



March 14, 2023

Re: Rule on Partnerships with Faith-Based and Neighborhood Organizations

Proposed by the Departments of Agriculture, Education, Health and Human Services, Homeland Security, Housing and Urban Development, Justice, Labor, and Veterans Affairs, and the Agency for International Development

RIN: 0412-AB10; 0510-AA00; 0991-AC13; 1105-AB64; 1290-AA45; 1601-AB02;
1840-AD46; 2501-AD91; 2900-AR23

To Whom It May Concern:

Americans United for Separation of Church and the American Civil Liberties Union jointly submit these comments in support of the proposed rule, “Partnerships with Faith-Based and Neighborhood Organizations,” published in the Federal Register on January, 13, 2023.

We unreservedly agree with and have joined the comments submitted by the Coalition for Religious Discrimination (CARD). We submit these comments to offer additional legal analysis and suggestions to further strengthen the rule.

For decades, Americans United and the American Civil Liberties Union have been dedicated to safeguarding a fundamental American value: religious freedom. The First Amendment to the U.S. Constitution grants everyone in this country the right to believe—or not believe—without government interference or coercion. It also ensures that no one can use religion as a justification for ignoring laws that protect the rights of others.

Our organizations have worked side by side to ensure that government partnerships with faith-based and neighborhood organizations abide by the separation of church and state so that people in need do not face religious discrimination or religious coercion as a condition of receiving government-funded social services and that taxpayers are not forced to fund religion. We are grateful that the Proposed Rules take important steps towards upholding this principle.

Beneficiary Protections Must Be Available to Everyone

The religious-freedom protections set forth for beneficiaries in the Agencies’ regulations governing social-service grantees are important and should apply broadly to all who are eligible to participate in government-funded programs. Unfortunately, arguments have been made in the past that some individuals—for example, prospective foster parents—are not “beneficiaries” for purposes of the regulations and are thus not protected against religious

discrimination. The Proposed Rule, however, explains that beneficiaries are the people served by providers.¹ We strongly support this inclusive description and urge the Agencies to clarify that everyone who participates in or uses federally funded services is afforded the critical protections for religious freedom set forth in the Proposed Rule. This can be done either by amending the definition of “beneficiary” to clarify that it covers *all* actual and prospective program participants, or by amending the descriptions of whom the protections cover to expressly refer to “program participants” instead of “beneficiaries.” For simplicity, our comments use “beneficiary” to encompass “beneficiary,” “prospective beneficiary,” and other program participants and prospective participants.

Provisions Barring Discrimination Against Beneficiaries Are Vital

The Proposed Rule retains the longstanding prohibition on discrimination against beneficiaries in all federally funded social service programs. Beneficiaries may not be discriminated against “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,”² whether they participate in a direct-aid or indirect-aid program.³ We strongly support this.

To further strengthen their “commit[ment] to ensuring that all beneficiaries and potential beneficiaries have access to federally funded services and programs without unnecessary barriers and free from discrimination,”⁴ we urge the Agencies to clarify the following provisions:

- All Agencies⁵ should explicitly state that all beneficiaries, whether participating in programs funded by direct or indirect aid, are protected. The Department of Agriculture’s provision should serve as a model.⁶
- Executive Order 13279 (as amended by Executive Order 13559) bars discrimination by organizations “in providing services supported in whole or in part with Federal financial assistance, and in their outreach activities related to such services.”⁷ The majority of Agencies include “outreach” in their nondiscrimination provisions, but the Departments of Justice, Health and Human Services, and Housing and Urban Development, and the Agency for International Development do not. These

¹ Notice of Proposed Rulemaking, Partnerships with Faith-Based Organizations, 88 Fed. Reg. 2395, 2398 (Jan. 13, 2023) (NPRM).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ The Agency for International Development does not have indirect-aid programs or indirect-aid provisions in its regulations.

⁶ USDA, proposed § 16.4(a) (“Any organization that receives direct or indirect Federal financial assistance shall not, with respect to services, or, in the case of direct Federal financial assistance, outreach activities funded by such financial assistance, discriminate against a current or prospective program beneficiary on the basis of religion, religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.”).

⁷ Exec. Order No. 13,279, 67 Fed. Reg. 77,141, 77,142 (2002), as amended by Exec. Order No. 13,559, 75 Fed. Reg. 71,317 (2010) at § 2(d).

Agencies should conform their rules to the others by adding “outreach” to their nondiscrimination provisions.

