



February 18, 2020

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U.S. Department of Education
400 Maryland Avenue SW
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RE: Proposed Rule: Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Direct Grant Programs, State-Administered Formula Grant Programs, Developing Hispanic-Serving Institutions Program, and Strengthening Institutions Program

To Whom It May Concern,

The American Center for Law and Justice (ACLJ) submits the following comments, on behalf of itself and its members¹ supporting the adoption of the proposed rule issued by the Department of Education (“The Department”) on January 17, 2020, regarding amendments to the Department regulations on equal treatment for faith-based and other neighborhood organizations to implement Executive Order 13831 as reported in 85 FR 3190 of the Federal Register (hereinafter “Rule”).

The ACLJ is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States in a number of significant cases involving the freedoms of speech and religion.²

¹ These comments are joined by more than 75,000 ACLJ members who have signed our Petition to End Unequal Treatment of Religious Organizations and Faith-Based Businesses and Defend Religious Liberty, available at <https://aclj.org/religious-liberty/end-obama-era-anti-religious-liberty-rule>.

² See, e.g., *Pleasant Grove v. Summum*, 555 U.S. 460 (2009) (unanimously holding that the Free Speech Clause does not require the government to accept counter-monuments when it has a war memorial or Ten Commandments monument on its property); *McConnell v. FEC*, 540 U.S. 93 (2003) (unanimously holding that minors have First Amendment rights); *Lamb’s Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993) (unanimously holding that denying a church access to public school premises to show a film series on parenting violated the First Amendment); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding by an 8-1 vote that allowing a student Bible club to meet on a public school’s campus did not violate the Establishment Clause).

I. BACKGROUND

In general, it is good for society to shape its laws in ways that allow people to live their lives consistent with their sincerely held religious beliefs. As Americans, we have always valued the freedom and expression of religion, and religious accommodations are an essential part of everyday life. In fact, governments often employ tax incentives and grants to pursue desired social goods, such as the fostering of charitable works and the education of children. The participation of religious entities in those incentivized activities is not a constitutional problem, as has been made clear in numerous Supreme Court decisions.³ In fact, a constitutional issue arises when the government discriminatorily excludes or places additional burdens upon otherwise qualified, eligible entities solely because of their religious identity or activities.

When President Bush signed Executive Order 13279 into action, he recognized the need for regulations and principles that guide Federal agencies in formulating and implementing policies to ensure that faith-based organizations have equal protection and opportunity under the law as they work to meet the social needs of American communities. The Executive Order was then amended in 2010 by President Obama through Executive Order 13559, and those amendments restricted the ability of faith-based organizations to equally serve American communities by burdening faith-based providers with extra notice and written requirements. Under the Obama administration requirements, faith-based providers had to provide beneficiaries with referrals to alternative providers, as well as provide written information that stated the following:

- (1) The organization may not discriminate against a beneficiary based on religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice;
- (2) The organization may not require a beneficiary to attend or participate in any explicitly religious activities that are offered by the organization, and any participation by the beneficiaries in those activities must be purely voluntary;
- (3) The organization must separate in time or location any privately funded explicitly religious activities from activities supported by direct Federal financial assistance;
- (4) If a beneficiary or prospective beneficiary objects to the religious character of the organization, the organization will undertake reasonable efforts to identify and refer the beneficiary to an alternative provider to which the beneficiary does not object; and

³ *Walz v. Tax Comm'n of NY*, 397 U.S. 664 (1970) (tax exemption included properties dedicated to religious purposes); *Mueller v. Allen*, 463 U.S. 388 (1983) (deduction for education expenses included expenses at private religious schools).

- (5) A beneficiary or prospective beneficiary may report violations of these protections, including any denials of services or benefits, to the Federal agency or intermediary administering the program.⁴

Under the Obama administration rules, *only* faith-based organizations were required to provide this written information. These additional requirements imposed on faith-based organizations are precisely the sort of express governmental discrimination toward religious organizations that the Constitution forbids.⁵

President Trump then ordered further changes through Executive Order 13798, and the Department is now working to correct the previous unconstitutional discrimination and instead follow the Constitution and Federal law by applying equal treatment of all organizations. To that end, the Department is also clarifying the guidance documents the Department uses when providing financial assistance to faith-based organizations.

We believe the Rule should be implemented fully as the Department has proposed. The alternative would mean that religious organizations that currently, or in the future may, participate in Department programs would continue to be targeted and burdened unequally merely because of their faith-based nature. The Rule would serve to bring the Department's implementation of its programs in-line with the requirements of Federal law, including the First Amendment and the Religious Freedom Restoration Act. The rule would also serve to further the ability of the Federal government to provide equal opportunity to those organizations that faithfully serve our American society through social welfare programs.

II. LEGAL ANALYSIS

The Rule, as noted in the Attorney General's Memorandum on Religious Liberty, reaffirms that individuals and organizations do not give up religious liberty protections by providing government-funded social services, and the "government may not exclude religious organizations as such from secular programs . . . when the aid is not being used for explicitly religious activities such as worship or proselytization."⁶

Critics of the Rule are trying to argue in the reverse, asserting that what these protections afford is actually tantamount to religious discrimination in and of itself.⁷ The truth, however, is that this Rule in no way undermines the religious freedom protections for beneficiaries of programs. It adds nothing new to existing regulations, and merely clarifies that "Federal law protects the freedom of Americans and their organizations to exercise religion

⁴ Federal Agency Final Regulations Implementing Exec. Order 13559: Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations, 81 F.R. 19353 (May 4, 2016), <https://www.federalregister.gov/documents/2016/04/04/2016-07339/federal-agency-final-regulations-implementing-executive-order-13559-fundamental-principles-and>.

