The Coalition Against Religious Discrimination

March 14, 2023

Department of Agriculture
Department of Education
Department of Health and Human Services
Department of Homeland Security
Department of Housing and Urban Development
Department of Justice
Department of Labor
Department of Veterans Affairs
Agency for International Development

Re: Rule on Partnerships with Faith-Based and Neighborhood Organizations (RIN: 0412-AB10; 0510-AA00; 0991-AC13; 1105-AB64; 1290-AA45; 1601-AB02; 1840-AD46; 2501-AD91; 2900-AR23)

To Whom It May Concern:

We, the undersigned members and allies of the Coalition Against Religious Discrimination (CARD), write in support of the proposed rule, "Partnerships With Faith-Based and Neighborhood Organizations," published on January 13, 2023.

When the government funds faith-based and community-based social service organizations—such as food banks, homeless or domestic violence shelters, job training centers, and elder care providers—it must protect the religious freedom of people who use the services and ensure they can get the help they need. We thank the Biden administration for the Proposed Rule, which takes important steps to restore vital protections for program beneficiaries.

In 2016, CARD welcomed the Obama administration regulations that were based on consensus policy recommendations from the President's Advisory Council on Faith-Based and Neighborhood Partnerships. The 2016 Rule added important religious freedom protections for beneficiaries. Despite strong opposition from CARD and a wide range of organizations, the Trump administration stripped these protections and made other changes that undermined the rights of those served by social service programs. The 2020 Rule elevated the interests of taxpayer-funded entities, some of which receive millions of taxpayer dollars each year, above the needs of people who use government-funded social services. It stripped away religious freedom protections from our most vulnerable, while at the same time broadened and created new religious exemptions for faith-based providers. It expanded exemptions that allow taxpayer-funded employment discrimination and imposed flawed rules for indirect aid programs that could force beneficiaries into programs with explicitly religious activities.

The Proposed Rule, in contrast, re-centers people in need, restoring their religious freedom protections and making it more likely that they can access critical services. It will help ensure that people who use social services will not be pressured to participate in religious activities or be required to meet a religious litmus test in exchange for obtaining the help they need. When the government funds social service programs, it must ensure that the programs are open to people of all faiths and nonreligious people, and that religion is not used to deny people services or their civil rights protections.

Accordingly, we support the provisions in the Proposed Rule that:

- Reinstate the requirement that providers give beneficiaries written notice of their religious freedom rights;
- Encourage Agencies, when feasible, to provide notice to beneficiaries about how to obtain information about other alternative service providers;
- Rewrite the definition of indirect aid to better align with constitutional requirements (although we believe that the definition needs additional revisions to fully meet the constitutionally required test);
- Eliminate language from the 2020 Rule that invited providers to claim religious exemptions and wrongly suggested that Agencies would be bound to grant such requests; and
- Narrow the existing religious exemption that allows religious organizations to accept grants and discriminate in employment with taxpayer funds (although we believe that the Agencies should fully eliminate the exemption). Providers should not be allowed to take government funds and then place religious litmus tests on whom they hire.

We have concerns, however, that the Proposed Rule fails to set out a thorough process for complaints, as well as robust procedures for enforcement, monitoring, and training. Throughout the comments, we also provide additional suggestions for ways to increase consistency, clarity, and uniformity, and to further protect beneficiaries and employees.

The Coalition Against Religious Discrimination

CARD is a broad and diverse group of leading religious, religious freedom, civil rights, labor, reproductive rights and health, LGBTQ rights, and secular organizations formed in the 1990s to monitor legislative and regulatory changes affecting government partnerships with religious and other nonprofit organizations and, in particular, to oppose government-funded religious discrimination. We have long advocated for strengthening the constitutional and legal safeguards integral to the rules governing these partnerships.

We appreciate the important role religiously affiliated institutions historically have played in addressing many of our nation's most pressing social needs, as a complement to government-funded programs. We also recognize that the separation of church and state is the cornerstone of religious freedom. Faith-based organizations, like secular organizations, should not be allowed to take government funds and then place religious litmus tests on whom they hire, whom they serve, or which of the required services they will provide.

We have been actively involved in every iteration of these regulations since their inception.[1] We care deeply about this issue and have the expertise and perspective that we believe offer great value to the Departments as they again propose new regulations.