- The Department of Veterans Affairs should update two of its nondiscrimination provisions, which now protect “religion or religious belief,” to include the full range of protections against discrimination.⁸

Written Notice Is a Critical Protection for Beneficiaries

We strongly support the Proposed Rule’s requirement that both faith-based and secular providers give beneficiaries written notice of their rights. The written-notice requirement protects beneficiaries in two ways. First, notice informs beneficiaries that they have a right to receive services free from discrimination, proselytization, and religious coercion. Without notice, beneficiaries are even more vulnerable—they cannot exercise their rights if they are not aware of them. Second, providing beneficiaries with notice also reminds staff and volunteers that, regardless of whether they are working in a faith-based or secular organization, the services they provide cannot be religious, and they must not impose their beliefs upon beneficiaries.⁹

The written-notice requirement had been a critical protection for beneficiaries; it was based on years of work from an expert task force, a Presidential Advisory Council that recommended consensus-based policies,¹⁰ and an interagency working group that produced model regulations.¹¹ But the Trump Rule disregarded this careful work, eliminating the notice provision while providing no legitimate reason for this change.

The compliance costs to providers were minimal,¹² while the benefits that come from giving people notice of their rights are significant. Indeed, at the same time that the Trump Rule eliminated notice for beneficiaries, it added notices for providers “to ensure that faith-based organizations are aware of their legal protections.”¹³ If providers deserve notice, then so too do vulnerable beneficiaries.

⁸ 38 C.F.R. §§ 61.64(e); 62.62(e).

⁹ See U.S. Gov’t Accountability Off., GAO-06-616, Faith-Based and Community Initiative: Improvements in Monitoring Grantees and Measuring Performance Could Enforce Accountability (June 2006), <https://bit.ly/3YGxcOo> (faith-based providers reported that they understood the prohibition on supporting or engaging in religious activities with direct federal funding yet still engaged in impermissible religious activities at the same time and location as federally funded services).

¹⁰ President’s Advisory Council on Faith-Based and Neighborhood P’ships, A New Era of Partnerships: Report of Recommendations to the President 117-20;140-41 (2010), <http://bit.ly/2A0yhXA>. The Task Force and Council comprised experts representing many varied perspectives from religious freedom organizations, denominations, and religiously affiliated organizations, including providers.

¹¹ NPRM at 2396.

¹² Final Rule, Equal Participation of Faith-Based Organizations in the Federal Agencies’ Programs and Activities, 85 Fed. Reg. 82,037, 82,063 (Dec. 17, 2020).

¹³ E.g., Notice of Proposed Rulemaking, Ensuring Equal Treatment of Faith-Based Organizations, 85 Fed. Reg. 2974, 2979 (Jan. 17, 2020).

Below are just a few examples of why written notice is vital to beneficiaries:

- An older person would not necessarily know that a faith-based long-term care provider receiving federal funds cannot require religious participation or membership in a particular religion.
- A beneficiary who is Jewish, Sikh, or nonreligious might forgo desperately needed services if that person's initial contact with a provider is in a church adorned with Christian iconography and they do not receive a notice assuring them that they need not participate in church services.
- Because of their age and vulnerability, an "at-risk" teenager who is receiving mentoring services from a community organization and has a mentor who is pressuring them to attend religious programming might participate in these activities against their will because they do not know that they can say "no."
- A nonreligious veteran who is at risk of homelessness and thus seeks help with case management may feel profoundly uncomfortable at a faith-based provider whose staff asks him to go to Bible study, but he would not be aware of his right to refuse to do so.

Even in circumstances where a provider has no intent to discriminate against beneficiaries or to otherwise make them feel unwelcome, religious imagery or a casual and well-intentioned invitation to join in a prayer circle or to say grace before a federally funded meal may make some beneficiaries uncomfortable and unsure about whether they can refuse.

Restoration of the written-notice requirement is a critical step in protecting beneficiaries, but Agencies can and should do more: To further improve the effectiveness of the written notice, Agencies should make a few additional changes to enhance clarity and make the process easier to administer, including:

- All Agencies should restore model notices to help grantees comply with their obligation. In particular, the Agencies should follow the lead of the Department of Labor and set out required language for the notice in an appendix to the regulations.¹⁴
- The notice should provide explicit information about how beneficiaries can file a complaint and how the complaint will be addressed. For example, the Department of Labor designates an office that is responsible for handling complaints and includes the address and phone number.¹⁵
- The Agencies should include additional information in the notice that would aid beneficiaries whose rights have been violated, including the name of the funding Agency, any intermediaries, and the name of the federal program.

Finally, the written-notice requirement currently applies only to direct-aid programs.¹⁶ This leaves beneficiaries who participate in the Agencies' indirect-aid programs without the information they need to advocate for and protect their rights. The Proposed Rule correctly

¹⁴ DOL, proposed § 2.34(a) & Appendix C.

¹⁵ DOL, proposed § 2.34(a)(4) & Appendix C(4).

¹⁶ NPRM at 2398-99.

justifies restoring the written-notice requirement because it “would improve beneficiaries’ access to federally funded services by informing them of their rights and thus removing certain barriers arising from discrimination.”¹⁷ This reasoning applies equally to indirect-aid programs, and the Agencies should extend the written-notice requirement to these programs as well.¹⁸

The Definition of Indirect Aid Reflects Constitutional Prerequisites

Whether a program is categorized as indirect or direct aid has important implications for the rights of beneficiaries because indirect-aid programs have laxer religious-freedom protections for beneficiaries. For example, providers in indirect-aid programs are permitted, in some instances, to use aid for religious activities. In addition, as noted above, under the Proposed Rule, indirect-aid programs currently need not give written notice to beneficiaries of their rights—although we strongly urge the Agencies to correct this unnecessary disparity.

