

The Coalition Against Religious Discrimination

November 24, 2017

Center for Faith-Based and Neighborhood Partnerships
Office of Intergovernmental and External Affairs
U.S. Department of Health and Human Services
Hubert H. Humphrey Building
200 Independence Avenue, SW
Washington, DC 20201
CFBNP@hhs.gov

Attention: RFI Regarding Faith-Based Organizations

To whom this may concern:

The following comments to the Request for Information regarding “Removing Barriers for Religious and Faith-Based Organizations to Participate in HHS Programs and Receive Public Funding” (RFI) are submitted by the undersigned members of the Coalition Against Religious Discrimination (CARD).

We write to inform the Department that there are no “regulatory or other barriers” that it needs to remove nor actions it needs to take to “affirmatively accommodate[]” faith-based organizations that partner with the federal government. In fact, agency regulations already contain religious exemptions that are too expansive. For example, certain HHS regulations allow faith-based organizations to both take government funds and discriminate in hiring with those funds. This violates a core principle of religious freedom—no one should be denied a government-funded job because they are the “wrong” religion. We urge the Department to reject efforts to extend this flawed policy to other forms of discrimination in future HHS rules and regulations.

In particular, we urge HHS to deny requests to allow agency contractors and grantees to use religion as a reason to refuse to serve certain people who seek government-funded services. We also urge HHS to reject efforts to give faith-based organizations a categorical exemption that would allow them to cite religion to refuse to provide beneficiaries services they are supposed to receive within the government-funded program.

It is unfair and wrong to provide a blanket exemption under which beneficiaries would be denied taxpayer-funded services because the contractor or grantee that is supposed to provide the services cites religion. Federal religious freedom laws do not contemplate such categorical results, and in fact, a blanket religious exemption permitting such a refusal of service would raise serious constitutional concerns. Furthermore, such a blanket policy would run counter to the Department’s mission, which “is to enhance the health and well-being of Americans by providing for effective health and human services.”¹

HHS rules and regulations should serve as a shield to protect religious freedom, not a sword that allows harm to those seeking government services.

¹ U.S. Dep’t of Health & Human Services, *Strategic Plan FY 2014–2018*, Mission, <http://bit.ly/2hPKkCo> [hereinafter *HHS Strategic Plan*].

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 non-profit 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. In our view, even as we believe that faith-based organizations need not give up their distinct religious identities to partner with the government in the provision of social services, we also believe that effective government collaboration with faith-based groups does not require the sanctioning of government-funded religious discrimination. As explained by the unanimous recommendations of the 2010 President's Advisory Council on Faith-Based and Neighborhood Partnerships (Council): "fidelity to constitutional principles is an objective that is as important as the goal of distributing Federal financial assistance in the most effective and efficient manner possible."² Accordingly, we have long advocated for strong, clear, and constitutionally sound safeguards to govern partnerships between the government and faith-based social services providers.

There Are No Barriers for HHS to Remove

The RFI asks whether there are any "regulatory or other barriers" that need to be removed to allow faith-based organizations to partner with the federal government. The answer is no.

The Last Two Administrations Have Engaged in this Process Already

Executive order 13198,³ issued by George W. Bush in 2001, required department-wide audits to identify "all existing barriers to the participation of faith-based and other community organizations in the delivery of social services." The effort led to five more executive orders and dozens of new regulations that made drastic and unprecedented changes to the grant-making and contracting rules that apply to nearly all federal agencies. In the name of eliminating barriers, the initiative eliminated several significant church-state protections that, for decades, had existed in the rules that applied to the partnerships between faith-based organizations and the government.

In 2008, 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."⁴ It was, as the members of the Council explained, "the first time a governmental entity has convened individuals with serious differences on some church-state issues and asked them to seek common ground in this area."⁵ The Council made twelve unanimous recommendations focused on improving the constitutionality and clarity of the rules and increasing protections for beneficiaries. The

² President's Advisory Council on Faith-Based and Neighborhood Partnerships, *A New Era of Partnerships: Report of Recommendations to the President* 127 (2010), <http://bit.ly/2A0yhXA> [hereinafter *Council Report*].

