

February 18, 2020

Jean-Didier Gaina
U.S. Department of Education
400 Maryland Avenue SW
Washington, DC 20202

RE: Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Direct Grant Programs, State-Administered Formula Grant Programs, Developing Hispanic-Serving Institutions Program, and Strengthening Institutions Program, RIN 1840-AD45/ Docket ID ED-2019-OPE-0080

Dear Mr. Gaina:

Americans United for Separation of Church and State submits the following comments to this Notice of Proposed Rulemaking, Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Direct Grant Programs, State-Administered Formula Grant Programs, Developing Hispanic-Serving Institutions Program, and Strengthening Institutions Program.

The proposed rule would significantly change the existing regulations that govern the partnerships between the government and faith-based social service providers. It would strip away religious freedom protections from people, often vulnerable and marginalized, who use government-funded social services, while expanding religious exemptions for faith-based providers that could even allow faith-based organizations to discriminate in government-funded programs. This proposal places the interests of taxpayer-funded entities ahead of the needs of people seeking critical services. Accordingly, we write to oppose this proposed rule.

We oppose the Department's proposed rule because it would:

- remove requirements that faith-based organizations must provide people seeking government services notice of their rights and take reasonable steps to provide a referral to an alternative provider, if requested;
- expand or create religious exemptions for faith-based providers, increasing the likelihood that faith-based organizations would claim an exemption to deny services to those in need;
- expand the religious exemption that allows taxpayer-funded employers to discriminate in hiring;
- make drastic changes to indirect aid programs, removing the secular option requirement and allowing providers to require participation in religious activities;
- allow religious student organizations at institutions of higher education to discriminate; and
- expand the Title IX religious exemption.

In addition, the proposed rule is procedurally flawed in a variety of ways. In particular, the 30-day public comment period does not allow the public to provide meaningful feedback to these sweeping and complex changes.

Americans United for Separation of Church and State

With a national network of more than 300,000 supporters, Americans United for Separation of Church and State has been safeguarding our American value of religious freedom for all people since 1947. The U.S. Constitution grants all Americans the right to believe—or not believe—without government interference or coercion and ensures that no one can use religion as a justification for ignoring the laws that protect the rights of others. Americans United advocates for this foundational principle every day and fights to protect everyone’s religious freedom.

Americans United has a long history with these regulations. In the 1990s and 2000s, Americans United advocated against legislation that would undermine church-state safeguards and threaten beneficiaries’ religious freedom in government-funded social service programs. During the last decade, Americans United worked to restore and strengthen the constitutional and legal footing of the rules governing these partnerships. Our former Executive Director, the Rev. Barry W. Lynn, served on the President’s Advisory Council on Faith-based and Neighborhood Partnerships Task Force on the “Reform of the Office of Faith-Based and Neighborhood Partnerships.” The Task Force, like the Advisory Council, was composed of “individuals with serious differences on some church-state issues,” yet its members found “common ground.”¹ The members engaged in serious discussion and debate about what reforms should be made to how the government partners with religiously affiliated organizations in social service programs.

The Task Force’s diverse members agreed on many important reforms and recommended these to the Advisory Council. To be sure, the Task Force did not agree on all issues it discussed, but in the end, it found significant common ground that advanced “fidelity to constitutional principles,” which the Advisory Council said “is an objective that is as important as the goal of distributing Federal financial assistance in the most effective and efficient manner possible.”²

Based on the Task Force’s work, the Advisory Council made twelve unanimous recommendations to the President to strengthen the constitutional protections against unwelcome proselytizing of program beneficiaries, to promote grantee and contractor transparency and understanding of church-state separation parameters, and to implement safeguards against excessive government entanglement with religious institutions. The Advisory Council’s recommendations formed the basis of Executive Order 13559 and were implemented through rulemaking in 2016.

¹ President’s Advisory Council On Faith-based And Neighborhood Partnerships, A New Era Of Partnerships: Report Of Recommendations To The President 120 (2010), *available at* <https://bit.ly/2OSMONS> [hereinafter Advisory Council Report].

² *Id.* at 127.

At that time, we applauded the new regulations as a positive step to safeguard vital religious liberty protections.

Yet, despite the broad consensus represented in the Obama administration's regulations and no real justification for changing the rules just four years later, the Trump administration is now revising these regulations again and undoing the common-ground provisions.

The 30-Day Comment Period Is Insufficient

The Administrative Procedure Act requires the Department to give the public a meaningful opportunity to comment on proposed regulations.³ Comment periods “should generally be at least 60 days.”⁴ Yet the Department, with no justification, has provided the public a mere 30 days to comment. The complexity and wide-ranging impacts of this rule demand at least a standard 60-day comment period.⁵

Furthermore, the administration announced this rule at the same time as eight other connected but distinct rules, seven of which also provide only 30 days to comment.⁶ As the White House explained, the agencies “worked together over many months,” coordinating and collaborating on the proposed rules.⁷ A person or organization, like Americans United, that is interested in commenting on one rule is likely to want to comment on all of these rules. In effect, the administration is giving the public only 30 days to comment, simultaneously, on eight complex rules that require analysis independently and jointly since the administration coordinated their content. This is insufficient and should render the rule procedurally invalid.

The Regulations Strip Critical Religious Freedom for Beneficiaries

In 2016, the Department revised its regulations to add more robust safeguards for beneficiaries of government-funded social services. A “key policy goal” of Executive Order 13559 was to “strengthen[] religious liberty protections for beneficiaries”⁸ and the alternative provider and notice of rights requirements were critical to fulfilling that goal.

³ 5 U.S.C. § 553(c).

⁴ Exec. Order 13563 § 2(b) (Jan. 18, 2011); Exec. Order 12866 (Sept. 30, 1993) (The comment period “in most cases should include a comment period of not less than 60 days.”); Regulatory Timeline, regulations.gov, <https://bit.ly/2SLkm1j> (“Generally, agencies will allow 60 days for public comment. Sometimes they provide much longer periods.”).

⁵ In 2015, when these same agencies issued proposed rules to revise the same set of regulations, the comment period was the standard 60 days, which allowed the public and experts from all sides a meaningful opportunity to comment.

⁶ The HUD proposed rule was announced at the same time as the other eight rules, but was not published until February 13, 2020. The HUD rule has a 60-day comment period, demonstrating that the other agencies could, and should, also allow 60 days to comment.

⁷ The White House acknowledged that all of the Departments “worked together over many months” to draft the proposals in coordination. Domestic Policy Council Director Joe Grogan, White House Office of the Press Secretary, Background Press Call Transcript on New Rules to Protect Religious Freedom (Jan. 16, 2020) [hereinafter White House Background Press Call].

⁸ Federal Agency Final Regulations Implementing Executive Order 13559: Fundamental Principles and Policymaking Criteria for Partnerships With Faith-based and Other Neighborhood Organizations, 81 Fed. Reg. 19,353, 19361 (Apr. 4, 2016) [hereinafter 2016 Final Regulations].

Both vital protections were based on common-ground recommendations, yet the Department is now proposing to eliminate them.

The Alternative Provider Requirements Protect Programs Beneficiaries

The current regulations require providers to take “reasonable efforts” to refer beneficiaries to an alternative provider, if requested.⁹ This is a critical religious freedom protection for vulnerable people who use government social service programs. It ensures that people who are uncomfortable at a provider because of its religious character will be referred to an alternative provider. Removing this provision could cause beneficiaries significant harm, and could even result in them receiving no government services at all.

Even though social service programs that are funded directly by the government are supposed to have only secular content, there are reasons why a person might feel uncomfortable and want an alternative provider, nonetheless. For example, a Jewish person might forgo counseling for a mental illness, substance use disorder, or HIV/AIDS because the only program they know of is in a church adorned with Christian iconography, art, and messages. An LGBTQ teen experiencing homelessness might not seek services such as housing, food, or counseling, and lose the opportunity to find a place to live because they know the religion of the faith-based provider condemns them for being gay. Or a pregnant or parenting teen might want to leave a faith-based group home because she is uncomfortable in the religious setting.

Removing the alternative provider requirements makes it less likely beneficiaries like these will get the services they need.