As set forth in the CARD comments, we support the Agencies’ decision to redefine “indirect Federal financial assistance” to better align with constitutional requirements and to correct problems created by the Trump Rule. The Proposed Rule should be further revised, however, to ensure that the definition is accurate and uniform across Agencies. In particular, the Rule must *require* secular options in indirect-aid programs, rather than making the availability of such options merely a “significant factor” in the analysis of whether a beneficiary is able to make the sort of wholly genuine, independent, private, and voluntary choice among providers necessary to render a program’s aid indirect.

The Proposed Rule makes two sets of changes to the definition of “indirect Federal financial assistance” to emphasize the constitutional prerequisites.

First, the Proposed Rule adds the words “wholly,” “genuinely,” and “private” to the definition, in an effort to further highlight the constitutional requirements of an indirect aid program.¹⁹ Some Agencies also affirmatively state that the choice must be that of the individual and “not a choice of the government.”²⁰ All Agencies should use these same terms to be consistent and achieve the goal of making “even clearer that the regulations incorporate the understanding of ‘indirect’ aid in” *Zelman v. Simmons-Harris*.²¹

¹⁷ NPRM at 2407.

¹⁸ For example, written notice should be provided particularly when the Agencies are “responsible for selecting service providers in an indirect aid program.” NPRM at 2401. The cost estimate provided would not change because the Agencies noted that, in calculating the costs for written notice, they could not differentiate between direct and indirect aid programs. NPRM at 2405.

¹⁹ NPRM at 2401.

²⁰ USDA, proposed § 16.2; HHS, proposed § 87.1(c)(2); HUD, proposed § 5.109(b); DOJ, proposed § 38.3(b)(2); DOL, proposed § 2.31(a)(2)(ii).

²¹ See NPRM at 2401; *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

Accordingly, we recommend that:

- the Departments of Education, Homeland Security, and Veterans Affairs add the “not a choice of the government” language to their indirect-aid definitions;
- the Department of Justice add “genuine” or “genuinely” as well as “private” to its definition of indirect aid;
- the Department of Labor add “private” to its indirect-aid definition; and
- the Department of Veterans Affairs ensure that its three definitions are consistent and include all of the relevant terms discussed above.²²

Second, the Proposed Rule provides that whether secular options are available to beneficiaries is a “a significant factor” in determining whether a beneficiary is able to make a genuine and independent choice.²³ This is a critical modification—even though there had been no change in the constitutional jurisprudence governing indirect aid programs, the Trump Rule eliminated the constitutionally required obligation that a beneficiary must be able to choose a secular provider in order for a program to qualify as indirect aid.²⁴ To fully meet the demands of the Constitution, however, the Agencies should *require* that there be secular alternatives.

In *Zelman*, the Supreme Court upheld a school-voucher program against an Establishment Clause challenge, concluding that the program could fund private religious education because it was a program of “true private choice,” in which the families, rather than the government, chose to attend a religious school. The Court made clear that the voucher program at issue qualified as a program of “true private choice,” only because it (a) was “entirely neutral with respect to religion,” (b) provided “benefits directly to a wide spectrum of individuals,” and (c) permitted “individuals to exercise genuine choice among options public and private, secular and religious.”²⁵

Having secular options was, therefore, key to the ruling in *Zelman*.²⁶ Indeed, the *Zelman* Court emphasized that, because the voucher program provided “genuine opportunities for Cleveland parents to select secular educational options for their school-age children” in addition to religious options, parents were not unconstitutionally coerced into sending their children to religious schools.²⁷

²² See VA, proposed §§ 50.1(b)(2); 61.64(b)(2); 62.62(b)(2).

²³ NPRM at 2400-01.

²⁴ NPRM at 2397.

²⁵ *Zelman*, 536 U.S. at 662.

²⁶ “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 Inst. Policy Analysis No. 466, 8 (2003), available at <https://bit.ly/3219pgr>. Courts have likewise described the secular option as essential to *Zelman*. See, e.g., *Moses v. Ruszkowski*, 458 P.3d 406, 414 (N.M. 2018); *Anderson v. Town of Durham*, 895 A.2d 944, 955 (Me. 2006); *Eulitt ex rel. Eulitt v. Maine Dep’t of Educ.*, 386 F.3d 344, 348 (1st Cir. 2004).

²⁷ *Zelman*, 536 U.S. at 655-56. “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 at 8.