[1] In fact, the Presidential Advisory Council on Faith-Based and Neighborhood Partnerships and the Council's Task Force on Reform, formed in 2009, included leaders from some of CARD's member organizations.

Beneficiary Protections[2]

We strongly support the Agencies' decision to restore critical protections for beneficiaries that were stripped in the 2020 Rule. These protections will help ensure that all beneficiaries have access to federally funded services and programs without unnecessary barriers and free from discrimination.

Written Notice

Reestablishing the written notice requirement for beneficiaries is crucial. Without it, beneficiaries are vulnerable and unaware that they have a right to receive services free from discrimination, proselytization, and religious coercion. Indeed, participants can't exercise their rights if they aren't even aware of them.

The notice in the Proposed Rule informs beneficiaries that providers may not discriminate against them, or require them to attend or participate in any explicitly religious activities as part of the program. It further explains that providers may not pressure beneficiaries to attend privately funded religious activities held outside of the program. And it provides information on how beneficiaries may file a complaint if they believe the provider has not lived up to its legal obligations.

This notice is essential to empowering people to protect themselves. Without notice of their rights, for instance, beneficiaries may accept invitations to religious activities even if they do not want to attend, because they mistakenly believe it is necessary to continue in the government program. For those using services provided by a faith-based organization, the notice may mitigate fears of disapproval or discrimination. For example, with notice, a transgender homeless teen's fears about getting services at a shelter affiliated with a religion that condemns LGBTQ people may be reduced, if they know religion cannot be infused into the services and they can refuse to attend religious programming. Furthermore, the notice requirement informs and reminds staff and volunteers—at both faith-based and secular providers—of the legal limits placed upon the services they provide and that they should not impose their beliefs on beneficiaries.

Accordingly, we support requiring both secular and faith-based organizations to provide beneficiaries written notice of their rights. We recommend, however, that all Agencies ensure that written notices provide explicit information about how beneficiaries can file a complaint and how the complaint will be addressed.

Alternative Provider

People who seek social services and who are uncomfortable at a provider because of its religious conduct, activities, or setting or whose rights have been violated by that provider should be given help to find an alternative provider. The Proposed Rule reinstates a "modified

[2] Because the Proposed Rule uses the term "beneficiary," for simplicity, these comments do as well. For the purposes of these comments, "beneficiary" encompasses "beneficiary," "prospective beneficiary," "potential beneficiary," and other program participants and prospective or potential participants. We urge the Agencies to clarify that all the protections apply to all program participants and prospective participants.

version of the 2016 Rule's referral procedure."[3] This procedure "encourage[s] Agencies, when appropriate and feasible, or State agencies and other entities that might be administering a federally funded social service program, to provide notice to beneficiaries or prospective beneficiaries about how to obtain information about other available federally funded service providers."[4]

Even though all social service programs that receive direct aid should have only secular content, there are reasons why a person might feel uncomfortable with a religious provider and want an alternative one nonetheless. For example, someone who follows a minority religion or is nonreligious might forgo social services altogether if the only program they know of is in a church adorned with Christian iconography, art, and messages that make them uncomfortable. Forcing beneficiaries, who are likely in a vulnerable position, to find an alternative provider on their own might be the hurdle that prevents them from getting help at all.

We support the new alternative provider provision because it helps facilitate access to federally funded programs and services and "[w]ithout such assistance, it may be challenging for beneficiaries or prospective beneficiaries unfamiliar with Federal grant programs to identify other federally funded providers."[5]

Indirect Aid — Voucher Programs

Because people retain fewer religious freedom protections in indirect aid programs, Agencies should use voucher programs only sparingly and must ensure that voucher programs abide by constitutional requirements. In order to satisfy the Establishment Clause, indirect aid programs must permit "individuals to exercise genuine choice among options public and private, secular and religious."[6]

The 2016 Rule defined "indirect Federal financial assistance" to reflect these principles, but the 2020 Rule redefined the term and eliminated the requirement that the beneficiary must have the option of a secular provider. To make matters even worse, the 2020 Rule allowed organizations that accept indirect aid to *require* beneficiaries to participate in religious activities. This conflicted with the governing Executive Order, and the very subsection where the requirement was inserted: both bar discrimination in direct and indirect aid programs against beneficiaries on the basis of "refusal to attend or participate in a religious practice."[7] Under the 2020 Rule, beneficiaries could have been forced into a religious program and then forced to participate in the religious activities. This clearly violates the religious freedom of beneficiaries.

