U.S. Department of Health and Human Services
Office for Civil Rights
Attention: 1557 NPRM (RIN 0945-AA17)
Hubert H. Humphrey Building, Room 509F
200 Independence Avenue, SW
Washington, D.C. 20201

Submitted electronically via regulations.gov (Docket ID number HHS-OS-2022-0012)

The Women's Liberation Front (WoLF) is a nonpartisan, nonprofit organization that works to restore, protect, and advance the rights of women and girls through legal argument, policy advocacy, and public education. WoLF focuses on issues that are ignored by mainstream feminist organizations in the U.S., including the harms of gender ideology and its centrality to male domination.

WoLF thanks the Department of Health and Human Services ("HHS") Office for Civil Rights ("OCR") for the opportunity to provide comments on its notice of proposed rulemaking entitled *Nondiscrimination in Health Programs and Activities* ("the NPRM"). As a group representing radical feminists, WoLF confines its comments to the NPRM's proposed redefinition of "sex" to include gender identity and the proposed expansion of "federal financial assistance" to include reimbursement of Medicare providers under Part B. **For the reasons outlined herein, WoLF strongly opposes these two proposals.**

Summary of Relevant Proposals

The Affordable Care Act (ACA) section 1557 provides that an individual shall not be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any health program or activity, any part of which receives federal financial assistance, or under any program or activity established under Title I of the Act, on the grounds prohibited by, among others, Title VI of the Civil Rights Act of 1964 (race, color, national origin) and Title IX of the Education Amendments of 1972 (sex).

In the NPRM, the OCR claims to reinstate certain protections provided in a 2016 final rule implementing ACA section 1557 that were subsequently limited in a 2020 final rule. However, the NPRM goes far beyond mere reinstatement of previous protections established via the legislative process and implemented via the regulatory process. Rather, it reinstates a previous administrative fiat that fundamentally redefined one of the longstanding grounds for civil rights protection – sex – and then greatly expands the reach of its enforcement authority related to that redefinition.

The NPRM accomplishes this in two main ways:

(1) HHS proposes to redefine discrimination on the basis of sex as including discrimination on the basis of gender identity across nearly all health insurance markets, which has the effect of extending this redefinition to plans covering well over 200 million people combined (Medicare, Medicaid, the Children's Health Insurance Program, the Program of All-Inclusive Care for the Elderly, group and individual markets, and the exchanges); and

(2) HHS proposes to redefine Medicare Part B payments to providers of medical services to Medicare beneficiaries as "federal financial assistance" for purposes of civil rights jurisdiction, which empowers the Administration to impose its new definition of "sex" on these providers.

Redefining Sex to Include "Gender Identity"

In defending its redefinition of sex to include "gender identity," the NPRM provides the following reasoning:

> *The Supreme Court has now held that Title VII's prohibition of employment discrimination on the basis of sex encompasses discrimination based on sexual*

orientation and gender identity. The Court reasoned that, even if Congress understood that "the term 'sex' in 1964 referred to 'status as either male or female [as] determined by reproductive biology,'" Title VII prohibits discrimination based on sexual orientation and gender identity. Since Bostock, two federal courts of appeals have held that the plain language of Title IX's prohibition on sex discrimination must be read similarly. The DOJ has also taken this position in Title IX litigation.

First, the argument that the Department of Justice has elsewhere taken the same position as proposed in this particular NPRM stands for nothing other than this Administration's internal consistency in overhauling major tenets of federal civil rights law, a task that belongs to the U.S. Congress. For example, the Department of Education has also proposed to redefine "sex" in the context of Title IX. Citing its own arguments in different contexts amounts to a self-referential circle that proves only the Administration's unyielding obsession with embedding gender ideology into every facet of American life, no matter the cost to women and girls, in an effort to circumvent the legislative process and its attendant democratic debate on an ideology that only a small minority of Americans support.[1]

Second, the NPRM expands the narrow scope of the *Bostock* holding beyond recognition. In *Bostock*, the Supreme Court held that Title VII of the Civil Rights Act's prohibition on sex-based discrimination in the workplace extends to individuals who are homosexual or who identify as transgender. That holding was specific to Title VII of the Civil Rights Act, which covers discrimination in employment, yet the NPRM extends it to Title VI, which covers discrimination in federally funded programs, thereby extending the workplace-specific *Bostock* holding to virtually every health program and activity across the United States. To do so, it relies on the judicial activism of two appellate courts. As explained below, the NPRM also takes the opportunity to radically expand the definition of "federal financial assistance" in the process. This far exceeds what *Bostock* stands for.

[1] There has been significant Congressional debate in recent years (including the current legislative session) on the issue of anti-discrimination protections on the basis of sexual orientation and "gender identity," giving rise to the introduction of bills such as the Equality Act, which would create similar requirements as are being proposed in the NPRM. Notably, despite a Democratic majority in Congress, they have been unable to muster support for even the Fairness for All Act (considered to be a potentially-bipartisan "compromise" bill). This lack of actual, current legislative support makes this NPRM even more improper and capricious.

The Administration provides no meaningful relief or exemption for those who object to gender ideology on conscience, religious freedom, or scientific grounds. Individuals or institutions who object must raise that objection to the very same OCR that proposes to erase sex in service of gender. OCR will then review these objections on a case-by-case basis; whether these reviews will be conducted by neutral arbiters is doubtful.