At the same time that the Department is striking this protection for beneficiaries, it is adding language that could increase the likelihood that beneficiaries could feel uncomfortable attending programs run by faith-based providers. The proposed regulations would add new, potentially far-reaching language that appears to expand already existing religious exemptions for providers.¹⁰ The new language goes so far as to even suggest that religious organizations could be exempt from program requirements.¹¹ Broad religious exemptions would increase the likelihood that inappropriate religious content is included in social service programs and that people will be denied critical services. This could result in more people feeling uncomfortable and forgoing services because finding an alternative provider on their own is too high a hurdle.

Providers, who offer professional social services in their community and navigate the grantmaking system, are more likely than a beneficiary to know of other providers and

⁹ 34 C.F.R. § 75.713; 34 C.F.R. § 76.713.

¹⁰ See *infra*, The Proposed Rules Would Expand and Create New Religious Exemptions for Faith-based Providers and Put the Rights of Beneficiaries at Risk.

¹¹ Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Direct Grant Programs, State-Administered Formula Grant Programs, Developing Hispanic-Serving Institutions Program, and Strengthening Institutions Program, 85 Fed. Reg. 3190, 3220, 3222, 3224 (to be codified at 2 C.F.R. § 3474.15(b)(3); 34 C.F.R. §§ 75.52 (a)(3), 76.52(a)(3)).

are more capable of finding an alternative provider. Beneficiaries, on the other hand, are likely to face considerable challenges in finding an alternative provider: they may not understand where to look, have access to the internet or a library to do research, or have time because they have caregiving responsibilities or work two jobs. This harms the beneficiary and undermines the entire purpose of the program.

The Department said it “does not have adequate information available at this time to estimate” what, if any cost savings there would be for providers by removing the alternative provider requirements.¹² Other agencies, such as the Department of Justice and the Department of Health and Human Services, however, have concluded that removing the requirements would have no cost savings, providing no support for taking away the safeguard.¹³ Even if it imposes some costs on providers, the safeguard should not be eliminated. When recommending the alternative provider requirements, the Council recognized that, even though it could impose significant monetary costs on providers, it must be done “in order to provide adequate protection for the fundamental religious liberty rights of social service beneficiaries.”¹⁴ Yet, the Department still seeks to remove this protection.

Furthermore, the Department fails to consider the non-quantifiable benefit to the beneficiaries. Though few may seek an alternative provider, it is critical to those who really need one.

Removing the alternative provider requirements would also stray greatly from tradition, current practice, and consensus in this area. “Charitable choice” laws, which are the predecessor to the George W. Bush administration’s faith-based regulations, include alternative provider requirements.¹⁵ President Bush also incorporated this protection in his signature faith-based legislation, although that legislation ultimately failed for other reasons,¹⁶ and at least one of the architects of the Bush plan has voiced opposition to the Department’s proposal to remove this safeguard.¹⁷ Furthermore, the diverse Advisory Council unanimously recommended adding the alternative provider to the regulations.¹⁸

¹² 85 Fed. Reg. at 3217-19.

¹³ Equal Participation of Faith-Based Organizations in Department of Justice's Programs and Activities: Implementation of Executive Order 13831, 85 Fed. Reg. 2921, 2926 (to be codified at 28 C.F.R. pt. 38) [hereinafter DOJ] (The Department of Justice admits that it “does not expect the elimination of the referral and recordkeeping requirements to result in a cost savings.”); Ensuring Equal Treatment of Faith-Based Organizations, 85 Fed. Reg. 2974, 2984 (to be codified at 45 C.F.R. pts. 87, 1050) [hereinafter HHS] (The Department of Health and Human Services “estimates that the removal of the referral requirements would, at most, generate only de minimis benefits for faith-based social service providers.”).

¹⁴ Advisory Council Report at 141.

¹⁵ 42 U.S.C. § 290kk-1(f); 42 U.S.C. § 300x-65(e); 42 U.S.C. § 604a(e).

¹⁶ Community Solutions Act of 2001, H.R. 7, 107th Cong. § 1994a (2001) (President George W. Bush’s signature Faith-Based Initiative legislation that he proposed before he implemented his Initiative through regulations.).

¹⁷ Stanley Carlson-Thies, *Trump Administration Proposes Changes in Rules for Funding Faith-Based Services*, Inst. Religious Freedom Alliance (Jan. 30, 2020), <https://bit.ly/38vjVix>.

¹⁸ Advisory Council Report at 141.

The Notice Requirement Protects Program Beneficiaries

Giving beneficiaries notice of their rights is critical to protecting their religious freedom. It is fair to assume that people using government-funded social services are not experts in the Constitution and are unaware of their religious freedom rights. They cannot exercise their rights if they aren't aware they have them. Refusing to inform beneficiaries of their rights leaves them vulnerable, not knowing providers can't subject them to discrimination, proselytization, and religious coercion when getting government-funded services. Yet, the proposed regulations would strip this important protection.

The Department does not identify a monetary cost savings associated with eliminating the notice requirement. The Department of Justice and the Department of Health and Human Services estimate the savings would be no more than \$200 per year.¹⁹ Imposing this minor cost on providers is more than reasonable considering the benefits the notice provides to people who use social service programs.

Indeed, the Department must be keenly aware of the importance of notice requirements: at the same time that it is proposing to remove notice for beneficiaries, it seeks to add notices for providers. If providers deserve notice, so too do the vulnerable beneficiaries who use the programs.

Trinity Lutheran v. Comer Does Not Require the Department to Remove these Critical Beneficiary Protections

The Department mistakenly relies on *Trinity Lutheran Church of Columbia, Inc. v. Comer*²⁰ to argue that the government cannot require faith-based organizations to adhere to the alternative provider or notice safeguards if it does not require the same of secular organizations.²¹ Reliance on *Trinity Lutheran* to strike these requirements is wrong for several reasons. But even if *Trinity Lutheran* prohibited the existing regulations, the answer would be to require secular organizations to provide these same critical religious freedom protections for beneficiaries too, not to deny vulnerable beneficiaries the religious freedom protections they deserve.

First, the holding of *Trinity Lutheran* is extraordinarily narrow. The plurality opinion of the Court, which is controlling, explained that the decision was limited to the specific facts of the case: "This case involves express discrimination based on religious identity with respect to playground resurfacing."²² The Department wrongly extends the *Trinity* holding to federal grants that fund social service programs. *Trinity Lutheran* says only that the government cannot disqualify a religious entity from competing for a grant "solely because of its religious character."²³ It does not bar the government from

¹⁹ DOJ, 85 Fed. Reg. at 2926; HHS, 85 Fed. Reg. at 2984.

²⁰ 137 S. Ct. 2012 (2017).

²¹ The Department not only wrongly claims that these existing beneficiary protections conflict with *Trinity Lutheran*, but also that the alleged conflict places a non-quantifiable cost on providers.

²² *Id.* at 2024 n.3 (Chief Justice Roberts delivered the opinion of the Court, except as to footnote 3. Justices Kennedy, Alito and Kagan joined the opinion in full, and Justices Thomas and Gorsuch joined except as to footnote 3.).

²³ *Id.* at 2021.

requiring faith-based providers operating under a grant to adhere to appropriate church-state safeguards. The existing regulations already make clear that religious organizations can compete for grants that fund social service programs: the regulations plainly state that religious organizations “are eligible” “on the same basis as” any other organization²⁴ and cannot be discriminated against because of their “religious character or affiliation.”²⁵ *Trinity Lutheran* requires nothing more. In fact, provisions in the existing and proposed rule already go too far. They do not ensure religious organizations are eligible on an *equal* basis as secular organizations, but provide multiple *advantages* to religious organizations over secular groups. For example, the proposed rule seems to suggest that religious organizations may be able to skirt eligibility and program requirements.²⁶ Thus, it is disingenuous to argue that faith-based entities are discriminated against or disqualified from grant programs in violation of *Trinity Lutheran*.

Even if asking faith-based organizations to satisfy these basic religious freedom safeguards violated this principle in *Trinity Lutheran*, that is not the end of the legal analysis. The provisions would only violate the Free Exercise Clause if they also failed to meet strict scrutiny: the safeguards must be narrowly tailored to further a compelling government interest.²⁷ The safeguards meet even this strict analysis.