The Proposed Rule changes the definition of "indirect Federal financial assistance" in two important ways. First, it adds the words "wholly," "genuinely," and "private" to emphasize that any decision to allocate indirect aid to a service provider that uses the aid for explicitly religious activities must be wholly private and voluntary.[8] Some Agencies also affirmatively state that the

[3] Notice of Proposed Rulemaking, Partnerships with Faith-Based Organizations, 88 Fed. Reg. 2395, 2399 (Jan. 13, 2023).
[4] *Id.*
[5] *Id.*
[6] *Zelman v. Simmons-Harris*, 536 U.S. 639, 662 (2002).
[7] Exec. Order No. 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); *e.g.*, 45 C.F.R. § 87.3(d).
[8] NPRM at 2401.

choice must be that of the individual and "not a choice of the government."[9] We support these changes and recommend that all the Agencies add this language uniformly to the definition.

The Proposed Rule also changes the definition to make clear that the availability of secular options is a "a significant factor" in determining whether a beneficiary is able to make a wholly genuine and independent choice.[10] While this is a vast improvement, it is not enough. *Zelman*[11] and lower court opinions make clear that secular options are not merely a factor, but are *required* to ensure there is genuinely independent and private choice.[12] Without secular options, people in need could be left with only religious choices and forced into a program that includes explicitly religious content and program requirements. In this scenario, the government would, in effect, be adding a religious test to government services.

Finally, we support eliminating the language that allowed providers in indirect aid programs to mandate participation in religious activities and programming.

Religious Exemptions for Government-Funded Providers

Religious exemptions for service providers are likely to undermine the effectiveness of taxpayer-funded services and come at a cost that is likely to be borne by beneficiaries. This is especially true when exemptions could lead to beneficiaries being denied services. Yet, the 2020 Rule inserted language suggesting that the Agencies would grant religious exemptions to providers even when the exemptions were not justified or required by federal law, creating more confusion instead of clarity.

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[9] *E.g.*, HHS, proposed § 87.1(C)(2).

[10] NPRM at 2400-01.

[11] The voucher program in *Zelman* offered "true private choice" because beneficiaries had genuine and independent choices "among options public and private, secular and religious." *Zelman*, 536 U.S. at 662. The Court 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." *Id.* The voucher program in *Zelman* had six options, only one of which was religious. Having five public or nonreligious options—allowing students to "remain in public school as before, remain in public school with publicly funded tutoring aid, . . . obtain a scholarship and choose a nonreligious private school, enroll in a community school, or enroll in a magnet school") is the reason the Supreme Court found that the program provided "genuine opportunities." *Id.*

[12] *See, e.g.*, *Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 425 (8th Cir. 2007) (quoting *Witters v. Wash. Dep't of Servs. for the Blind,* 474 U.S. 481, 488 (1986)) (prison program not indirect aid because people did not "'have full opportunity to expend . . . aid on wholly secular programs"). Courts describe the secular option as essential to *Zelman*. *See, e.g.*, *Moses v. Ruszkowski*, 458 P.3d 406, 414 (N.M. 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) ("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.") (citing *Zelman*) (emphasis added); *Eulitt ex rel. Eulitt v. Maine Dep't. of Educ.*, 386 F.3d 344, 348 (1st Cir. 2004) ("[I]ndirect 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.") (citing *Zelman*) (emphasis added).

The Proposed Rule acknowledges that the 2020 Rule's provisions on the eligibility of providers wrongly included language suggesting the Agencies "would be bound to make [religious] accommodations even when the accommodation would be permissive rather than required by Federal law."[13] Accordingly, the Proposed Rule eliminates or modifies that language. While the Proposed Rule no longer ties eligibility to religious accommodations, it does not in any way change the longstanding policy that faith-based organizations are eligible for funding without discrimination.