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 the aid could be used in religious or secular settings.²⁸ Lower courts also have consistently held that indirect aid requires that beneficiaries be able to make a genuine choice among options that included secular ones. 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.²⁹ The court concluded that the beneficiaries had “no genuine and independent private choice because [they] had only one option.”³⁰

To justify this unconstitutional change, the Trump Rule misinterpreted dicta in *Zelman* that discussed the percentages of religious schools that participated in the voucher program.³¹ The Court noted that, even if a “preponderance” or “most” of the private schools in a geographic area are religious, a school voucher program may be constitutional.³² But ultimately, the percentages were irrelevant to the Court’s holding because “basing a standard of constitutionality on the actual percentages of aid used could not provide ‘certainty’ or ‘principled standards.’”³³ The constitutional standard adopted by the Court is whether beneficiaries have a genuine choice, and beneficiaries do not have one if they have no secular option.³⁴

No one should be forced to participate in a religious program, attend worship, or pray in order to obtain vital services, but that is the effect of the Trump Rule. Under the Trump Rule, certain government-funded social services are categorized as indirect-aid programs even though not even one secular option is available. Beneficiaries, therefore, do not have the ability to make a genuine and independent choice as to a provider. They are necessarily forced either to accept services offered by religious providers—where they have fewer

²⁸ 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); cf., *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 nonsectarian private schools or sectarian private schools”).

²⁹ *Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 425-26 (8th Cir. 2007) (quoting *Witters*, 474 U.S. at 488).

³⁰ *Id.* at 426. See also *Am. Jewish Congress v. Corp. for Nat'l and Comm'y Serv.*, 399 F.3d 351, 358 (D.C. Cir. 2005) (“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.”); *Freedom from Religion Found., Inc. v. McCallum*, 324 F.3d 880, 881-82 (7th Cir. 2003) (halfway houses that parolee could choose included several secular and one religious option).

³¹ See 85 Fed. Reg. at 2983; see also 85 Fed. Reg. at 82,073.

³² *Zelman*, 536 U.S. at 657-58.

³³ Thomas Berg et al., *School Vouchers: Settled Questions, Continuing Disputes*, Pew Forum on Religion & Pub. Life, Nov. 2002, at 5, available at <https://pewrsr.ch/2HEMz53>.

³⁴ *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 E.O. 13559, 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.”).

religious-freedom protections and could be required to take part in religious activities—or forgo services altogether.

Importantly, *requiring* secular alternatives, rather than using their availability as one factor in the indirect-aid analysis, will not disqualify religious providers from offering services under government programs. The Proposed Rule sets out a simple, logical, and constitutional approach to addressing situations where certain beneficiaries may not have genuinely independent and private choice (e.g., when there are no adequate secular options available). The Agency would either expand the universe of available and adequate providers to include secular options or apply the direct-aid requirements to the funding.³⁵ These remedies would ensure that providers are not disqualified from receiving government funds to deliver services because they are religious; that beneficiaries are not forced to participate in religious activities in order to receive services they need; and that federal funds are not used to directly support explicitly religious activities.

Finally, we urge all Agencies to require *more than* one secular option. *Zelman* explained that the Establishment Clause “question must be answered by evaluating all options Ohio provides Cleveland schoolchildren, only one of which is to obtain a program scholarship and then choose a religious school.”³⁶ In fact, the voucher program at issue in *Zelman* offered five out of six options that were nonreligious. Thus, a program with just two options of social-service providers, even if one is secular, would be inadequate because it does not offer a range of service providers that amounts to real choice for beneficiaries.

To that end, the Departments of Agriculture, Education, Housing and Urban Development, and Justice³⁷ should change the language in the final rule to match that of other Agencies: “adequate secular alternatives,” which signifies not only that to qualify as indirect aid programs must have a secular option, but also that more than one secular option may be necessary to provide beneficiaries an adequate choice.

Religious Exemptions Threaten Beneficiaries and the Provision of Effective, Equitable, and Efficient Services

The central goal in all grant programs is to provide people with the services they need. But the Trump Rule’s addition of new religious exemptions undermined this goal. Accordingly, we support the Proposed Rule’s elimination of language that invites providers to claim overly broad religious exemptions and wrongly suggests that Agencies would be bound to grant such requests.

Infused with new references to potential religious exemptions, the Trump Rule was designed to allow faith-based organizations to do whatever they want in government-funded programs. Provisions ensuring that faith-based organizations be treated equally are

³⁵ NPRM at 2400-01.

³⁶ *Zelman*, 536 U.S. at 656.

³⁷ USDA, proposed § 16.2; ED, proposed §§ 75.52(c)(3)(ii)(B) & 76.52(c)(3)(ii)(B); HUD, proposed § 5.109(b); DOJ, proposed § 38.3(b)(2).

contravened by language suggesting that these groups can be treated specially. Provisions establishing provider requirements are undermined by language suggesting that faith-based organizations need not actually comply. And notices of these purported exemption rights are required to be issued at various stages of the grant process, encouraging religious providers to request additional overly broad exemptions. Although the Trump Rule was portrayed as adding clarity to the process, it offers none: There are no clear lines, as each provision is undermined by the suggestion that faith-based providers may be excused from any standard, rule, requirement, guidance, or policy that applies to, and ensures the efficacy of, government-funded programs.