The written notice and the alternative provider requirements both further the compelling interest of protecting the religious freedom rights of people using Department-funded programs. The Department’s interest in serving and protecting beneficiaries is furthered by ensuring beneficiaries understand their rights. For many beneficiaries, the written notice may be the only way they learn about their own religious freedom rights. The administration clearly understands the non-quantitative benefits of providing such notice, as eight of its nine proposed rules add new and extensive notice requirements to give information to faith-based providers.²⁸

²⁴ 2 C.F.R. § 3474.15(b); 34 C.F.R. § 75.52(a)(1); 34 C.F.R. § 76.52(a)(1).

²⁵ 2 C.F.R. § 3474.15(b)(2); 34 C.F.R. § 75.52(a)(2); 34 C.F.R. § 76.52(a)(2).

²⁶ 85 Fed. Reg. at 3220, 3221, 3222, 3224 (to be codified at C.F.R. § 3474.15(b)(1), 34 C.F.R. §§ 75.52(a)(1) & (3), 76.52(a)(1) & (3)).

²⁷ *Trinity Lutheran*, 137 S. Ct. at 2024 (citing *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993)).

²⁸ 85 Fed. Reg. at 3224, (to be codified at 34 C.F.R. Appendix A, Appendix B to pt. 75); Equal Opportunity for Religious Organizations in U.S. Department of Agriculture Programs: Implementation of Executive Order 13831, 85 Fed. Reg. 2897, 2906 (to be codified at 7 C.F.R. Appendix A, Appendix B to pt. 16); HHS, 85 Fed. Reg. at 2987 (to be codified at 45 C.F.R. Appendix A, Appendix B to pt. 87); Equal Participation of Faith-Based Organizations in DHS’s Programs and Activities: Implementation of Executive Order 13831, 85 Fed. Reg. 2889, 2897 (to be codified at 6 C.F.R. Appendix A, Appendix B to pt. 19); Equal Participation of Faith-Based Organizations in HUD Programs and Activities: Implementation of Executive Order 13831, 85 Fed. Reg. 8215, 8224 (to be codified at 24 C.F.R. Appendix A to pt. 5); DOJ, 85 Fed. Reg. at 2928-29 (to be codified at 28 C.F.R. Appendix A, Appendix B to pt. 38); Equal Participation of Faith-Based Organizations in the Department of Labor’s Programs and Activities: Implementation of Executive Order 13831, 85 Fed. Reg. 2929, 2937-38 (to be codified at 29 C.F.R. Appendix A, Appendix B to pt. 2) [hereinafter DOL]; Equal Participation of Faith-Based Organizations in Veterans Affairs Programs: Implementation of Executive Order 13831, 85 Fed. Reg. 2938, 2948 (to be codified at 38 C.F.R. Appendix A, Appendix B to pt. 50).

In addition to protecting religious freedom, the alternative provider requirements also serve the compelling interest of ensuring that the beneficiaries get the services they need: Failure to provide an alternative provider could prevent a person from getting treatment for opioid use disorder; someone seeking safety for herself and her family from domestic violence from finding a shelter; or a veteran reentering the civilian workforce from receiving job training.

The notice and alternative provider safeguards also are narrowly tailored. It is difficult to argue that giving beneficiaries a simple written notice that no Department estimates will cost more than \$200 a year, is not narrowly tailored.²⁹ Furthermore, requiring agencies to take only “reasonable efforts” to refer a beneficiary to an alternative provider is narrowly tailored.

The Religious Freedom Restoration Act Does Not Require the Department to Remove the Alternative Provider Requirements

The preamble wrongly claims that the Religious Freedom Restoration Act prevents the government from imposing the alternative provider requirements because it “could in certain circumstances raise concerns under RFRA.”³⁰ RFRA asks whether the law places a “substantial burden” on religious exercise. If yes, the government regulation must “further a compelling government interest” by using the “least restrictive means.” Minimal burdens do not trigger RFRA protection³¹ and even substantial burdens on religious exercise must be permitted where the countervailing interest is significant. Thus, the Department cannot use RFRA to deny beneficiaries this critical religious freedom protection.

The Department’s own RFRA analysis doesn’t even assert confidence that there is a violation: the alternative provider requirements “*could* impose such a burden” ... “[a]nd it is far from clear that” the alternative provider “requirement would meet the strict scrutiny that RFRA requires of laws that substantially burden religious practice.”³² This weak analysis can’t justify removing a critical protection for all social service beneficiaries.

Even if the RFRA claim were more robust, RFRA does not give the Department the authority to adjudicate claims it anticipates might happen and create blanket exemptions. Rather, RFRA requires a “careful, individualized, and searching review,”³³ based on an actual assertion that a sincerely held religious belief has been substantially

²⁹ See, e.g., HHS, 85 Fed. Reg. at 2984 (estimating cost at no more than \$100 per provider, per year); DHS, 85 Fed. Reg. at 2894 (estimating cost at no more than \$200 per provider, per year); DOJ, 85 Fed. Reg. at 2926 (same); DOL, 85 Fed. Reg. at 2935. (same).

³⁰ 85 Fed. Reg. at 3206.

³¹ See *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) (interpreting parallel statute, Religious Land Use and Institutionalized Persons Act (RLUIPA)); see also *Goehring v. Brophy*, 94 F.3d 1294, 1299 n.5 (9th Cir. 1996) (Even if a plaintiff’s beliefs “are sincerely held, it does not logically follow . . . that any governmental action at odds with these beliefs constitutes a substantial burden on their right to free exercise of religion.”).

³² 85 Fed. Reg. at 3194 (emphasis added).

³³ *California v. U.S. Dep’t of Health & Human Servs.*, 941 F.3d 410, 427 (9th Cir. 2019).

burdened.³⁴ The Department cannot assume that a simple requirement to help protect beneficiaries is a substantial burden on grantees' religious exercise. Blanket exemptions to rules—or here complete elimination of basic safeguards—by their nature, are not individualized reviews.

Perhaps the Department glossed over its RFRA analysis because it knew it was incorrect. A policy that requires a government-funded entity to take “reasonable steps” to refer a beneficiary to another provider is not a “substantial burden”³⁵ on government-funded providers. Faith-based organizations voluntarily partner with the government and if they do not want to fulfill responsibilities under a grant that are clearly tied to program objectives, they can decline the funding.³⁶

Nor does the Department's hypothetical—a faith-based organization has a religious objection to referring the beneficiary to an alternative provider that might provide services in a manner that would violate the organization's religious tenets—equate to a “substantial burden” under RFRA. The question in this scenario is whether *the act of the referral* creates a substantial burden, which we have established it does not. The provider in this scenario, however, would actually be objecting to “what follows from” the referral.³⁷ But, “[t]o the extent that [an organization] object[s] to [the alternative provider] acting in ways contrary to an organization's religious beliefs, they have no recourse.”³⁸

Even if the alternative provider requirements did impose a “substantial burden” on a faith-based organization's religious exercise, the government clearly has a compelling

³⁴ Determining whether there is a substantial burden on religious exercise is not up to individual claimants, however. See *id.* at 428 (RFRA does not authorize Department to “impose a blanket exemption for self-certifying religious objectors.”); see also *Real Alternatives, Inc. v. Sec'y Dep't of Health & Human Servs.*, 867 F.3d 338, 358 & n.23 (3d Cir. 2017); *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 588 (6th Cir. 2018) *cert. granted sub. nom. R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 2019 WL 1756679 (U.S. 2019).

³⁵ See *Locke v. Davey*, 540 U.S. 712, 721-22, 725 (2004) (distinguishing between coercive actions that substantially burden free exercise and a condition on funding that was “a relatively minor burden”); see also *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 681 (2010) (student group seeking official university recognition (“effectively a state subsidy”) “face[d] only indirect pressure to modify its membership policies” with university nondiscrimination policy); see generally Public Rights/Private Conscience Project, *Memo re Law Professors' Analysis of a Need for Legal Guidance and Policy-Making on Religious Exemptions Raised by Federal Contractors*, Colum. U. Sch. of Law, May 10, 2016, at 2-5, available at <https://bit.ly/39H3wrv>; Ira C. Lupu & Robert W. Tuttle, *The State of the Law – 2008*, Roundtable on Religion & Soc. Welfare Policy, 2008, at 33-37, available at <https://bit.ly/2StPhR6>.