³ Exec. Order No. 13,198, 66 Fed. Reg. 8497 (Jan. 31, 2001).

⁴ *Council Report* at Introduction, v.

⁵ *Id.* at 120.

recommendations were implemented through an executive order and a noncontroversial rulemaking process that was finalized on April 4, 2016.

There is no need for a new audit of the rules that apply to partnerships between the government and faith-based organizations.

Faith-Based Organizations Frequently Perform Government Grants and Contracts Already

Religious organizations have a longstanding tradition of providing social services, including in some cases, with the use of government funds. Many of the organizations in our coalition know this firsthand. The RFI itself makes clear that there are no real barriers for faith-based groups that want to provide services under a government contract or grant. It emphasizes that faith-based organizations “have historically been a crucial component of HHS’ efforts” and boasts that HHS, for example, “awarded over \$817 million in funding to faith-based organizations across 65 competitive, non-formula grant programs in fiscal year 2007.” This history demonstrates that religious exemptions that extend beyond those that currently exist are not necessary for government collaboration with faith-based groups.

HHS Must Ensure It Continues to Provide Effective Services to Beneficiaries

HHS is the “U.S. government’s principal agency for protecting the health of all Americans and providing essential human services, especially for those who are least able to help themselves.”⁶ Its activities “impact health, public health, and human services outcomes throughout the life span.”⁷ It is critical to the country as a whole and to those in need that HHS-funded programs are effective, available, and accessible.

Prior administrations recognized the importance of protecting beneficiaries. Although this coalition opposed most of the changes the George W. Bush Administration made to the existing rules and regulations governing partnerships with faith-based organizations, we expressed appreciation for the fact that it took steps to ensure government-funded entities could not refuse to serve beneficiaries based on religion. Under President Bush’s executive order 13279,⁸ no government-funded social service organization was “allowed to discriminate against current or prospective program beneficiaries on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to actively participate in a religious practice.”

In executive order 13559,⁹ the Obama Administration maintained that protection and further emphasized the importance of protecting beneficiaries. In fact, most of the unanimous recommendations from the diverse Council were focused upon protecting those whom the programs are meant to serve.

The RFI, however, does not explain that HHS-funded programs must remain effective and fulfill program objectives. Nor does it ask for information about how the types of religious exemptions it contemplates could make the provision of services more difficult. New, broad religious exemptions seem likely to undermine the effectiveness of HHS-funded programs.

⁶ *HHS Strategic Plan*, Overview, <http://bit.ly/2zSOikF>.

⁷ *Id.*

⁸ Exec. Order No. 13,279, 67 Fed. Reg. 77,141 (Dec. 16, 2002).

⁹ Exec. Order No. 13,559, 75 Fed. Reg. 71,319 (Nov. 22, 2010).

The RFI similarly fails to mention the importance of protecting the interests of those who receive benefits from HHS-funded programs. Nor does it request information on how new religious exemptions could affect those beneficiaries. New blanket religious exemptions for service providers 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.

When considering whether to provide a religious exemption, HHS must consider how the exemption will affect the beneficiaries of the program and the effectiveness of the program. And it must reject requests to adopt blanket religious exemptions that would allow government-funded service providers to refuse to help those seeking services or deny services that other service providers would be required to provide.

Federal Religious Freedom Laws Do Not Require New “Affirmative” Accommodations

Federal religious freedom laws do not require HHS to create new “affirmative” accommodations within its programs and the U.S. Constitution prohibits it from doing so when those exemptions would cause harm to others.

The Religious Freedom Restoration Act (RFRA),¹⁰ was intended to provide protection for free exercise rights, applying strict scrutiny, on a case-by-case basis, to federal laws that substantially burden religious exercise.¹¹ It cannot be used to require religious exemptions, as the RFI contemplates, where the government merely “burdens or interferes” with religion nor to justify rules that further “respect for the religious exercise of faith-based organizations” that accept government grants or contracts. Even when a law or policy creates a substantial burden, a religious exemption is only granted when the government lacks a compelling interest and the law is not narrowly tailored to further that interest. And, because all these factors must be considered on a case-by-case basis, RFRA cannot be used to create blanket, categorical exemptions.

