The Coalition Against Religious Discrimination

February 18, 2020

U.S. Department of Health and Human Services
Center for Faith and Opportunity Initiatives (Partnership Center)
Attention: Equal Treatment NPRM, RIN 0991-AC13
Hubert H. Humphrey Building, Room 747D
200 Independence Avenue SW
Washington, DC 20201

RE: Ensuring Equal Treatment of Faith-Based Organizations 13831 RIN 0991-AC13

Dear Ms. Royce:

We, the undersigned members and allies of the Coalition Against Religious Discrimination (CARD), write to comment on the proposed rules regarding "Ensuring Equal Treatment of Faith-Based Organizations."

We oppose the Department's proposed changes because they would:

- strip away religious freedom protections from people, often vulnerable and marginalized, who use government-funded social services;
- expand or create religious exemptions for faith-based providers, including those that would allow them to refuse to provide services;
- expand exemptions that allow taxpayer-funded employment discrimination; and
- create flawed rules for "indirect" aid programs that will harm the religious freedom of beneficiaries.

Furthermore, we object to the 30-day comment period provided for public comment. The Administration issued eight interconnected, but distinct proposed regulations on the same day.[1] Given the complexity and wide-ranging impacts of these rules, 30 days does not allow the public a meaningful opportunity to comment.

Faith-based organizations have long partnered with the government to provide important social services for people in need. These longstanding partnerships demonstrate that faith-based organizations do not need these changes in order to effectively work with the government. Rather than ensure faith-based organizations are treated the same as secular organizations, the proposed rules would elevate the interests of taxpayer-funded service providers above the needs and the religious freedom rights of people seeking critical services. As a result, the proposed regulations could make it harder for beneficiaries to get the services they need and undermine the effectiveness of government-funded programs. People in need should never be faced with the

[1] 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].

stark choice between accessing the services they need or retaining their religious freedom protections. Nor should faith-based organizations be allowed to take government funds and then place religious litmus tests on who they hire, who they serve, or whether to provide services required under the grant.

The Coalition Against Religious Discrimination (CARD)

CARD is a broad and diverse group of leading religious, civil rights, education, labor, health, LGBTQ, and women's organizations formed in the 1990s to monitor legislative and regulatory changes impacting government partnerships with religious and other nonprofit organizations and, in particular, to oppose government-funded religious discrimination. Our coalition members 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; indeed, many members of CARD are directly involved in this work. We also recognize that the separation of church and state is the linchpin of religious freedom.

Accordingly, we have long advocated for strengthening the constitutional and legal safeguards of the current rules governing partnerships between the government and faith-based social service providers.

CARD has been actively involved in every iteration of these regulations since their inception. 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 our member organizations. We care deeply about this issue and have the expertise and perspective that we believe offer great value to the Department as it again proposes new regulations.

History of the Faith-Based Regulations

The George W. Bush Administration first implemented these regulations that govern partnerships between government and faith-based social service providers. When Congress refused to support proposals to eliminate existing constitutional and anti-discrimination safeguards that applied to federally funded social service programs, President Bush acted unilaterally—advancing his initiative through a series of Executive Orders and new grant-making and contracting rules. The policies had many flaws and were a dramatic departure from the way the government had, for decades, provided social welfare services for our nation's most vulnerable citizens. In the name of eliminating barriers, the regulations actually eliminated church-state protections. For example, they allowed faith-based organizations to discriminate in employment with government funds.

The Obama Administration took a common-ground approach when it examined the rules that govern the partnerships between faith-based organizations and the government. The President convened an advisory council comprising "leaders and experts in fields related to the work of faith-based and neighborhood organizations."[2] It was, as the members of the Council explained, "the first time a governmental entity has convened individuals with serious differences on some

[2] President's Advisory Council on Faith-Based and Neighborhood Partnerships, *A New Era of Partnerships: Report of Recommendations to the President,* Introduction, v (2010), *available at* https://obamawhitehouse.archives.gov/sites/default/files/docs/ofbnp-council-final-report.pdf.

church-state issues and asked them to seek common ground in this area."[3] The Council made twelve unanimous recommendations focused on improving the constitutionality and clarity of the rules and increasing protections for beneficiaries. The recommendations were implemented through an executive order and a noncontroversial rulemaking process that was finalized in 2016. A "key policy goal" of the executive order was to "strengthen[] religious liberty protections for beneficiaries."[4]

On January 16, the Trump Administration announced that it was revising these regulations yet again. Despite the fact that the existing rules make "clear that faith-based organizations are eligible to participate in the Agencies' social service programs on the same basis as any other private organization,"[5] Administration officials are claiming the proposed rules are necessary to "ensure equal treatment for religious organizations" and put them on a "level playing field."[6] To the contrary, the proposed rules put the interests of taxpayer-funded entities, some of which receive millions of dollars each year of government money, ahead of the needs of people seeking critical services. There is no need to undo the vital religious freedom protections that were implemented just three years ago and that were a result of consensus among leaders on different sides of the issue.