³⁶ Because faith-based organizations can reject a grant and “maintain their practices,” these kinds of obligations are not coercive and therefore do not impose a substantial burden. Lupu, *supra* note 35, at 34. Grants to provide social services are wholly distinct from government benefits, like unemployment insurance, and nothing requires the government to fund social services through faith-based organizations, *Teen Ranch v. Udow*, 389 F. Supp. 2d 827, 838 (W.D. Wis. 2005); see also *Lyng v. Northwest Indian Cemetery Protective Ass'n.*, 485 U.S. 439, 451 (1988) (quoting *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring) (explaining religious liberty protections ensure what government may not do, not “what the individual can exact from the government”)).

³⁷ *Pennsylvania v. Trump*, 930 F.3d 543, 573 (3d Cir. 2019).

³⁸ *California*, 941 F.3d at 430 (citing *Lyng*, 485 U.S. at 449. See also *E. Tex. Baptist Univ. v. Burwell*, 793 F.3d 449, 459 (5th Cir. 2015); *Geneva Coll. v. Sec'y U.S. Dep't of Health & Human Servs.*, 778 F.3d 422, 440 (3d Cir. 2015), *vacated and remanded by Zubik v. Burwell*, 136 S. Ct. 1557 (2016).

interest. First, the government has a compelling interest in protecting the religious freedom rights of the beneficiaries. Second, the government has a compelling interest in ensuring people who most need services are provided them.³⁹

The RFRA argument actually cuts the other way. The Department acknowledges that it is possible “a beneficiary, due to a sincerely held religious belief, could not enter a particular religious facility to obtain social services” and that beneficiary, when “confronted with such a choice between adhering to religious beliefs and receiving social services likely would have a right to relief under RFRA.”⁴⁰ While making a stronger argument that RFRA actually requires the alternative provider than it prohibits it, the Department still strikes the provision.

The Proposed Rules Would Expand and Create New Religious Exemptions for Faith-based Providers and Put the Rights of Beneficiaries at Risk

Under the guise of conforming to *Trinity Lutheran* and adding clarity, the Department offers a number of unnecessary changes that meet neither of these goals. The language, which is not required by *Trinity Lutheran*, appears to expand already existing religious exemptions for providers, and would actually add more confusion than clarity. These changes, once again, would put the interests of faith-based providers above those of program beneficiaries, whose own religious freedom rights and access to needed program services would be put at risk.

“Religious Character” Changed to “Religious Exercise”

The existing regulations already reflect the holding of *Trinity Lutheran*. As noted above, the Department’s regulations state that faith-based organizations cannot be discriminated against because of their “religious character or affiliation.”⁴¹ This language accurately reflects *Trinity Lutheran*, which repeatedly uses the same term: “religious character.”⁴² No changes, therefore, are needed to the regulations. Nonetheless, the Department seeks to change the term “character” to “exercise” and add the term “religious exercise.”⁴³ This proposal should be rejected because it strays from the

³⁹ In fact, the Department’s “mission is to promote student achievement and preparation for global competitiveness by fostering educational excellence and *ensuring equal access*.” U.S. Dep’t of Educ., <https://www.ed.gov/> (emphasis added).

⁴⁰ See ED, 85 Fed. Reg. at 3195.

⁴¹ 2 C.F.R. § 3474.15(b)(2); 34 C.F.R. § 75.52(a)(2); 34 C.F.R. § 76.52(a)(2).

⁴² *Trinity Lutheran*, 137 S. Ct. at 2021 (“The Department’s policy expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious *character*.”) (emphasis added); *id.* at 2015 (*Trinity Lutheran* “is asserting a right to participate in a government benefit program without having to disavow its religious *character*.”) (emphasis added); *id.* at 2022 (*Trinity Lutheran* “asserts a right to participate in a government benefit program without having to disavow its religious *character*.”) (emphasis added); *id.* at 2024 (“[T]his case expressly requires *Trinity Lutheran* to renounce its religious *character*...” (emphasis added); *id.* (*Trinity Lutheran* was denied a “benefit solely because of its religious *character*.”) (emphasis added).

⁴³ 85 Fed. Reg. at 3220-21, 3224 (to be codified at 2 C.F.R. § 3474.15(b)(2); 34 C.F.R. §§ 75.52 (a)(2), 76.52(a)(2)) (change in language for bar on discrimination). See 85 Fed. Reg. at 3220-21, 3222, 3224 (to be codified at 2 C.F.R. § 3474.15(b)(4); 34 C.F.R. §§ 75.52(a)(4), 76.52(a)(4)) (adding new provisions barring disqualification based on “religious exercise”).

precise term in the case and wrongly signals an expansion of the existing exemption beyond that contemplated in *Trinity Lutheran*.

To make matters worse, the Department pairs this change with the addition of a definition of “religious exercise” that is used in RFRA. This broad definition of “religious exercise” makes more sense in the context of RFRA, where the mere fact that a person is exercising religion does not trigger an exemption. Under RFRA, the exercise of religion prompts the question of whether that exercise is substantially burdened, and if so, the court would apply strict scrutiny. The provisions in the regulations lack that limiting language. Use of “religious exercise” in this context falsely suggests that a provider is eligible for religious exemptions anytime it wishes to exercise religion, even when not required by *Trinity Lutheran* or RFRA. This not only raises constitutional concerns,⁴⁴ but threatens the rights and needs of beneficiaries.

Giving Faith-Based Organizations Special Rather than Equal Treatment

The Department’s current regulations state that faith-based organizations are eligible, “on the same basis” as any other organization,⁴⁵ to participate in grant programs. This too is already in line with *Trinity Lutheran*, yet the Department seeks to modify this language, by adding the clause: “considering any reasonable accommodation.”⁴⁶ If the Department truly wants to ensure a level playing field, this language is unnecessary. In fact, adding this language is directly at odds with the concept of a level playing field and instead suggests that the Department intends to treat faith-based organizations specially. This language should be struck.

Religious Exemptions from Program Requirements

The central goal in all grant programs is to provide people with the services they need. But the proposed rule would undermine this goal by making even the basic requirement that all providers “carry out eligible activities in accordance with all program requirements,” subject to religious accommodations.⁴⁷ Again, this language creates more confusion than clarity. The language suggests that providers do not have to meet program requirements and perhaps even that providers may refuse to provide services otherwise required by a grant award. These regulations should avoid even the suggestion that a provider can deny a beneficiary the services they need.

The proposed rule, infused with new references to potential religious exemptions, seems designed to let faith-based organizations do what they want in government-funded programs. Provisions ensuring that faith-based organizations be treated equally are contravened by language suggesting faith-based organizations can be treated

⁴⁴ See *infra* nn. 48-52 and accompanying text (explaining constitutional limits on government’s ability to create religious exemptions).

⁴⁵ 2 C.F.R. § 3474.15(b); 34 C.F.R. § 75.52(a)(1); 34 C.F.R. § 76.52(a)(1).

⁴⁶ 85 Fed. Reg. at 3220, 3221, 3224 (to be codified at 2 C.F.R. §§ 3474.15(b)(1) &)(3); 34 C.F.R. §§ 75.52(a)(3), 76.52(a)(3)).

⁴⁷ 85 Fed. Reg. at 3220, 3222, 3224 (to be codified at 2 C.F.R. § 3474.15(b)(3); 34 C.F.R. §§ 75.52(a)(3), 76.52(a)(3)).

specially. Provisions establishing provider requirements are undermined by language suggesting faith-based organizations don't actually have to comply. And new notices will be issued at various stages of the grant process to invite providers to request additional exemptions. Although the regulations are supposed to add clarity, they will offer none: there will be no clear lines, as each provision is undermined by the suggestion that faith-based providers can be excused from any standard, rule, requirement, guidance, or policy that applies to, and ensures the efficacy of, government-funded programs..

