2016 Grants Rule. However, the Court notes that this case may quickly become moot depending on the outcome of the case in the District Court for the District of Columbia.

For the reasons explained below, Defendants' Motion to Dismiss is GRANTED.

BACKGROUND

In November 2019, HHS issued a Notice of Non-Enforcement that stated it would no longer enforce the 2016 Grants Rule. 84 Fed. Reg. 63809 (Nov. 19, 2019). In issuing the Notice of Non-Enforcement, HHS stated it had "significant concerns" that the 2016 Grants Rule did not comply with the Regulatory Flexibility Act. 81 Fed. Reg. 63809.

Plaintiffs are three different community outreach organizations that work with LGBTQ-identifying groups.³ Plaintiff Family Equality works to "advance legal and lived equality for LGBTQ families" through community outreach intended to educate LGBTQ families about their rights. Compl. ¶¶ 9-10. Family Equality also engages in federal- and state-level lobbying to "ensure that adoption and foster care services do not discriminate against" LGBTQ individuals. Compl. ¶ 10. Plaintiff True Colors United seeks to "implement innovative solutions to youth homelessness that focus on the unique experiences of LGBTQ young people." Compl. ¶ 12. True Colors United offers training and education designed to "ensure that LGBTQ youth experiencing homelessness have access to safe and supportive services." Compl. ¶ 13. Like Family Equality, True Colors United also engages in "lobbying at 'federal, state and local levels

³ The Court adopts the language that Plaintiffs use to describe their constituents. *See* Compl. ¶ 5.

to promote funding and support related to all aspect of” their members’ identities. Compl. ¶ 13. Finally, Plaintiff SAGE is “a national advocacy and services organization whose mission is to allow LGBTQ older people to age with respect and dignity.” Compl. ¶ 16. SAGE provides training and educational services, in addition to services through which “LGBTQ older people may obtain meals, access social and cultural programming, and gain assistance with obtaining a variety of aging services.” Compl. ¶ 16.

Each Plaintiff claims that it relied on the non-discrimination requirements of the 2016 Grants Rule to help accomplish their objectives of promoting non-discrimination and providing services to its respective constituent members. *See* Compl. ¶¶ 11, 14, 17. Plaintiffs allege that the Notice of Non-Enforcement “guts” the policy of non-discrimination from the 2016 Grants Rule. Compl. ¶ 15. Specifically, Plaintiffs maintain that the Notice of Non-Enforcement is a substantive, binding rule within the meaning of the APA that was promulgated without notice and comment procedures, and is arbitrary and capricious. *See* Compl. ¶¶ 53-58. This Court answers the only question currently before it as framed by the pending Motion to Dismiss: whether Plaintiffs have standing to bring suit.

DISCUSSION

I. LEGAL STANDARD FOR ARTICLE III STANDING

Federal Rule of Civil Procedure 12(b)(1) requires dismissal of a claim for lack of subject matter jurisdiction if a plaintiff fails to allege adequate facts that establish constitutional standing under Article III. *Cortlandt St. Recovery Corp. v. Hellas Telecomms.*, 790 F.3d 411, 416-17 (2d Cir. 2015). Article III of the Constitution “limits federal courts to deciding ‘Cases’ and ‘Controversies.’” *Dep’t of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019); U.S. Const.

art. III, § 2. This basic requirement dictates that “at least one plaintiff must have standing to sue.” *Dep’t of Commerce*, 139 S. Ct. at 2565.

The Supreme Court has “established that the ‘irreducible constitutional minimum’ of standing consists of three elements.” *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). “The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Id.*

“To establish injury in fact, a plaintiff must show that he or she suffered ‘an invasion of a legally protected interest’ that is ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical.’” *Id.* at 1548 (quoting *Lujan*, 504 U.S. at 560). The “injury-in-fact” requirement is “a low threshold, which helps to ensure that the plaintiff has a personal stake in the outcome of the controversy.” *John v. Whole Foods Mkt. Grp.*, 858 F.3d 732, 736 (2d Cir. 2017) (internal quotation marks omitted). There must be a causal connection between the alleged injury and the complained-of conduct. *Lujan*, 504 U.S. at 561. This connection must be “fairly traceable,” a standard “lower than that of proximate cause.” *Rothstein v. UBS AG*, 708 F.3d 82, 91 (2d Cir. 2013). It must also be more than “merely speculative” that plaintiff’s “injury will be redressed by a favorable decision.” *Id.* The plaintiff bears the burden of establishing standing “as the party invoking federal jurisdiction.” *Id.*