Beneficiary Protections: Alternative Provider and Notice of Rights

In 2015, CARD applauded the Department and welcomed its decision to add more robust safeguards for beneficiaries to these regulations. Today, we express our great disappointment and strong opposition to the Department's plan to strip the notice and alternative provider requirements. Both are vital protections based on common-ground recommendations.

The notice requirement is crucial—people cannot enforce their rights if they don't know they have them. The alternative provider provision ensures that people who seek social services and who are uncomfortable at a provider because of its religious character will be referred to an alternative provider. 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 if the only program they know of is in a church adorned with Christian iconography, art, and messages because they feel deeply 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.

[3] *Id.* at 120.
[4] 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, 19,361 (Apr. 4, 2016) [hereinafter 2016 Final Regulations].
[5] *Id.* at 19,358.
[6] White House Background Press Call.

The Department wrongly relies on *Trinity Lutheran v. Comer*[7] for this change. *Trinity Lutheran*, however, is extraordinarily narrow decision limited to its specific facts.[8] Furthermore, *Trinity Lutheran* says only that the government cannot disqualify a religious entity from competing for a grant "solely because of its religious character."[9] It does not say that the government cannot require faith-based organizations to provide religious freedom safeguards that protect beneficiaries.

The Department also wrongly claims it must remove the alternative provider provision because it "could in certain circumstances raise implications under RFRA."[10] But this is not how RFRA works. RFRA cannot be used to create blanket exemptions; instead, requests for RFRA exemptions must be considered on a case-by-case basis. The Department has no legal basis, in RFRA or elsewhere, to eliminate this critical protection.

Religious Exemptions for Government-Funded Providers

The Department adds language throughout the regulations that appear to expand or add new religious exemptions for faith-based providers. We oppose these changes. These additions are not required by religious freedom jurisprudence and they create more confusion rather than clarity. Furthermore, the Department fails to recognize how these changes could harm beneficiaries and adds no corresponding language to protect beneficiaries' religious freedom rights or to ensure they maintain access to services. There is also no acknowledgment of the constitutional limits on the government's ability to grant these exemptions—the Establishment Clause prohibits the government from granting religious exemptions that cause harm to others.[11]

We oppose the following:

- Making the requirement that providers "carry out eligible activities in accordance with all program requirements," "except where modified or exempted by any required or appropriate religious accommodations."[12] This wrongly suggests that providers do not have to meet program requirements and perhaps even that providers may refuse to deliver services otherwise required by a grant. Individuals should not be denied the services they need or the constitutional and civil rights protections to which they are entitled because of

[7] 137 S. Ct. 2012 (2017).
[8] *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.) ("This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination.").
[9] *Id.* at 2021.
[10] Ensuring Equal Treatment of Faith-Based Orgs., 85 Fed. Reg. 2974, 2976 (proposed Jan. 17, 2020) (to be codified at 45 C.F.R. pts. 87, 1050).
[11] "At some point, accommodation may devolve into [something] unlawful." *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 334-35 (1986) (internal quotation marks omitted). Any exemption to the government grants "must be measured so that it does not override other significant interests" or "impose unjustified burdens on other[s]." *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); *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").
[12] 85 Fed. Reg. at 2986 (to be codified at 45 C.F.R. § 87.3(e)).

the religious beliefs cited by the organization paid by the Department to provide those services.

- Changing the prohibition on discriminating against or disqualifying faith-based organizations based on their "religious character," to a prohibition on discriminating against or disqualifying based on their "religious exercise."[13] *Trinity Lutheran* repeatedly describes the violation in the case as being discrimination based on an entity's "religious character" *not* based on an entity's "religious exercise."[14]
- Modifying the requirement that faith-based organizations are eligible to participate in grant programs *on the same basis as any other organization*, with the clause, "except where modified or exempted by any required or appropriate religious accommodations."[15] Again, this change is not required by *Trinity Lutheran* and causes confusion. Indeed, saying faith-based organizations are to be treated the same, while simultaneously saying they may get exemptions from rules, is contradictory.