Lost in this scheme is the beneficiary—the person for whom access to the government program could be a matter of life and death. Nowhere in the proposed regulations are there corresponding modifications to ensure beneficiaries get the respect and the services they need. The Department is putting the beneficiary's well-being second to the religious beliefs of a faith-based provider.

Also lost is recognition that the Establishment Clause prohibits the government from granting religious exemptions that cause harm to others: “At some point, accommodation may devolve into [something] unlawful.”⁴⁸ The constitutional requirements are straightforward: “an accommodation must be measured so that it does not override other significant interests”⁴⁹ or “impose unjustified burdens on other[s].”⁵⁰ The Department must not create exemptions that have a harmful, discriminatory impact on others⁵¹ or give contractors and grantees the right to refuse to provide services, which amounts to giving them “the right to use taxpayer money to impose [their beliefs] on others.”⁵²

The Department Should Eliminate the Provision that Allows Taxpayer-Funded Employment Discrimination Not Expand It

The religious exemption in Title VII of the Civil Rights Act of 1964, as amended, allows religiously affiliated employers, using their own funds, to prefer co-religionists in employment. This exemption should not be extended to government funded jobs. Yet, the current regulations permit faith-based providers to discriminate in hiring with

⁴⁸ *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 334-35 (1986) (internal quotation marks omitted). Of course, in some instances exemptions may be constitutionally permissible but unwise public policy.

⁴⁹ *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005); see also *Estate of Thornton v. Caldor, Inc.* 472 U.S. 703, 709-10 (1985) (“unyielding weighting” of religious interests of those taking exemption “over all other interest” violates Constitution).

⁵⁰ *Cutter*, 544 U.S. at 726. See also *Texas Monthly, Inc. v. Bullock*, 480 U.S. 1, 18 n.8 (1989) (religious accommodations may not impose “substantial burdens on nonbeneficiaries”).

⁵¹ See *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2786 (Kennedy, J. concurring and controlling opinion) (no accommodation should “unduly restrict other persons . . . in protecting their own interests, interests the law deems compelling”); *id.* at 2760 (the religious accommodation would have “precisely zero” impact on third parties); see also *Holt v. Hobbs*, 135 S. Ct. 853, 867 (Ginsburg, J. concurring) (the accommodation “would not detrimentally affect others”).

⁵² *ACLU of Mass. v. Sebelius*, 821 F. Supp. 2d 474, 488 n.26 (D. Mass. 2012), *vacated as moot sub nom.*, *ACLU of Mass. v. U.S. Conference of Catholic Bishops*, 705 F.3d 44 (1st Cir. 2013).

taxpayer dollars. No one should be disqualified from a taxpayer-funded job because they are the “wrong” religion.

The proposed rule would not just reaffirm the existing provision that allows government-funded employment discrimination, but would expand it.

The existing regulatory provision that allows taxpayer-funded employment discrimination, which has met resistance since it was first proposed and remains highly controversial, conflicts with congressional intent. Title VII was enacted at a time when no one in Congress would have imagined that religious organizations that could qualify for the Title VII exemption could also qualify for government funding, let alone that they could avail themselves of the religious exemption when taking government funds.⁵³ And, Congress has rejected numerous efforts to allow government-funded entities to use religion to discriminate in employment.⁵⁴

Permitting providers to use the Title VII religious exemption to discriminate in government-funded jobs is also bad policy. First, the justification for the Title VII exemption—it allows religious organizations to maintain their autonomy and independence from the government—disappears when the organizations solicit government grants. Second, the government should never fund discrimination.

Allowing such discrimination also raises constitutional concerns. “[T]he Constitution prohibits the state from aiding discrimination.”⁵⁵ The government has a “constitutional obligation” to “steer clear . . . of giving significant aid to institutions that practice racial or other invidious discrimination.”⁵⁶

Moreover, the religious exemption violates the Establishment Clause’s prohibition on government promotion or advancement of religion. In *Corporation of Presiding Bishop v. Amos*, the Supreme Court explained that the Title VII exemption allows “churches to advance religion,” which does not violate the Constitution.⁵⁷ The case would have been different had “the government itself . . . advanced religion through its own activities and influence.”⁵⁸ Unlike in *Amos*, here the government itself is involved: Its funding

⁵³ See, e.g., Steven K. Green, *Religious Discrimination, Public Funding and Constitutional Values*, 30 *Hastings Const. L.Q.* 1, 4-5 (2002).

⁵⁴ Each time it was considered, legislation containing such a provision was either left in the House of Representatives without a vote from the Senate, or left out of the conference committee report. See, e.g., Work Opportunities Act of 1995, H.R. 4, 104th Cong. § 104 (1995), available at <https://bit.ly/2uBTFUZ>; CARE Act of 2002, H.R. 7, 107th Cong. § 201 (2001), available at <https://bit.ly/2SsoRz4>; School Readiness Act of 2003, H.R. 2210, 108th Cong. § 116 (2003) available at <https://bit.ly/39vPicG>; Workforce Investment Act Amendments of 2003, H.R. 1261, 108th Cong. § 123, available at <https://bit.ly/39yto8P>; National Defense Authorization Act for Fiscal Year 2017, H.R. 4909, 114th Cong. § 1094, available at <https://bit.ly/2SxX7ct>.

⁵⁵ E.g., *Norwood v. Harrison*, 413 U.S. 455, 465-66 (1973).

⁵⁶ *Id.* at 467.

⁵⁷ 483 U.S. at 337.

⁵⁸ *Id.*; see also *id.* at 340-41 (Brennan, J., concurring) (Discrimination in employment creates coercive pressure on job applicants and employees to “conform[] to certain religious tenets” or risk “losing a job opportunity [or] a promotion.”).

transforms the Title VII religious exemption into an unconstitutional advancement of religion.⁵⁹

For those reasons, the Department should have struck this provision. Instead, it is choosing to expand it.

The Title VII exemption is narrow. Religious employers may consider religion—and only religion—in their employment practices. The Title VII exemption “does not confer upon religious organizations a license to make those [employment] decisions” on the basis of race, national origin, or sex.⁶⁰ The exemption “merely indicates that such institutions may choose to employ members of their own religion without fear of being charged with religious discrimination. Title VII still applies, however, to a religious institution charged with” discrimination on another protected basis.⁶¹ Indeed, when debating the Civil Rights Act of 1964 and amendments in 1972, Congress considered and rejected blanket exemptions that would have allowed religious employers to discriminate against other protected classes.⁶²

The proposed regulations, however, would expand this narrow exemption. They would add: “An organization qualifying for such exemption may select its employees on the basis of their acceptance of or adherence to the religious tenets of the organization.”⁶³ This language fails to make clear that religious employers do not get a license to discriminate on grounds other than religion, even when motivated by religion. For example, courts have consistently held that it is “fundamental that religious motives may not be a mask for sex discrimination in the workplace.”⁶⁴ Therefore, even if a religious employer may demand that its employees adhere to a particular religious code of conduct, “Title VII requires that this code of conduct be applied equally” to all employees regardless of sex.⁶⁵

⁵⁹ See *Dodge v. Salvation Army*, No. S88-0353, 1989 WL 53857, *4 (S.D. Miss. Jan. 9, 1989); Green, *supra* note 53, at 48-52; Vikram Amar & Alan Brownstein, Legal Commentary, *The “Charitable Choice” Bill That Was Recently Passed by the House: Why Supreme Court Precedent Renders It Unconstitutional*, Findlaw, May 13, 2005, available at <https://bit.ly/2vBYIEK>.

⁶⁰ *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985); see also, e.g., *Kennedy v. St. Joseph’s Ministries, Inc.*, 657 F.3d 189, 192 (4th Cir. 2011); *Petruska v. Gannon Univ.*, 462 F.3d 294, 303 (3d Cir. 2006); *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 658 (6th Cir. 2000); *Bollard v. Cal. Province of the Soc’y of Jesus*, 196 F.3d 940, 945 (9th Cir. 1999); *EEOC v. Pac. Press Pub. Ass’n*, 676 F.2d 1272, 1277 (9th Cir. 1982); accord EEOC Compliance Manual, Section 12 No. 915-003 (July 22, 2008).