For example, the 2020 Rule modified the provisions setting out faith-based organizations' eligibility to participate in grant programs *on the same basis as any other organization*, by adding the clause, "and considering any permissible accommodation."[14] Stating that faith-based organizations should be treated the same while simultaneously stating that they also get an exemption from applicable rules is contradictory and confusing. The language also suggests that the Agency *must* grant exemptions that are requested even when the exemptions are not otherwise required by law and without regard for the harm that they could cause beneficiaries. We support the six Agencies that eliminate this clause and strongly urge HHS, DHS, and HUD to do the same.[15]

The 2020 Rule also modified the obligation that providers "carry out eligible activities in accordance with all program requirements," adding the clause: "subject to any required or appropriate accommodation."[16] This wrongly suggested that providers do not have to meet program requirements and perhaps even that providers may refuse to deliver services otherwise required by a particular grant. Beneficiaries should not be denied the services they need, or the constitutional and civil rights protections to which they are entitled, because of the religious beliefs cited by the organization paid by an Agency to provide those services. We support the removal of this language.

In place of the problematic language, the Proposed Rule adds language—which varies by agency—saying that program requirements are "subject to any accommodations that are granted to organizations on a case-by-case basis."[17] This is a vast improvement. The language is more accurate and acknowledges that all exemptions require an independent, case-by-case analysis. The placement of this language in the clause about program requirements, however, could create confusion similar to that of the 2020 Rule. Because the exemption language directly follows the constitutionally required bar on the direct funding of explicitly religious activities, it could be misread to suggest that a religious exemption could be given to this requirement when it cannot. Furthermore, the language is unnecessary given that the Proposed Rule inserts similar language in a stand-alone provision: nothing precludes the Agency "from making an accommodation with respect to one or more program requirements on a case-by-

[13] NPRM at 2402.
[14] 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.
[15] *See* HHS, proposed § 87.3(a); DHS, proposed § 19.3(a); HUD, proposed § 5.109(c)(1).
[16] 34 C.F.R. § 75.52(a)(3); *see also, e.g.*, 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").
[17] *E.g.*, HHS, proposed § 87.3(g).

case basis in accordance with the Constitution and laws of the United States."[18] Accordingly, we support the inclusion of the stand-alone language but recommend that similar language be removed from the program requirement provision.

Finally, the Agencies include important information about the eligibility, independence, and obligations of faith-based organizations in announcements and notices for providers.[19] We support the changes to the announcements and notices but urge the Agencies to align the text of these provider notices so that they are consistent with each other and reflect all the positive changes in the Proposed Rule.

Taxpayer-Funded Employment Discrimination

Effective government partnership with faith-based groups does not require the sanctioning of federally funded discrimination. Government-funded employers should not be allowed to impose a religious test on their applicants or employees. Yet, the original iteration of these regulations wrongly extended the Title VII exemption, which allows privately funded religious organizations to prefer co-religionists, to federally funded social service providers to allow them to discriminate when hiring for taxpayer-funded jobs. This policy has been highly problematic and controversial since it was adopted in the early 2000s. The 2020 Rule exacerbated the problem.

In the 2020 Rule, six Agencies extended this troubling exemption, allowing faith-based organizations to discriminate even beyond what is permitted under Title VII. More specifically, it permits taxpayer-funded entities to discriminate against "employees on the basis of their acceptance of or adherence to the religious tenets of the organization."[20] This language invites religious organizations to engage in broad discrimination against employees. For example, a faith-based employer 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 employer finds that those employees do not practice their religion the "right" way.

The Proposed Rule narrows the religious exemption so that it once again aligns with the Title VII religious exemption.[21] This is an important change that we support. But the Agencies should do more.

The regulations leave in place the original religious exemption that allows federally funded employment discrimination. But permitting providers to use the Title VII religious exemption to discriminate in *government-funded* jobs is bad policy. The justification for the Title VII exemption—to maintain the autonomy of religious organizations and independence from the government—disappears when the organizations solicit and accept grant funding. But most importantly, no one should be disqualified from a taxpayer-funded job because they are the

[18] *E.g.*, HHS, proposed § 87.3(b).
[19] *E.g.*, DOJ, proposed Appendix A & Appendix B.
[20] 45 C.F.R. § 87.3(f).
[21] In a provision on the independence of faith-based organizations, HUD includes language that allows employers to require the "acceptance of or adherence to" the religious tenets. 24 C.F.R. § 5.109(d)(2). This provision is similar to ED provisions, which the NPRM corrects. NPRM at 2409 (striking "and employees" from § 75.52(d)(2)(iv)); NPRM at 2411 (striking "and employees" from § 76.52(d)(2)(iv)). In order to ensure that this provision will not "mistakenly suggest" that faith-based organizations get a sweeping religious exemption, HUD must remove "and employees" from this provision.