We must also note that the *Bostock* holding is flawed and unworkable even on its narrow terms. Throughout its opinion, the Court conflates homosexuality and transgenderism, even though homosexuality (i.e., same-sex attraction) is by definition based on the existence of two sexes. Moreover, redefining sex to include gender identity has the effect of erasing biological sex as a protected ground in the context of civil rights protection. If the law prohibits an employer from promoting a man over a woman because he is a man, the employer may now circumvent that prohibition as long as that man claims he is a woman. If sex no longer exists as an objective fact under the law, it cannot serve as a protected status. Additionally, prohibiting discrimination by employers based on an employee's internal landscape at any particular moment sets up employers for failure, especially since gender ideology teaches that one's "gender identity" may be "fluid" or subject to change throughout a person's life. The absurdity of this logic becomes apparent when applied to any of the other grounds protected by civil rights law. For example, one either has a certain national origin, or one does not. Sex is no different: one is either a woman or one is not, in which case one is a man. As a result of *Bostock*, however, employers must now divine an entirely internalized perception that may not be externally noticeable or verifiable.

It is also worth noting that civil rights law also typically includes "perception" as to protected characteristics i.e. people are protected from sex discrimination whether they <u>are</u> a particular sex or whether they are <u>perceived</u> to be a particular sex. Furthermore, discrimination on the basis of sex stereotypes is included in sex discrimination. In practical terms, individuals who identify as transgender have functional protection against invidious discrimination on the basis of their appearance or non-conformity to sex stereotypes, without any need to redefine sex or endanger single-sex spaces and resources for women and girls. Given that the OCR has undertaken no discussion as to conflicts or balancing of rights, or the ways in which redefining 'sex' causes hardship for women and girls, it is prudent to take the most cautious approach. This NPRM is not cautious by any measure; it redefines the protected characteristic of 'sex' so that it no longer protects female people as a

class, and then makes it unlawful to take certain actions to protect the female sex class from discrimination - actions that may have heretofore been *required* in order to comply with anti-discrimination rules. There is no logical reading of *Bostock* that allows, let alone requires, this result. The Eastern District of Tennessee recently enjoined similar interpretations being enforced under Title VII and Title IX in 20 states, correctly identifying this interpretation as "advanc[ing] *new* interpretations… and impos[ing] *new* legal obligations on regulated entities" (emphasis in original). The NPRM seeks to entrench this unlawful framework into the Affordable Care Act as well.[2]

Redefining "Federal Financial Assistance" to include the Reimbursement of Medicare Part B Providers

Currently, for purposes of civil rights complaints, reimbursements and other payments to providers pursuant to Medicare Part B are not considered federal financial assistance. In the 2016 final rule that the NPRM claims to reinstate, the OCR noted that commenters had urged it to expand the definition of "federal financial assistance" to Part B, but OCR stated in response that it "does not believe that this rule is the appropriate vehicle to modify the Department's position."[3] The NPRM does not explain how it can claim to reinstate a regulation when that regulation expressly disavowed what the NPRM proposes, nor does OCR explain why this NPRM is an appropriate vehicle when a previous regulation on the same topic was not.

When it comes to health care settings, distinctions between what requirements attach to which setting of care are numerous and not confined to civil rights law. For example, last year's vaccine mandate for healthcare providers applied to Medicare-certified providers, which includes hospitals and a wide range of other types of providers but, to use the Administration's words, "does not directly apply to other health care entities, such as physician offices, that are not regulated by CMS."[4] This is but one example of how the physician's office has long been treated differently than the hospital. Civil rights law is no different. Since the advent of civil rights law in the 1960s and the creation of Medicare in

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[2] Memorandum Opinion and Order at 31. *Tennessee v. U.S. Department of Education*. Case No. 3:21-cv-308. U.S. District Court - Eastern District of Tennessee at Knoxville. July 15, 2022.
[3] Federal Register, Vol. 81, No. 96, p. 31383.
[4] Department of Health and Human Services, Centers for Medicare & Medicaid Services, Interim final rule with comment period, "Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination".

1965, Part B payments have never been considered "federal financial assistance." The NPRM provides little satisfactory explanation of why this unilateral expansion is needed now, when Part B has existed without it for over half a century.

This sweeping expansion of OCR jurisdiction may lead Part B providers to opt out of Medicare altogether. Already, Part B faces structural reimbursement stability issues that are causing many providers to leave the program at a time when it can hardly afford those losses. According to a 2020 report by the Association of American Medical Colleges, approximately 45% of the 938,980 active physicians in the United States are aged 55 or older, which means that almost half of practicing physicians will reach retirement age in the next decade.[5] Burdening physicians with additional litigation risk and federal enforcement authority for refusing to deny the science and reality of sex will drive many more physicians into early retirement – if not complete retirement, then at least from Medicare. At a time when 11,000 people age into Medicare *each day*, the Administration must do everything in its power to attract more physicians to participate in the program in order to avoid a loss of beneficiary access to care. Instead, this Administration proposes to drive out providers in the name of gender ideology. Here too, the Administration's myopic fixation takes priority, no matter the potential harm to Medicare beneficiaries.

Conclusion

Even as it claims that sex is irrelevant or nonexistent, gender ideology uses sex as a Trojan horse to dismantle the civil rights protections afforded on that basis. We hope that the Administration will abandon these proposals and join women as we fight to protect our hard-won legal rights from male supremacy in its latest disguise.

Sincerely,

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[5] American Association of Medical Colleges, *Physician Specialty Data Report*.