An organization may have Article III standing in one of two ways. An organization may have associational standing to sue on behalf of its members if one member of the organization has standing to bring the suit individually. *NY Civil Liberties Union v. NYC Transit Auth.*, 684 F.3d 286, 294 (2d Cir. 2014). Alternatively, and at issue here, an organization “may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever

rights and immunities the association itself may enjoy.” *Warth v. Seldin*, 422 U.S. 490, 511 (1975). “Under this theory of ‘organizational’ standing, the organization is just another person—albeit a legal person—seeking to vindicate a right.” *NY Civil Liberties Union*, 684 F.3d at 294. The standing test applies to organizations in the same way it applies to individuals; that is, the organization must show an “actual or threatened injury in fact that is fairly traceable to the alleged illegal action and likely to be redressed by a favorable court decision.” *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 649 (2d Cir. 1998) (internal quotation marks omitted). And where, as here, “multiple parties seek the same relief, ‘the presence of one party with standing is sufficient to satisfy Article III’s case-or-controversy requirement.’” *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 110 (2d Cir. 2017) (“*Centro de la Comunidad*”) (quoting *Rumsfeld v. Forum of Acad. and Inst. Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006)).

For purposes of Article III standing, “an organization must demonstrate a ‘perceptible impairment’ of its activities sufficient to meet the ‘injury-in-fact’ requirement” by showing *either* “that a policy has impeded, and will continue to impede, the organization’s ability to carry out its responsibilities” *or* that it has “divert[ed] its resources away from its current activities.” *Centro de la Comunidad*, 868 F.3d at 110-11 (internal quotation marks and alterations omitted).

In *Moya v. United States Department of Homeland Security*, the Second Circuit “reiterated” that “where an organization diverts its resources away from its current activities, it has suffered an injury that has been repeatedly held to be independently sufficient to confer organizational standing,” and that only a “perceptible impairment is required.” 975 F.3d at 129 (quoting *Centro de la Comunidad*, 975 F.3d at 129). *Moya*, and the cases it relied upon, left

some lack of clarity⁴ with respect to organizational standing requirements. The most recent pronouncement by the Second Circuit on organizational injury for standing purposes has provided some clarification, and holds that where “an organization is not directly regulated by a challenged law or regulation, it cannot establish a ‘perceptible impairment’ absent an involuntary material burden on its established core activities.” *Connecticut Parents Union v. Russell-Tucker*, 8 F.4th 167, 173 (2d Cir. 2021).

II. PLAINTIFFS DO NOT ESTABLISH ARTICLE III STANDING

Defendants maintain that Plaintiffs lack Article III standing because they “fail to establish a cognizable injury in fact” and instead proffer only “a policy disagreement with the challenged Notice of Nonenforcement.” Defs.’ Mem. at 7; Defs.’ Reply at 2. Plaintiffs allege that there has been a “perceptible impairment” of their organizational activities as a result of a diversion of resources because they have diverted significant manpower and time in responding to the Notice of Non-Enforcement. *See* Compl. ¶¶ 79, 87, 92. Defendants propound that Plaintiffs simply continue to engage in activities that they pursued before the Notice of Non-Enforcement, which, in their view, is insufficient to establish an injury-in-fact. Defs.’ Mem. at 10. The Court agrees that Plaintiffs have not made out a *prima facie* showing of standing.

i. Plaintiffs Have Not Suffered an Involuntary Material Burden on Established Core Activities

Under Second Circuit authority, a diversion of resources for injury purposes may be to activities already part of an organization’s usual services. *Moya*, 975 F.3d at 130 (rejecting argument that no diversion existed because “navigating the immigration laws is [the organization’s] current activity.”); *see also De Dandrade v. DHS*, 367 F. Supp. 3d 174, 182

⁴ *Moya v. DHS*, 975 F.3d 120, 137 (2d Cir. 2020) (Jacobs, J, concurring) (disagreeing with majority interpretation of organizational standing requirement and writing that “*Centro* needs clarification.”).

(S.D.N.Y. 2019) (“It is of no consequence that part of the diversion of resources is to . . . activities that are already part of the organization’s usual services.”). Indeed, Defendants’ own authority underscores this statement of the law. *Centro de la Comunidad* involved a town ordinance that sought to limit the solicitation of employment by people approaching cars next to public rights-of-way. 868 F.3d at 107; Defs. Mem. at 10 (citing *Centro de la Comunidad*). The plaintiff was an organization that sought to end the exploitation of Latino immigrant workers, and alleged that the ordinance would require it to “divert resources from other of its activities to combat the effects of the [o]rdinance.” *Id.* at 110. In *Centro de la Comunidad*, the Second Circuit identified “three ways in which the entity’s core activities were burdened:” 1) “the ordinance would require the physical dispersal of laborers, which would impede organizing activity, one of the entity’s primary ‘responsibilities,’” 2) “the entity would have to ‘divert resources from other of its activities to combat the effects of the [challenged] [o]rdinance, *i.e.* the entity would have to expend additional resources to continue organizing after the forced dispersal of the laborers,” and 3) “the entity’s members would face the risk of ‘erroneous arrest’ while conducting ‘advocacy activities’ among the laborers.” *Connecticut Parents Union*, 8 F.4th at 174 (alterations in original) (quoting *Centro de la Comunidad*, 868 F.3d at 109-110).