⁶¹ *Boyd v. Harding Academy of Memphis, Inc.*, 88 F.3d 410, 413 (6th Cir. 1996).

⁶² See *Pac. Press*, 676 F.2d at 1276-77 (recounting legislative history); *Rayburn*, 772 F.2d at 1167 (same).

⁶³ 85 Fed. Reg. at 3221, 3222, 3225 (to be codified at 2 C.F.R. § 3474.15(g); 34 C.F.R. §§ 75.52(g), 76.52(g)).

⁶⁴ *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 250 (E.D.N.Y. 1998); see also, e.g., *Hamilton v. Southland Christian Sch.*, 680 F.3d 1316 (11th Cir. 2012); see *EEOC v. Fremont Christian Sch.*, 781 F.2d 1367 (9th Cir. 1986); *Pac. Press*, 676 F.2d at 1276; *Herx v. Diocese of Ft. Wayne-South Bend, Inc.*, 48 F. Supp. 3d 1168, 1175-76 (N.D. Ind. 2014); *Vigars v. Valley Christin Ctr.*, 805 F. Supp. 802, 807 (N.D. Cal. 1992).

⁶⁵ *Boyd*, 88 F.3d at 414; see also, e.g., *Cline* 206 F.3d at 658; *Ganzy*, 995 F. Supp. at 348; *Dolter v. Wahlert High Sch.*, 483 F. Supp. 266, 270 (N.D. Iowa 1980).

Because, the proposed rule lacks this limiting language, it could invite religious organizations to engage in broad discrimination against employees. Under the new rule, faith-based employers might claim that the religious exemption allows them to fire or refuse to hire someone who is LGBTQ, a person who uses birth control, or a woman who is pregnant and unmarried, because the employers find that those employees do not practice their religion the “right” way.

The Department’s Definition of Indirect Aid Defies Constitutional Requirements

Executive Order 13559 ordered the agencies to more clearly differentiate between direct and indirect federal funding.⁶⁶ Social service providers and program officers have benefitted from clear definitions and explanations about the two types of government-funded programs. And as the Advisory Council noted, better explanations allow social service providers to “better assess . . . whether a program might suit their particular institutional commitments and structure.”⁶⁷ Moreover, with greater clarity on this matter, the Department can better design programs to properly protect beneficiaries’ religious freedom.

The definition of indirect financial assistance, adopted in the 2016 rule, “aligns with the constitutional principles addressed in *Zelman v. Simmons-Harris*.”⁶⁸ Even though there has been no change in the constitutional jurisprudence governing indirect aid programs, the Department proposes to revisit the definition and strip one of the constitutionally required criteria. We strongly oppose this revision.

In *Zelman v. Simmons-Harris*, the Supreme Court upheld a private school voucher program against an Establishment Clause challenge. The Court concluded that the voucher program could fund religious education because it was a program of “true private choice,” in which the families, rather than the government, chose to attend the religious school. To qualify as a program of “true private choice,” the program must (a) be “entirely neutral with respect to religion,” (b) provide “benefits directly to a wide spectrum of individuals,” and (c) permit “individuals to exercise genuine choice among options public and private, secular and religious.”⁶⁹

⁶⁶ Executive Order 13831 did not change this requirement.

⁶⁷ Advisory Council Report at 133.

⁶⁸ 2016 Final Regulations, 81 Fed. Reg. at 19,362.

⁶⁹ *Zelman v. Simmons-Harris*, 536 U.S. 639, 662 (2002).

Having a secular option is key to *Zelman*.⁷⁰ Using a voucher to attend a program with religious content is not a choice if there were no adequate secular alternatives.⁷¹ Indeed, the *Zelman* Court emphasized that the voucher program provided “genuine opportunities for Cleveland parents to select secular educational options for their school-age children” in addition to religious options and thus parents were not unconstitutionally coerced into sending their children to religious schools.⁷²

Zelman is part of a line of Supreme Court cases addressing indirect aid. Like in *Zelman*, all the programs that have survived constitutional scrutiny have done so because they have included secular options.⁷³ Lower courts also have consistently held that indirect aid requires that the beneficiaries be able to make a genuine choice that includes secular options. For example, the U.S. Court of Appeals for the Eighth Circuit held that a religious residential program at an Iowa prison was not indirect aid because people who were incarcerated did not “‘have full opportunity to expend . . . aid on wholly secular’ programs.”⁷⁴ The court concluded that the beneficiaries had “no genuine and independent private choice because [they] had only one option.”⁷⁵

⁷⁰ “If parents in a choice program are faced with no reasonable alternative to a religious school, then that program will be unconstitutional.” Marie Gryphon, *True Private Choice A Practical Guide to School Choice after Zelman v. Simmons-Harris*, Cato Institute Policy Analysis No. 466, 8 (2003), available at <https://bit.ly/3219pgr>. Courts describe the secular option as essential to *Zelman*. See, e.g., *Moses v. Ruszkowski*, No. 2019-NMSC-003, — P.3d —, 2018 WL 6566646 at *6 (N.M. Dec. 13, 2018) (describing *Zelman* as “upholding a publicly financed school voucher program that was neutral with respect to religion and provided aid to families who exercised an independent choice regarding whether to enroll in *public or private school*”) (emphasis added); *Anderson v. Town of Durham*, 895 A.2d 944, 955 (Me. 2006) (describing *Zelman* as “public tuition subsidies to students to attend sectarian educational institutions may be permissible under the Establishment Clause if the financial assistance program has a valid secular purpose, provides benefits to a broad spectrum of individuals who can exercise genuine private choice among *religious and secular options*, is paid through the students’ parents, and is neutral toward religion” (emphasis added)); *Eulitt ex rel. Eulitt v. Maine Dep’t. of Educ.*, 386 F.3d 344, 348 (1st Cir. 2004) (describing *Zelman* as “indirect public aid to sectarian education is constitutionally permissible when the financial assistance program has a valid secular purpose, provides benefits to a broad spectrum of individuals who can exercise genuine private choice among *religious and secular options*, and is neutral toward religion” (emphasis added)).

⁷¹ “The Court’s use of qualifying words, such as ‘genuine’ and ‘reasonable,’ suggests that not just any secular option will fulfill the Court’s requirement.” Gryphon, *supra* note 70, at 8.

⁷² *Zelman*, 536 U.S. at 655-56.

⁷³ See, e.g., *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S.1, 10 (1993) (services under IDEA available to student “without regard to the sectarian-nonsectarian, or public-nonpublic nature” of the school the child attends” (quotation marks omitted)); *Witters v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481, 488 (1986); *Mueller v. Allen*, 463 U.S. 388, 397 (1983) (tax deduction available “for educational expenses incurred by all parents, including those whose children attend public schools and those whose children attend non-sectarian private schools or sectarian private schools”).

⁷⁴ *Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 426-26 (8th Cir. 2007) (quoting *Witters*, 474 U.S. at 488).

⁷⁵ *Id.* at 426. “When enough non-religious options exist, those participants who choose [a religious option] do so only as a result of their own genuine and private choice.” See also *Am. Jewish Congress v. Corp. for Nat’l and Comm’y Serv.*, 399 F.3d 351, 358 (D.C. Cir. 2005); *Freedom from Religion Found., Inc. v. McCallum*, 324 F.3d 880, 881-82 (7th Cir. 2003) (parolee could choose among several secular and one religious halfway houses).