Lost in the Trump Rule is the beneficiary—the person for whom access to the government program could be a matter of life and death. The Trump Rule makes no corresponding modifications to ensure that beneficiaries get the respect and the services they need. It puts the beneficiary's well-being second to the religious beliefs of a faith-based provider.

Also lost is the recognition that the Establishment Clause prohibits the government from granting religious exemptions that cause harm to others. The constitutional requirements are straightforward: “[A]n accommodation must be measured so that it does not override other significant interests”³⁸ or “impose unjustified burdens on other[s].”³⁹ The government may not create exemptions that have a harmful, discriminatory impact on others.⁴⁰ In short, the government may not make one person bear the costs of another person’s religion.⁴¹

The Trump Rule made these changes under the guise of conforming to *Trinity Lutheran Church of Columbia, Inc. v. Comer*.⁴² But the new language was not required by *Trinity Lutheran*, and, as the Proposed Rule acknowledges, actually added more confusion than clarity.⁴³ *Trinity Lutheran* holds only that the government cannot disqualify a religious entity from competing for a grant “solely because of its religious character.”⁴⁴ Despite the fact that the regulations already plainly stated that religious organizations could compete equally for grants that fund social-service programs,⁴⁵ which is all that *Trinity Lutheran* requires, the

³⁸ *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 interests” violates the Constitution).

³⁹ *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”).

⁴⁰ See, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693, 729 n.37 (2014); *id.* at 739 (Kennedy, J., concurring); *Cutter*, 544 U.S. at 720, 726; *Texas Monthly* 489 U.S. at 18 n.8; *Caldor*, 472 U.S. at 708-10.

⁴¹ Doing so would violate the historic, foundational principle at the heart of the Establishment Clause: The government must remain neutral between religions, and between religion and nonreligion. See *Larson v. Valente*, 456 U.S. 228, 244 (1982).

⁴² 137 S. Ct. 2012 (2017).

⁴³ NPRM at 2401.

⁴⁴ 137 S. Ct. at 2021.

⁴⁵ For example, the Department of Health and Human Services regulations said religious organizations “are eligible” “on the same basis as” any other organization and cannot be discriminated against because of their “religious character or affiliation.” Final Rule, 81 Fed. Reg. 19,355, 19,426 (Apr. 4, 2016) (codified at 45 C.F.R. § 87.3(a)).

Trump Rule added harmful language that advantaged religious organizations over secular groups.

Eligibility and Program Requirements

Throughout the regulations governing eligibility and grantee obligations, the Trump Rule inserted provisions designed to give exemptions to faith-based providers that would enable them to refuse to fulfill program requirements. The language suggests that providers will be given a religious exemption whenever one is sought.⁴⁶

First, the Trump Rule modified the existing requirement that faith-based organizations are eligible to become grantees “on the same basis as” any other organization with the caveat: “considering any permissible accommodation.”⁴⁷ Adding this language was directly at odds with the concept of a level playing field for faith-based and secular organizations. The provision now suggests that, rather than being eligible on the “same basis” as secular groups, faith-based organizations should be treated specially.

Additional language in the Trump Rule suggests that providers must be granted religious exemptions from program requirements even when not required by law and regardless of the impact on beneficiaries.⁴⁸

Accordingly, and as set out in the CARD comments, we support the Agencies’ changes to the overly broad religious-exemption language in the Trump Rule, and we offer these additional comments:

- The Trump Rule prohibits discrimination *against* faith-based providers but fails to acknowledge that Agencies also may not favor faith-based providers. Thus, we strongly support the Proposed Rule’s changed language to clarify that Agencies cannot discriminate “for or against” a faith-based provider.⁴⁹
- We support the new language that prohibits discrimination against faith-based organizations “on the basis of the organization’s religious character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to disfavor a similarly situated secular organization.”⁵⁰ It clarifies and states “more plainly” the existing prohibitions that protect religious providers.⁵¹

⁴⁶ NPRM at 2401-02.

⁴⁷ 45 C.F.R. § 87.3(a); see also, e.g., 6 C.F.R. § 19.3(a) (“considering any religious accommodations appropriate under the Constitution or other provisions of Federal law, including but not limited to 42 U.S.C. 2000bb et seq., 42 U.S.C. 238n, 42 U.S.C. 18113, 42 U.S.C. 2000e-1(a) and 2000e-2(e), 42 U.S.C. 12113(d), and the Weldon Amendment”). The language varied slightly among the Agencies.

⁴⁸ E.g., 34 C.F.R. § 75.52(a)(3) (“subject to any required or appropriate religious accommodation”); 28 C.F.R. 38.5(d) (“subject to any religious accommodations appropriate under the Constitution or other provisions of Federal law, including but not limited to 42 U.S.C. 2000bb et seq., 42 U.S.C. 238n, 42 U.S.C. 18113, 42 U.S.C. 2000e-1(a) and 2000e-2(e), 42 U.S.C. 12113(d), and the Weldon Amendment”).