Furthermore, the U.S. Constitution limits the reach of RFRA and any religious exemptions HHS might adopt: “at some point, accommodation may devolve into [something] unlawful.”¹² The Constitution commands that “an accommodation must be measured so that it does not override other significant interests”,¹³ “impose unjustified burdens on other[s]”,¹⁴ or have a “detrimental

¹⁰ 42 U.S.C. §§ 2000bb–bb-4.

¹¹ Some of us were members of the Coalition for the Free Exercise of Religion, which led the effort to persuade Congress to enact legislation after the United States Supreme Court sharply curtailed Free Exercise Clause protections in *Employment Division v. Smith*, 494 U.S. 872 (1990). This effort culminated in 1993, when then-President William J. Clinton signed RFRA into law.

¹² *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 334-35 (1986) (internal quotation marks omitted). See also, e.g., *ACLU of Mass. v. Sebelius*, 821 F. Supp. 2d 474, 487-88 (D. Mass. 2012), *reversed on other grounds*, *ACLU of Mass. v. U.S. Conference of Catholic Bishops*, 705 F.3d 44 (1st Cir. 2013) (striking down an accommodation for a religious HHS contractor that refused to provide necessary services).

¹³ *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 Constitution).

¹⁴ *Cutter*, 544 U.S. at 726; see also *Texas Monthly, Inc. v. Bullock*, 480 U.S. 1, 18 n.8 (1989) (such accommodations may not impose “substantial burdens on nonbeneficiaries”).

effect on any third party.”¹⁵ As explained above, blanket religious exemptions could lead to harm to beneficiaries and employees, and could undermine the effectiveness of HHS programs.

Thus, HHS may not adopt blanket exemptions that permit contractors or grantees to discriminate in who it hires or who it serves. Nor may it create blanket exemptions allowing government-funded organizations to refuse to provide services otherwise required under their grants or contracts.

Individuals 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 HHS to deliver those services.

Thank you for the opportunity to provide comments on this request for information. If you should have further questions, please contact Maggie Garrett, (202) 466-3234 or garrett@au.org.

Sincerely,

American Atheists
American Civil Liberties Union
American Humanist Association
American Jewish Committee (AJC)
Americans for Religious Liberty
Americans United for Separation of Church and State
Anti-Defamation League
B'nai B'rith International
Baptist Joint Committee for Religious Liberty
Bend the Arc Jewish Action
Catholics for Choice
Center for Inquiry
Central Conference of American Rabbis
Disciples Justice Action Network
Equal Partners in Faith
Family Equality Council
Hadassah, The Women's Zionist Organization of America, Inc.
Hindu American Foundation
Human Rights Campaign
Interfaith Alliance
Japanese American Citizens League
Jewish Council for Public Affairs
Jewish Women International
Lambda Legal
Military Association of Atheists & Freethinkers
Muslim Advocates
NAACP
National Center for Lesbian Rights

¹⁵ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 n.37 (2014) (citing *Cutter*, 544 U.S. at 720). Indeed, every member of the Court, whether in the majority or in dissent, reaffirmed that the burdens on third parties must be considered. *See id.*; *id.* at 2786-87 (Kennedy, J., concurring); *id.* at 2790, 2790 n.8 (Ginsburg, J., joined by Breyer, Kagan, and Sotomayor, JJ., dissenting). *See also Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring).

National Center for Transgender Equality
National Council of Jewish Women (NCJW)
National Organization for Women
National Women's Law Center
People For the American Way
Presbyterian Church (USA)
Religious Institute
Secular Coalition for America
Secular Policy Institute
Sikh Coalition
Texas Freedom Network
Union for Reform Judaism
Unitarian Universalist Association
Unitarian Universalist Women's Federation
United Church of Christ, Justice & Witness Ministries
Women of Reform Judaism
Women's Alliance for Theology, Ethics and Ritual (WATER)