To justify this unconstitutional change, the preamble misinterprets dicta in *Zelman* that discussed the percentages of religious schools that participated in the program.⁷⁶ The Court said even if a “preponderance” or “most” of the private schools in a geographic area are religious, a school voucher program may be constitutional.⁷⁷ But ultimately, the percentages were irrelevant: “basing a standard of constitutionality on the actual percentages of aid used could not provide ‘certainty’ or ‘principled standards.’”⁷⁸ The constitutional standard that has been adopted by the Court is whether beneficiaries have a genuine choice and beneficiaries don’t have one if they have no secular option.⁷⁹

The Department’s misguided reliance on this passage in *Zelman* illustrates the underlying problem with using a school voucher case to create regulations that govern taxpayer-funded social services. Indeed, comparing school vouchers to social service vouchers is like comparing apples to oranges. In the school context, there will *a/ways* be a secular public option—namely public schools, and possibly charter schools and magnet schools—as well as secular private schools. The variety and availability of social service programs, on the other hand, is likely very different. A beneficiary’s options will usually be limited and in some areas, particularly rural areas, beneficiaries might have only one option.⁸⁰ In such scenarios, the aid cannot be treated as indirect. The Constitution demands that recipients of social services must be able to make an independent, private choice of providers among secular and religious options. Ignoring this requirement in the definition does not change the law.

The problems with the Department’s proposed definition are compounded by two additional proposed changes to the rule. First, the proposed definitions of “direct Federal financial assistance” and “Federal financial assistance” would limit the nondiscrimination provision to programs funded by direct aid only. This clearly conflicts with Executive Order 13559, which states that “*all* organizations”—that receive both direct and indirect aid—are prohibited from discrimination on the basis of “religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.”⁸¹

⁷⁶ See 85 Fed. Reg. at 3195. This passage was not mentioned at all in the preamble to the 2016 final rule and thus not deemed relevant to the definition. See 2016 Final Regulations, 81 Fed. Reg. at 19,361-62.

⁷⁷ *Zelman*, 536 U.S. at 657-58.

⁷⁸ Thomas Berg et al., *School Vouchers: Settled Questions, Continuing Disputes*, Nov. 2002, at 5, available at <https://pewrsr.ch/2HEMz53>.

⁷⁹ *Id.* at 3, 5-7. See also, e.g., Report to the President, Recommendations of the Interagency Working Group on Faith-Based and Other Neighborhood Partnerships Submitted pursuant to Executive Order 13559 at 17, available at <https://bit.ly/39By65v> (“Notably, the voucher scheme at issue in the *Zelman* decision, which was described by the Court as one of ‘true private choice,’ . . . offered beneficiaries genuine secular options.”).

⁸⁰ “In most areas of social service, by contrast, government tends to finance privately provided services rather than to operate such programs directly.” Ira C. Lupu & Robert W. Tuttle, *Zelman’s Future: Vouchers, Sectarian Providers, and the Next Round of Constitutional Battles*, 78 Notre Dame L. Rev. 917, 985 (2003).

⁸¹ Exec. Order 13,279, 67 Fed. Reg. 77,141 (2002), as amended by Exec. Order No. 13,559, 75 Fed. Reg. 71,317 (2010) at §2(d) (emphasis added). See also Federal Agency Final Regulations Implementing Executive Order 13559: Fundamental Principles and Policymaking Criteria for Partnerships With Faith-based and Other Neighborhood Organizations, 2016 Final Regulations, 81 Fed. Reg. at 19,360-61

Second, the Department has proposed adding a phrase to § 75.52(e) and § 76.52(e) that would allow organizations accepting indirect aid to require beneficiaries to attend religious activities. This proposed language conflicts with section 2(d) of Executive Order 13559, which prohibits discrimination against beneficiaries because of their “refusal to attend or participate in a religious practice” in both direct and indirect programs, as well as the first part of § 75.52(e) and § 76.52(e). Indeed, the 2016 final rule rejected requests to include a similar provision.⁸² Although one Department claims that this mandatory-attendance clause is a protection for beneficiaries,⁸³ another Department’s justification, that it is designed to benefit the provider and facilitate the provider’s religious exercise,⁸⁴ is more accurate.

Taken together, the mistaken definition of indirect financial assistance, the exclusion of beneficiaries from the nondiscrimination provision, and the mandatory-participation clause could mean that beneficiaries will be coerced to participate in religious activities as a condition of receiving government-funded services because the only providers to choose from are religious. Beneficiaries could (a) be true to their conscience, refuse to participate in religious activities, and be left with no services after being turned away or (b) pray, participate in Bible studies, and attend worship services even if they don’t share the same faith. This clearly violates the beneficiaries’ religious freedom.

The Department must restore the secular option to the definition of indirect financial assistance, ensure the nondiscrimination provision applies to direct and indirect aid, and strike the clause mandatory-participation clause.

The Proposed Rule Covering Social Service Programs Is Procedurally Flawed⁸⁵

The Proposed Rule Violates the Administrative Procedure Act

The proposed changes are “arbitrary and capricious” in violation of the APA.⁸⁶ The APA requires that there be some “reasoned explanation” for the changes to the current policy demonstrating the “rational connection between the facts found and the choices made.”⁸⁷ An agency “must examine the relevant data and articulate a satisfactory explanation.”⁸⁸ It cannot “ignore an important aspect of the problem” when promulgating a regulation.⁸⁹

(“[S]ection 2(d) of the Executive order does not limit these nondiscrimination obligations to direct aid programs.”). It is worth noting that in *Zelman*, all participating private schools agreed not to discriminate on the basis of race, religion, or ethnic background. *Zelman*, 536 U.S. at 643.

⁸² 2016 Final Regulations, 81 Fed. Reg. at 19,360-61.

⁸³ HHS, 85 Fed. Reg. at 2981.

⁸⁴ DOL, 85 Fed. Reg. at 2932.

⁸⁵ The procedural analysis focuses on the portion of the rule covering social service programs only. This should not be taken to mean that we believe the remaining portions of the rule are procedurally sound.

⁸⁶ 5 U.S.C. § 706(2)(a).

⁸⁷ *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

⁸⁸ *Id.*

⁸⁹ *Id.*

The proposed rule says, “it is the reasoned determination of the Department that” eliminating the alternative provider and notice requirements “would, to a significant degree, eliminate costs that have been incurred by faith-based organizations” in complying with the notice and referral requirements.⁹⁰ But simply stating that a determination is “reasoned” does not make it so.

As explained above, the Department admits that it “does not have adequate information available at this time to estimate” what, if any cost savings there would be for providers by removing the alternative provider requirements.⁹¹ And it does not identify a monetary cost saving associated with eliminating the notice requirement. Even its analysis of *Trinity Lutheran* and RFRA is cursory and flawed.⁹² The Department relied too much on conjecture to explain its position and this falls far short of the “reasoned explanation” required for a change to current policy.⁹³

Similarly, the Department lacks a reasoned explanation for expanding the employment and other exemption language. Vague references to “eliminating extraneous language” and making the existing provisions “align more closely with” RFRA and the First Amendment are insufficient.⁹⁴ And, the Department makes a significant change to the definition and parameters of indirect aid, again by citing the First Amendment, RFRA and *Zelman*, even though there has been no change in federal case law and the Department (along with the seven other Departments) promulgated regulations with the existing definition just 4 years ago.⁹⁵

The Proposed Rule Fails to Conduct a Family Policy Making Assessment

The proposed regulations fail to perform a “Family Policy Making Assessment” as required by Section 654 of the Treasury and General Government Appropriations Act of 1999 (note).⁹⁶ This statute requires agencies to “assess the impact of proposed agency actions on family well-being.”⁹⁷ This analysis must include whether “the action strengthens or erodes the stability or safety of the family and, particularly, the marital commitment,” whether “the action helps the family perform its functions,” and whether “the action increases or decreases disposable income or poverty of families and children. The Department failed to conduct any such analysis or provide any such certification for this proposed rule. It is obvious that this proposed rule, which changes how social services are delivered, could harm family well-being, and the Department ignores this important aspect of the problem.

⁹⁰ 85 Fed. Reg. at 3219.

⁹¹ *Id.* at 3217-19.

⁹² *Id.* at 3193-94.

⁹³ See *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).

⁹⁴ 85 Fed. Reg. at 3193-94.

⁹⁵ *Id.* at 3195, 3204.

⁹⁶ 5 U.S.C. § 601; see 105th Cong. Rec. S. 9256 (daily ed. July, 29, 1998) (Abraham (Others) Amendment No. 3362) (passing the requirement as an amendment to the Treasury and General Appropriations Act of 1999).

⁹⁷ 5 U.S.C. § 601.