⁴⁹ E.g., HHS, proposed § 87.3(a).

⁵⁰ E.g., *id.*

⁵¹ NPRM at 2402.

- We urge the Department of Agriculture to delete the definition of “[d]iscriminate against an organization on the basis of the organization’s religious exercise.”⁵² The definition is not necessary given that proposed changes spell the prohibition out in another provision⁵³ and there is no longer a reference to “religious exercise” in the Proposed Rule.
- In the provision barring disqualification based on religious character, motive, affiliation, or lack thereof, some Agencies do not use “motives,” but retain the less-clear “motivated or influenced by religious faith to provide social services” that is used in the current Trump Rule.⁵⁴ Because this creates internal inconsistency between the “discrimination” provision and the “disqualification” provision for these Agencies, they should change their rules to achieve uniformity and consistency and use “motives.” In addition, the Department of Agriculture should add “motives” to its provision barring disqualification.⁵⁵
- The Department of Veterans Affairs should delete the first sentence in its proposed § 50.2(e): “A faith-based organization is not rendered ineligible by its religious exercise or affiliation to access and participate in VA programs.” This will both avoid confusion and advance consistency, because there is also the standard language about disqualification in the same provision.
- We support the Proposed Rule’s removal of the language “on the same basis as any other organization, and considering a religious accommodation” from the sentence on eligibility. The Departments of Health and Human Services, Homeland Security, and Housing and Urban Development, however, have not removed this language and should do so.⁵⁶
- We support the inclusion of the new stand-alone provision⁵⁷ stating that providers must carry out eligible activities in accordance with all program requirements “subject to any accommodations that are granted to organizations on a case-by-case basis in accordance with the Constitution and laws of the United States.”⁵⁸ But there

⁵² USDA, proposed § 16.2.

⁵³ USDA, proposed § 16.3(a).

⁵⁴ HHS, proposed § 87.3(g); DHS, proposed § 19.3(g); HUD, proposed § 5.109(h); DOJ, proposed § 38.5(d); DOL, proposed § 2.32(c); USAID, proposed 205.1(g) (this provision also does not follow the form of all other Agencies’ provisions); VA, proposed § 50.2(e).

⁵⁵ See USDA, proposed § 16.3(d)(3).

⁵⁶ See HHS, proposed § 87.3(a); DHS, proposed § 19.3(a); HUD, proposed § 5.109(c)(1).

⁵⁷ HHS, proposed § 87.3(b). The Department of Labor incorporates this language into its prohibition on discrimination against faith-based organizations. DOL, proposed § 2.32(a).

⁵⁸ The Agencies’ commitment to case-by-case review is welcome and necessary. Granting a religious exemption without first objectively determining that there exists a substantial, government-imposed burden on a claimant’s religious exercise would violate the Constitution by favoring and promoting religion over nonreligion. See *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 613 n.59 (1989); *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 334-35 (1987).

If claims for exemptions are advanced under the Religious Freedom Restoration Act (RFRA), the law requires a careful, individualized review. Agencies are permitted—indeed required—to inquire into the circumstances underlying the claim. They must first ensure that the religious belief is sincerely held. See, e.g., *Holt v. Hobbs*, 574 U.S. 352, 369 (2015). They also must ensure that the asserted burden is “substantial” as a legal matter. See, e.g., *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 588 (6th Cir. 2018), *aff’d by Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) (RFRA claims were not at issue in Supreme Court case); see also, e.g., *Bowen v. Roy*, 476 U.S. 693, 702-03 (1986); *Hernandez v.*

are slight variations in the language across Agencies. For the sake of clarity and uniformity, the Agencies with the non-standard language should revise their provisions. We also support striking the religious-accommodation language in the provisions relating to program requirements because it is redundant of the stand-alone provision and its placement in the text could cause confusion.⁵⁹

Announcements and Notices

The Proposed Rule amends the announcements and notices in Appendices A and B to eliminate confusing and contradictory language and to add important information about the eligibility, independence, and obligations of faith-based organizations. We support these changes but urge the Agencies to align the text of these provider notices so that they are consistent with each other and reflect all of the positive changes in the Proposed Rule.

Specifically, we recommend the following changes:

- The Department of Housing and Urban Development should add Appendix A.
- The Agency for International Development should add Appendices A and B.
- The Department of Agriculture should update Appendix A(a) so that it prohibits discrimination “for or against” providers.
- In Appendix A(a), five Agencies prohibit discrimination against faith-based providers on the basis of their “religious character, motives, or affiliation, or lack thereof.” The Departments of Homeland Security, Labor, and Veterans Affairs do not include this standard language and their provisions should be changed:
 - The Department of Homeland Security retains the less-clear “motivated or influenced by religious faith to provide social services” from the Trump Rule, and this should be changed simply to “motives.”
 - The Department of Labor retains “exercise” from the Trump Rule and should remove it.
 - The Department of Veterans Affairs should add “or lack thereof.”
- In Appendix A(a), the Department of Housing and Urban Development should update the text to include “on the basis of conduct that would not be considered grounds to disfavor a similarly situated secular organization.”