Each Plaintiff here claims that, because of the Notice of Non-Enforcement, it will be forced to undertake new projects such as reforming and adjusting their outreach services, all while continuing their goals of providing services to LGBTQ individuals. Plaintiff True Colors United has been engaged in educational services that relate to the importance of refraining from discriminating against LGBTQ youth. Compl. ¶ 83. True Colors United claims that, as a result of the Notice of Non-Enforcement, its efforts will be “less effective,” and it will have to examine state-level protections, rather than previously promised federal protection. Compl. ¶ 83. At the

time of the Complaint, this required “135 hours of staff time” to examine just three state’s regulations, including “8 phone calls,” “5 trips for in person meetings, and spending several hours in preparation for those meetings.” Compl. ¶ 84.

Plaintiff Family Equality contends that the Notice of Non-Enforcement impedes “its ability to ensure that foster care and adoption services are safe” because it has introduced “substantial confusion” regarding the legal obligations of grant recipients. Compl. ¶¶ 77-78. Accordingly, Family Equality has engaged in a “widespread and comprehensive education and outreach campaign to ensure that LGBTQ youths and families understand the full impact of HHS’s nonenforcement action.” Compl. ¶ 79. This has resulted in “approximately 40 hours of staff time assessing the legal effect of the Notice of Nonenforcement,” working to “identify and understand the anti-discriminations left in place,” and in total “well over 170 hours of staff time responding to the Notice of Nonenforcement through its public outreach and education campaign.” Compl. ¶¶ 79-80. Notwithstanding its work to date, Family Equality asserts it has been injured because its “efforts to prevent discriminatory state legislation will be less effective.” Compl. ¶ 81.

Similarly, SAGE has been forced to “obtain state-level protections to fill the gap left by HHS’s now-abandoned non-discrimination protections,” which has resulted in its team spending “more than 20 hours designing a proposed new program to research and educate state policymakers on the need for state-level protections,” in addition to time spent on an education and outreach campaign. Compl. ¶¶ 91-92.

However, accepting these allegations as true, Plaintiffs here, unlike the plaintiffs in *Centro de la Comunidad*, have not suffered an *involuntary* burden on established core activities. Under binding precedent, “expenditures or other activities if incurred at the organization’s own

initiative[] cannot support a finding of injury.” *Connecticut Parents Union*, 8 F.4th at 173-174. Accordingly, “an organization’s decision to embark on categorically new activities in response to action by a putative defendant will not ordinarily suffice to show an injury for standing purposes, even if the organization’s own clients request the change.” *Id.* at 174. Just as in *Connecticut Parents Union*, Plaintiffs here do not “identify any restrictions on its ability to perform the core activities” it previously engaged in, such as education, outreach, lobbying, “meetings, lectures, and general organizing.” *Id.* at 175. To be sure, Plaintiffs allege that they have incurred expense by reacting to the Notice of Non-Enforcement. *See, e.g.*, Compl. ¶¶ 79-80, 84, 91-92. But those reactions are not an involuntary result of “increased demand for services,” *NY v. DOH*, 969 F.3d 42, 60-61 (2d Cir. 2020), or taken to “continue organizing” and advocating, *Centro de la Comunidad*, 868 F.3d at 110. Instead, they are activities the Plaintiffs pursued “at their own initiative” in response to the Notice of Non-Enforcement, which harms their “abstract social interests.” *Connecticut Parents Union*, 8 F.4th at 173-74. At bottom, an organization cannot establish standing “by claiming to have been injured by any law or regulation touching any issues within the scope of its mission . . . so long as it expends resources to oppose that law or regulation.” *Connecticut Parents Union*, 8 F.4th at 173. Plaintiffs here have simply suffered a “setback to [their] organization[s]’ abstract social interests.” *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

Applying the principles articulated by the Second Circuit, the Court concludes that Plaintiffs have not shown an involuntary and material impact on its advocacy activities.

ii. Plaintiffs’ Ability to Carry Out Responsibilities Has Not Been Impeded

As previously stated, an organization may also demonstrate a “perceptible impairment” of its activities sufficient to establish an injury-in-fact by showing “that a policy has impeded, and will continue to impede, the organization’s ability to carry out its responsibilities.” *Centro de*

la Comunidad, 868 F.3d at 110 (quotation and alterations omitted). Plaintiffs maintain that for various reasons the Notice of Non-Enforcement “conflicts with, impairs, and frustrates” each organization’s “mission and activities,” and that its advocacy will be “less effective” as a result of the Notice of Non-Enforcement. *See* Compl. ¶¶ 77, 81-83, 90. The Court does not agree that Plaintiffs’ missions are impeded since each organization plainly continues in the same educational activities and advocacy work it previously undertook. Accordingly, the Notice of Non-Enforcement does not impede Plaintiffs because Plaintiffs continue to engage in advocacy to ensure that HHS grant recipients do not discriminate against LGBTQ individuals.