The Department Is Not Entitled to the UMRA Exemption It Has Claimed

The Department wrongly claims the proposed rule is exempt from the Unfunded Mandates Reform Act (UMRA) of 1995.⁹⁸ The UMRA generally requires agencies to analyze how a proposed regulation will affect state and local governments and the private sector. They also must identify the estimated costs and benefits for the proposed rule. There are some exceptions to this UMRA requirement, including that it does not apply when proposed rules establish or enforce “statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability.”⁹⁹ The Department explains that the proposed rule will enforce a Supreme Court case—*Trinity Lutheran*—and RFRA,¹⁰⁰ neither of which are “statutory rights that prohibit discrimination.”

RFRA does not create a categorical right that bars discrimination, rather, it provides a mechanism for individuals to challenge generally applicable rules. The assessment is done on a case-by-case basis and the individual is not guaranteed an exemption—the government may justify the burden if the action is tailored to further a compelling interest.

The Regulations Would Carve Out Exemptions to Allow Religious Student Groups to Discriminate

The proposed rule adds an additional provision to 34 C.F.R. § 75.500 and § 76.500 that would require public universities and colleges to allow religious student organizations to discriminate in their practices, policies, membership, and leadership.¹⁰¹

The opportunity to both join and lead student groups is an essential part of the educational experience. Student groups contribute to the breadth and quality of collegiate life. They allow students to expand their knowledge and their resumes and explore different ideas and identities. Research shows that they contribute to overall student satisfaction and success. They provide opportunities for peer-to-peer connection, reduce isolation, develop leadership skills, and relieve stress.¹⁰²

Recognizing the importance of student groups, public colleges and universities often provide significant benefits to recognized groups: funding, meeting space, promotion in school media, advertising space, inclusion on student organization fairs, and use of school communication platforms. Students are usually charged a student fee in order to help fund student organizations and pay for these benefits.

To ensure all students can participate, colleges and universities often have nondiscrimination or “all-comers” policies that require officially recognized student

⁹⁸ 2 U.S.C. §1501 et seq.

⁹⁹ 2 U.S.C. § 1503(2).

¹⁰⁰ 85 Fed. Reg. at 3220.

¹⁰¹ 85 Fed. Reg. at 3216-17, 3225 (to be codified at 34 C.F.R. pts. 75, 76).

¹⁰² See, e.g., Foubert J.D. and Grainger L.U., Effects of Involvement in Clubs and Organizations on the Psychosocial Development of First-Year and Senior College Students, Vol. 43, No. 1, *NASPA Journal* (2006), available at <https://bit.ly/39E30KJ>.

groups to allow any student to join, participate in, and seek leadership in those groups. These policies promote equality by ensuring that public colleges and universities do not subsidize discrimination with tax dollars and tuition fees. They also guarantee that students are not forced to fund a student group that would reject them as members. Groups that do not want to follow the nondiscrimination policies can still exist, they just don't get the school's official recognition.

The proposed rule is meant to allow religious groups to circumvent all-comers policies.

All-comers policies are constitutional. In *Christian Legal Society v. Martinez*,¹⁰³ the Supreme Court upheld as constitutional a public university's all-comers policy that required student groups seeking official recognition to allow any student to join and participate in that group, including in elections for leadership positions. The Court held that such policies do not violate the free speech, expressive association, and free exercise rights of the students.¹⁰⁴ The Court also concluded that all-comers policies do not violate the Free Exercise Clause.¹⁰⁵ Rejecting the argument that such policies are not neutral but rather they target religion, the Court explained that exempting religious groups from all-comers policies would provide them "preferential, not equal, treatment."¹⁰⁶

Instead of treating all groups equally, this proposed rule would treat religious student groups specially. Only religious clubs would be exempt from the nondiscrimination requirement, which applies to all other clubs.

The proposed rule would also force schools to support discrimination. Colleges and universities have a legitimate interest in preventing discrimination on campus and fostering inclusionary practices for student organizations. All public institutions of higher education should have the right to ensure that the mandatory student activity fees only support those groups that are open to all students.

The Proposed Rule Would Expand the Religious Exemption in Title IX

Title IX bars sex discrimination in educational institutions that receive federal funding. Educational institutions that are "controlled by religious organizations" and object to provisions of Title IX insofar as those provisions are "inconsistent with their religious tenets" can claim an exemption.¹⁰⁷ To do so, these institutions need only provide written notification to the Department that "identif[ies] the provisions" of Title IX and the accompanying regulations that "conflict with a specific tenet of the religious organization."¹⁰⁸ The Department's proposed rule would expand this already broad

¹⁰³ 561 U.S. 661,697 (2010).

¹⁰⁴ *Id.* at 683.

¹⁰⁵ *Id.* at 697 n.27 (explaining that its decision in *Employment Division v. Smith*, which held that neutral and generally applicable laws do not violate the Free Exercise Clause, "forecloses that argument.").

¹⁰⁶ *Id.*

¹⁰⁷ 20 U.S.C. § 1681 (a)(3).

¹⁰⁸ 34 C.F.R. § 106.12.

exemption so that more schools, colleges, and universities will be able to discriminate on the basis of sex.

The Department's proposed regulations would codify criteria first established in 1977 and relied on ever since to determine if a school qualifies for the exemption.¹⁰⁹ But the language in the proposed rule would go beyond this longstanding policy. The Department proposes converting "examples of certain information" that schools have used to support a request for a religious exemption into regulatory standards.¹¹⁰ Previously, a school could use a "statement that the educational institution subscribes to specific moral beliefs or practice" and that "members of the institution community may be subjected to discipline for violating these beliefs or practices" to "support" a request for an exemption, but only to four specific regulatory provisions.¹¹¹ Under the proposed rule, this evidence would now be sufficient to claim an exemption to *any* part of Title IX¹¹² and permit an institution to discriminate.

In 2018, the Department proposed another rule that would eliminate the notice requirement under Title IX. The notice requirement offers critical protections for students, allowing them to make informed decisions and reduces the likelihood that they apply and attend a school without knowing that the school can discriminate against them. Students and prospective students should know whether their school provides Title IX protections or whether it claims a religious exemption that allows it to discriminate. Such notice is particularly important to the students most likely to face sex discrimination, including LGBTQ students, pregnant or parenting students, and students who access or attempt to access birth control or abortion services. The 2018 proposed rule would leave students in the dark, making it easier for schools to conceal their intent to discriminate and more difficult for students to know whether they are protected by Title IX.

Taken together, more schools would be eligible for the exemption and the students at these schools would be unaware they lacked Title IX protections. The Department should seek to foster inclusivity, not increase the likelihood that students will face discrimination. It should not expand the religious exemption.

Conclusion

For the many reasons discussed herein, we urge the Department to withdraw the proposed rule. Please feel free to contact Maggie Garrett (garrett@au.org) or (202) 466-

¹⁰⁹ U.S. Dep't of Educ., Office for Civil Rights, *Exemptions from Title IX*, <https://bit.ly/2Sx0Re3> (citing Memorandum from Harry M. Singleton, Assistant Secretary for Civil Rights, to Regional Civil Rights Director re Policy Guidance for Resolving Religious Exemption Requests (Feb. 19, 1985) (which cites HEW Form 639 A (Mar. 1977))).

¹¹⁰ 85 Fed. Reg. at 3207.

¹¹¹ Memorandum from William L. Smith, Acting Assistant Secretary for Civil Rights, to OCR Senior Staff re Title IX Religious Exemption Procedures and Instructions for Investigating Complaints at Institutions with Religious Exemptions at 2 (Oct. 11, 1989).

¹¹² 85 Fed. Reg. at 3226 (to be codified at 34 C.F.R. § 106.12(c)(5)).

3234) with any questions you may have about these comments. Your attention to this matter is greatly appreciated.

Sincerely,

A handwritten signature in black ink, appearing to read "Maggie Garrett".

Maggie Garrett
Vice President for Public Policy

A handwritten signature in black ink, appearing to read "Dena Sher".

Dena Sher
Assistant Director for Public Policy

A handwritten signature in black ink, appearing to read "Elise Helgesen Aguilar".

Elise Helgesen Aguilar
Federal Policy Counsel