C.I.R., 490 U.S. 680, 699 (1989). This includes an assessment of whether there is a logical tie between the asserted burden and a religious belief, *see, e.g.*, *Mahoney v. Doe*, 642 F.3d 1112, 1121 (D.C. Cir. 2011), and whether the requested accommodation is tailored to address the asserted burden. Even if all these requirements are met under RFRA, the Agency may still determine that denying the exemption is necessary because it is the least restrictive means of furthering a compelling Agency interest. Moreover, Agencies are required by the Establishment Clause to weigh the effect that granting an exemption would have on other significant interests and may not grant exemptions that detrimentally affect others.

⁵⁹ *E.g.*, HHS, proposed § 87.3(g) (“All organizations, whether faith-based or not, that participate in HHS awarding agency programs or services must carry out eligible activities in accordance with all program requirements, *including those prohibiting the use of direct Federal financial assistance to engage in explicitly religious activities*, subject to any accommodations that are granted to organizations on a case-by-case basis in accordance with the Constitution and laws of the United States.”) (emphasis added).

- In Appendix A(b) and Appendix B(a), the Departments of Agriculture and Labor should follow the lead of all other Agencies and eliminate the long list of citations to federal laws that encouraged overly broad claims for religious exemptions.
- Because *all* providers, whether or not religious, are prohibited from discriminating against beneficiaries or spending taxpayer funds on explicitly religious activities, the Agencies should use “an organization (faith-based or secular),” rather than “a faith-based organization” in Appendix A(c) and Appendix B(b). As written, the bar on beneficiary discrimination only applies to faith-based providers in the Departments of Education, Health and Human Services,⁶⁰ and Housing and Urban Development.⁶¹
- In Appendix A(c) and Appendix B(b), the Agencies explain that grantees may not “support or engage in any explicitly religious activities.”⁶² There are some inconsistencies among Agencies:
 - The Department of Labor should add “support.”
 - The Department of Education does not use this phrase and should amend the provisions in its appendices to do so.⁶³

The Proposed Rule Narrows a Religious Exemption that Permits Taxpayer-Funded Employment Discrimination

Because it will reduce confusion, we support the Proposed Rule’s elimination of provisions added by the Trump Rule that allow widespread employment discrimination.

Applying the Title VII Exemption to Taxpayer-Funded Jobs Is at Odds with our Government’s Commitment to Nondiscrimination

The religious exemption in Title VII allows religiously affiliated employers, using their own funds, to prefer co-religionists in employment. This exemption should not apply to government-funded jobs. Yet, the regulations permit faith-based providers to discriminate in hiring with taxpayer dollars.

Allowing taxpayer-funded employment discrimination, which has met resistance since it was first proposed and remains highly controversial, conflicts with congressional intent. Title VII was not written with government funding of religious organizations in mind.⁶⁴ And, Congress

⁶⁰ The Department of Health and Human Services designates these as Appendix B and Appendix C.

⁶¹ The text of each of the three provisions reads “Such an organization,” which refers back to “A faith-based organization.”

⁶² To the extent the corresponding regulatory provisions do not state “support or engage,” we urge the Agencies to update the language in those provisions. See 7 C.F.R. §§ 16.3(d), 16.4(b); HHS, proposed §§ 87.3(d), (e); 38 C.F.R. §§ 50.2(b), (e).

⁶³ The Department of Education does not include this type of provision in its corresponding regulations but should.

⁶⁴ See, e.g., Steven K. Green, *Religious Discrimination, Public Funding and Constitutional Values*, 30 Hastings Const. L.Q. 1, 4-5 (2002).

has rejected numerous efforts to allow government-funded entities to use religion to discriminate in employment.⁶⁵

Permitting providers to use the Title VII religious exemption to discriminate in government-funded jobs is harmful policy. First, the government should *never* fund discrimination. Second, 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 and accept government grants.

Moreover, the religious exemption violates the Establishment Clause’s prohibition on government 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.⁶⁶ The case would have been different had “the government itself . . . advanced religion through its own activities and influence.”⁶⁷ Unlike in *Amos*, here the government itself is involved: its funding transforms the Title VII religious exemption into an unconstitutional advancement of religion.⁶⁸

The Trump Rule Vastly Expanded This Troubling Exemption

Under the Trump Rule, six Agencies⁶⁹ added text to their regulations providing that faith-based organizations could select employees on the basis of their “acceptance of or adherence to” the “religious tenets of the organization.” This goes well beyond what Title VII allows.