New broad religious exemptions for service providers would be likely to undermine the effectiveness of taxpayer-funded services and will come at a cost that likely will be borne by these beneficiaries. This is especially true when exemptions could lead to the denial of service.

Taxpayer-Funded Employment Discrimination

No one should be disqualified from a government-funded job because they are the "wrong" religion. Thus, employers should not be allowed to take government funds and discriminate in employment with those funds. The Department should repeal the existing provision that extends the Title VII religious exemption to taxpayer-funded jobs, not add language that expands it.

The current exemption already allows religious organizations implementing social service programs to employ only members of a particular faith in taxpayer-funded jobs. The Department now proposes to add language that would allow employers to select its "employees on the basis of their acceptance of or adherence to the religious tenets of the organization."[16] Title VII, however, prohibits religious organizations from discriminating in employment on a protected basis other than religion.[17] The Department's proposed rule fails to account for this critical limitation, opening the door to employers using religion as a pretext to discriminate against employees more broadly.

"Indirect" Aid Rules

The proposed rules would redefine "indirect Federal financial assistance" to eliminate the current requirement that the beneficiary must have the option of a secular provider. This proposed change conflicts with the requirement in *Zelman v. Simmons-Harris* that "indirect aid" programs must permit "individuals to exercise genuine choice among options public and private, secular

[13] 85 Fed. Reg. at 2986, 2921 (to be codified at 45 C.F.R. §§ 87.3(a) & 87.3(e)).
[14] *Trinity Lutheran*, 137 S. Ct. at 2015, 2021, 2022, 2024 (twice).
[15] 85 Fed. Reg. at 2986 (to be codified at 45 C.F.R. § 87.3(a)).
[16] *Id.* (to be codified at 45 C.F.R. § 87.3(f)).
[17] *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 350 (E.D.N.Y. 1998); *see also, e.g.*, *Hamilton v. Southland Christian Sch*., 680 F.3d 1316 (11th Cir. 2012); *EEOC v. Fremont Christian Sch.,* 781 F.2d 1367 (9th Cir. 1986).

and religious."[18] By definition, the inability to reject a religious provider in favor of a secular option means that there was no genuine and independent choice.

The Department makes matters worse by proposing language to allow organizations that accept "indirect" aid to *require* beneficiaries to participate in religious activities. This conflicts with Executive Order 13559 and the very subsection where the Department proposes adding the participation requirement, which bar discrimination in "direct" and "indirect" aid programs against beneficiaries on the basis of "refusal to attend or participate in a religious practice."[19]

Finally, the proposed rules would define "Federal financial assistance,"[20] which, as a result, would strip protections against religious discrimination from beneficiaries in "indirect" programs. This would permit providers in "indirect" programs even to turn away beneficiaries because they are the "wrong" religion.

No one should be forced to participate in a religious program, attend worship, or pray in order to get vital services. Yet when people who have to use a voucher to get services have no secular option to choose from and lose protections against discrimination, this may be their reality.

Conclusion

For the above reasons and more, we urge you to keep the common-ground religious freedom protections currently in the regulations.

Respectfully,

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
Catholics for Choice
The Center for Health and Gender Equity (CHANGE)
Center for Inquiry
Baptist Joint Committee for Religious Liberty (BJC)
Bend the Arc: Jewish Action
Equality California
Family Equality
FORGE, Inc.
Freedom From Religion Foundation
Hindu American Foundation

[18] *Zelman v. Simmons-Harris*, 536 U.S. 639, 662 (2002).
[19] 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). *See also* 2016 Final Regulations, 81 Fed. Reg. at 19,360-61 ("[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.
[20] 85 Fed. Reg. at 2985 (to be codified at proposed 45 C.F.R. § 87.1(d)).

Human Rights Campaign
Interfaith Alliance
Jewish Women International
Lambda Legal
The Leadership Conference on Civil and Human Rights
MAZON: A Jewish Response to Hunger
Movement Advancement Project
NAACP
National Center for Lesbian Rights
National Center for Transgender Equality
National Council of Jewish Women
National Education Association
National Equality Action Team
National LGBTQ Task Force
National Women's Law Center
People For the American Way
PFLAG National
Planned Parenthood Federation of America
Religious Institute
Secular Policy Institute
True Colors United
Union for Reform Judaism
United Church of Christ, Justice and Witness Ministries