* * *

In sum, Plaintiffs fail to establish an injury-in-fact, a necessary predicate for Article III standing. *Spokeo, Inc.*, 578 U.S. at 338. Accordingly, the Court is without subject matter jurisdiction to adjudicate the dispute. *In re U.S. Catholic Conference*, 885 F.2d 1020, 1023 (2d Cir. 1989). Because the Court concludes that Plaintiffs do not have Article III standing to bring this suit, the Court does not reach the question of whether the Plaintiffs fall within the “zone of interests” of a statute or regulation in this case.

CONCLUSION

For the reasons stated above, Defendants’ Motion to Dismiss is GRANTED. Because the Court is without subject matter jurisdiction to adjudicate the dispute, the case is dismissed WITHOUT PREJUDICE. The Clerk of the Court respectfully is requested to terminate the motion at ECF No. 40 and close the case.

SO ORDERED.

Date: March 30, 2022
New York, NY



MARY KAY VYSKOCIL
United States District Judge

JA-70

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X
FAMILY EQUALITY; TRUE COLORS UNITED,
INC.; and SERVICES & ADVOCACY FOR GLBT
ELDERS,

Plaintiffs,

-against-

XAVIER BECERRA, in his official capacity as
Secretary, United States Department of Health and
Human Services; and THE UNITED STATES
DEPARTMENT OF HEALTH AND HUMAN
SERVICES,

Defendants.
-----X

USDC SDNY
DOCUMENT
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DOC#:
DATE FILED: 3/30/2022

20 CIVIL 2403 (MKV)

JUDGMENT

It is hereby **ORDERED, ADJUDGED AND DECREED:** That for the reasons
stated in the Court's Opinion and Order dated March 30, 2022, Defendants' Motion to Dismiss is
GRANTED. Because the Court is without subject matter jurisdiction to adjudicate the dispute,
the case is dismissed WITHOUT PREJUDICE; accordingly, the case is closed.

Dated: New York, New York

March 30, 2022

RUBY J. KRAJICK

Clerk of Court

BY:

Kmango

Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

Family Equality, True Colors United, Inc., and

Services & Advocacy for GLBT Elders

(List the full name(s) of the plaintiff(s)/petitioner(s).)

1:20 CV 02403 (MKV)()

-against-

NOTICE OF APPEAL

Xavier Becerra and the United States Department of Health

and Human Services

(List the full name(s) of the defendant(s)/respondent(s).)

Notice is hereby given that the following parties: Family Equality, True Colors United, Inc., and

Services & Advocacy for GLBT Elders

(list the names of all parties who are filing an appeal)

in the above-named case appeal to the United States Court of Appeals for the Second Circuit

from the judgment order entered on: March 30, 2022

(date that judgment or order was entered on docket)

that: Defendants' Motion to Dismiss is Granted.

(If the appeal is from an order, provide a brief description above of the decision in the order.)

May 27, 2022

Dated

/s/ Kristen P. Miller

Signature*

Miller, Kristen, P.

Name (Last, First, MI)

P.O. Box 34553

Address

Washington

City

D.C.

State

20043

Zip Code

(202) 448-9090

Telephone Number

kmiller@democracyforward.org

E-mail Address (if available)

* Each party filing the appeal must date and sign the Notice of Appeal and provide his or her mailing address and telephone number, EXCEPT that a signer of a pro se notice of appeal may sign for his or her spouse and minor children if they are parties to the case. Fed. R. App. P. 3(c)(2). Attach additional sheets of paper as necessary.

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of August 2022, I electronically served a copy of the foregoing document on the following counsel of record via CM/ECF, in accordance with Local Rule 25.1(h)(2):

Lucas Estlund Issacharoff
Benjamin H. Torrance
U.S. Attorney's Office for the Southern District of New York
86 Chambers Street
New York, NY 10007
Telephone: 212-637-2737
Fascimile: 212-637-2702
Lucas.Issacharoff@usdoj.gov
Benjamin.Torrance@usdoj.gov

Jeffrey Eric Sandberg
Michael Raab
United States Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Avenue, NW
Washington, DC 20530
Telephone: 202-532-4453
Jeffrey.E.Sandberg@usdoj.gov
Michael.Raab@usdoj.gov

Counsel for Defendants

Dated: August 26, 2022

s/ Kristen P. Miller
Kristen P. Miller

Counsel for Plaintiffs-Appellants