The Title VII exemption is narrow. Religious employers may consider religion—and only religion—in their employment practices. The exemption “does not confer upon religious organizations a license to make those [employment] decisions” on the basis of race, national origin, or sex.⁷⁰ Rather, it “merely indicates that such institutions may choose to

⁶⁵ 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., 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>.

⁶⁶ 483 U.S. at 337.

⁶⁷ *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.”).

⁶⁸ See *Dodge v. Salvation Army*, No. S88-0353, 1989 WL 53857, *4 (S.D. Miss. Jan. 9, 1989); Green 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>.

⁶⁹ 34 C.F.R. §§ 75.52(d)(2)(iv), 75.52(g); 76.52(d)(2)(iv), 76.52(g) & 3474.15(g); 45 C.F.R. § 87.3(f); 24 C.F.R. § 5.109(d)(2); 29 C.F.R. § 2.37; 38 C.F.R. § 50.2(f).

⁷⁰ *Rayburn v. Gen. Conf. 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);

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.⁷¹ 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.⁷²

The Trump Rule failed to make clear that religious employers do not have 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.”⁷³ 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.⁷⁴

The Proposed Rule

The Proposed Rule rightly acknowledges that

[t]he Title VII religious exemption generally allows qualifying religious organizations to hire only people of a particular religion in the absence of any inconsistent statutes, but as numerous courts have held, the Title VII religious exemption does not permit such organizations to discriminate against workers on the basis of another protected classification, even when an employer takes such action for sincere reasons related to its religious tenets (such as those that might amount to discrimination on the basis of employees’ sex).⁷⁵

It strikes the Trump Rule’s problematic text, therefore, because it “could mistakenly suggest that Title VII permits religious organizations that qualify for the Title VII religious exemption to insist upon tenets-based employment conditions that would otherwise violate Title VII or the particular underlying funding statute in question.”⁷⁶

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).

⁷¹ *Boyd v. Harding Academy of Memphis, Inc.*, 88 F.3d 410, 413 (6th Cir. 1996).

⁷² See *Pac. Press*, 676 F.2d at 1276-77 (recounting legislative history); *Rayburn*, 772 F.2d at 1167 (same).

⁷³ *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; *Herk v. Diocese of Ft. Wayne-South Bend, Inc.*, 48 F. Supp. 3d 1168, 1175-76 (N.D. Ind. 2014); *Vigars v. Valley Christian Ctr.*, 805 F. Supp. 802, 807 (N.D. Cal. 1992).

⁷⁴ *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).

⁷⁵ Nprm at 2402.

⁷⁶ *Id.*

We suggest two additional changes that would further clarify the regulations in this regard.

- The Department of Housing and Urban Development should remove language from a provision on the independence of faith-based organizations that allows employers to require the “acceptance of or adherence to” the religious tenets.⁷⁷ This provision is similar to the current, problematic Department of Education provisions, which the Proposed Rule corrects.⁷⁸
- The Department of Health and Human Services should conform its provision to the text of all other Agencies by striking reference to the Americans with Disabilities Act.⁷⁹

Finally, for the reasons explained above, we believe the Agencies should eliminate altogether the existing religious exemption that allows federally funded social service providers to discriminate in employment. No one should be disqualified from a taxpayer-funded job because they are the “wrong” religion.

The Proposed Rule Satisfies the Requirements of the Administrative Procedure Act

The Trump Rule was a vast departure from the consensus-based regulations developed over years of study and deliberation under the Obama administration. Not surprisingly, the stark changes were not adequately justified. The Trump Rule was based on erroneous and internally inconsistent reasoning, and it did not properly account for the harm it would cause. Many of these problems were explained in our comments filed in 2020⁸⁰ and again in these comments.

The Proposed Rule, on the other hand, corrects these errors and proposes policies that are based on reasoned decision-making.

* * *

For the reasons set forth in the CARD comments and here, we strongly support the Proposed Rule. We urge the Agencies to make the additional changes we suggest here, and those suggested in the CARD comments to further strengthen the rule and ensure

⁷⁷ 24 C.F.R. § 5.109(d)(2).

⁷⁸ NPRM at 2409 (striking “and employees” from § 75.52(d)(2)(iv)); NPRM at 2411 (striking “and employees” from § 76.52(d)(2)(iv)).

⁷⁹ HHS, proposed § 87.3(h).

⁸⁰ Comments submitted by Americans United for Separation of Church and State on Proposed Rule, Ensuring Equal Treatment of Faith-Based Organizations, RIN 0991-AC13 (Feb. 18, 2020), available at <https://bit.ly/424sQDA>; Comments submitted by the American Civil Liberties Union on Proposed Rule, Ensuring Equal Treatment of Faith-Based Organizations, RIN 0991-AC13 (Feb. 18, 2020), available at <https://bit.ly/3ZMAfWN>.

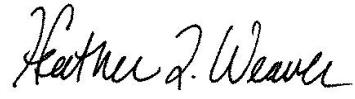
more robust religious-freedom protections for beneficiaries of government-funded social-service programs.

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Respectfully submitted,



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