"wrong" religion. The Agencies should put an end to taxpayer-funded employment discrimination.[22]

Complaints, Enforcement, Monitoring, and Training

Although the Proposed Rule requires grantees to provide notice to beneficiaries that they can file complaints for violations of the rules, it lacks both clear processes for accepting such complaints and enforcement procedures. The improved beneficiary protections will lack meaning if the government does not enforce them.

The 2016 Rule acknowledged that Agencies must "vigorously monitor and enforce" the regulations.[23] Other than the DOJ,[24] however, none of the Agencies have adopted regulatory language to define the complaint and enforcement procedures. As a result, beneficiaries have been left without recourse when violations occurred.

In order to effectuate the purpose of the Proposed Rule, it is essential for each Agency to add language to the final rule that clarifies where and how complaints for violations of these rules may be filed; establishes a procedure for enforcement, including by giving enforcement authority to the Office for Civil Rights or its equivalent; and describes potential consequences for violation of these rules.

The Agencies should also clarify how they will meet their obligation to monitor constitutional, statutory, and regulatory requirements. First, the Agencies should invest in training for program staff, Office for Civil Rights or an Agency's equivalent staff, and providers. Second, Agencies should uniformly establish specific processes for monitoring compliance. Finally, to understand whether the safeguards in the regulations are sufficient and how to improve grant outcomes and delivery of services, Agencies should implement data collections and similar tools. This will ensure fidelity to constitutional principles and programmatic goals, and ultimately, to serving beneficiaries in the most equitable, effective, and efficient way.

Clarify the Requirements for Funding Decisions

In the final rule, to assist applicants for funding and agency officials, the Agencies should further clarify the provisions on funding decisions. Currently, the regulations state that funding decisions must be free from political interference and made on the basis of merit, not religion or religious belief. We suggest adding language stating that merit-based funding decisions must include objective consideration of whether an organization will serve *all* beneficiaries and perform *all* services that are necessary to fulfill the program's objectives.

[22] HHS should conform its provision to the text of all other Agencies by striking reference to the Americans with Disabilities Act in this provision.
[23] Final Rule, Federal Agency Final Regulations Implementing E.O. 13559: Fundamental Principles and Policymaking Criteria for Partnerships With Faith-Based & Other Neighborhood Organizations, 81 Fed. Reg. 19,355, 19,370 (Apr. 4, 2016).
[24] 28 C.F.R. § 38.8.

Conclusion

Thank you for the opportunity to comment on the Proposed Rule. It makes critically important changes to the existing regulations. We also hope you consider our recommended changes, which we believe will further strengthen the rule so that it better protects religious freedom and equality for all.

Respectfully,

African American Ministers in Action
American Atheists
American Civil Liberties Union
American Federation of Teachers
American Humanist Association
Americans United for Separation of Church and State
Anti-Defamation League
Autistic Self Advocacy Network
B'nai B'rith International
Baptist Joint Committee for Religious Liberty (BJC)
Bayard Rustin Liberation Initiative
Bend the Arc: Jewish Action
Catholics for Choice
Center for American Progress
Center for Disability Rights
The Center for Inquiry and Richard Dawkins Foundation for Reason & Science
Center on Conscience and War
CenterLink: The Community of LGBT Centers
Clearinghouse on Women's Issues
Council for Global Equality
Equality California
Equality Federation
Family Equality
Feminist Majority Foundation
Fenway Institute
Freedom From Religion Foundation
GLSEN
Human Rights Campaign
Interfaith Alliance
International Association of Providers of AIDS Care
Jewish Women International
Lambda Legal
MAZON: A Jewish Response to Hunger
Methodist Federation for Social Action
Metropolitan Community Churches, Global Justice Institute
Missionary Oblates
Movement Advancement Project
Muslims for Progressive Values
NARAL Pro-Choice America

National Black Justice Coalition
National Center for Lesbian Rights
National Center for Parent Leadership, Advocacy and Community Empowerment (National PLACE)
National Center for Transgender Equality
National Council of Jewish Women
National Education Association
National Health Law Program
National Organization for Women
National Partnership for Women & Families
National Women's Law Center
Network of Jewish Human Service Agencies
People For the American Way
PFLAG National
Planned Parenthood Federation of America
Secular Coalition for America
Secular Policy Institute
Silver State Equality-Nevada
Union for Reform Judaism