⁵ The Constitution "forbids hostility" toward "all religions," *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). "State power is no more to be used so as to handicap religions than it is to favor them." *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947).

⁶ Memorandum from the Attorney Gen. of the U.S. to all Exec. Dep't and Agencies (Oct. 26, 2017), 82 F.R. 49668, *available at* <https://www.federalregister.gov/documents/2017/10/26/2017-23269/federal-law-protections-for-religious-liberty>.

⁷ Comment ED-2019-OPE-0080-8598 (Feb. 18, 2020), <https://www.regulations.gov/document?D=ED-2019-OPE-0080-8598>.

and participate fully in civic life without undue interference by the Federal Government,”⁸ and, thus, requires executive branch agencies to honor and enforce those protections.

According to the free-exercise clause of the First Amendment to the Constitution of the United States, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” Furthermore, “[t]he Free Exercise Clause ‘protect[s] religious observers against unequal treatment’ and subjects to the strictest scrutiny laws that target the religious for ‘special disabilities’ based on their ‘religious status.’”⁹

Thus, the Supreme Court has generally ruled it unconstitutional to discriminate against a religious organization based solely on its religious affiliation.¹⁰ The Court has also made clear that “the Constitution [does not] require complete separation of church and state; it affirmatively mandates **accommodation**, not merely tolerance, of all religions, and **forbids hostility** toward any.”¹¹ As such, the government should not pass laws that have the primary purpose of either advancing or inhibiting religion.¹²

Most recently, the Supreme Court held that the exclusion of an otherwise eligible recipient from a government grant program, solely because that entity is religious in nature, violates the Free Exercise Clause.¹³ The Court has also held that the Equal Protection Clause commands that “all persons similarly situated should be treated alike,”¹⁴ and that discrimination triggered by the exercise of a fundamental right – here, faith-based organizations participating in Department programs – triggers strict scrutiny under the Equal Protection Clause.¹⁵ This clearly demonstrates that government is to protect religious exercise by essentially being “hands off,” including not placing notice and referral burdens solely on faith-based organizations that are otherwise similarly situated to non-faith-based organizations.

The Religious Freedom Restoration Act of 1993 (“RFRA”) also reinforces the constitutionally protected right of a faith-based organization to engage in religious activities while participating in Department programs without restrictive and targeted burdens. To withstand the scrutiny of a claim under RFRA, the Government would have to prove that the burden placed on faith-based organizations – here the extra referral and notice requirements – further a compelling government interest and is the least restrictive means of furthering that interest.¹⁶ The requirements under the Obama Executive Order are neither compelling nor the

⁸ Exec. Order No. 13798, 82 F.R. 21675 (May 4, 2017).

⁹ *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017) (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533, 542 (1993)).

¹⁰ *Church of Lukumi*, *supra* note 9.

¹¹ *Lynch v. Donnelly* 465 U.S. at 673.

¹² See, e.g., *Walz v. Tax Comm’n*, 397 U.S. 664, 669 (1970); *Epperson v. Arkansas*, 393 U.S. 97, 103–04 (1968); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 299 (1963) (Brennan, J., concurring); *Everson v. Bd. of Educ.*, 330 U.S. 1, 18 (1947).

¹³ *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012 (2017).

¹⁴ *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

¹⁵ *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (classifications affecting fundamental rights trigger strict scrutiny).

¹⁶ Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb-1(b).

least restrictive means. As is rightly pointed out in the Department's own legal analysis:

When a faith-based grant recipient carries out its social service programs, it may engage in an exercise of religion protected by RFRA and certain conditions on receiving those grants may substantially burden the religious exercise of the recipient. *See Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to a Juvenile Justice and Delinquency Prevention Act*, 31 Op. O.L.C. 162, 169-71, 174-83 (2007) (“World Vision Opinion”). Requiring faith-based organizations to comply with the alternative provider requirement could impose such a burden, as in a case in which a faith-based organization has a religious objection to referring the beneficiary to an alternative provider that provides services in a manner that violates the organization's religious tenets. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 720-26 (2014). And it is far from clear that this requirement would meet the strict scrutiny that RFRA requires of laws that substantially burden religious practice. The Department is not aware of any instance in which a beneficiary has actually sought an alternative provider, undermining the suggestion that the interests this requirement serves are in fact important, much less compelling enough to outweigh the substantial burden on religious exercise.¹⁷

Another recent Supreme Court case, *National Institute of Family Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), perfectly illustrates the constitutional violations that arises when the government compels speech (i.e. referral and written notice requirements). In that case, the “Reproductive FACT Act,” a California law, required two things. First, licensed pro-life centers were required to advertise the availability of free and low-cost abortions by sharing with all their clients the following message: “**California has public programs that provide immediate free or low-cost access to** comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and **abortion** for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number].” Second, unlicensed pro-life centers were required to provide written notice in any ad for the center the following disclaimer: “This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services.”

The law specifically exempted some clinics that would have otherwise fallen under the requirements of the law, thus making it clear that the law was intended to target faith-based pro-life clinics. The Supreme Court found that these requirements were unconstitutional. Justice Thomas, in his opinion for the Court, stated: “The licensed notice is a content-based regulation of speech. By compelling individuals to speak a particular message, such as notices ‘alte[r] the content of [their] speech.’”¹⁸ Regarding the unlicensed disclosure requirement, Justice Thomas wrote: “The unlicensed notice imposes a government-scripted, speaker-based disclosure requirement that is wholly disconnected from California’s informational interest. It

¹⁷ Proposed Rule: Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Direct Grant Programs, State-Administered Formula Grant Programs, Developing Hispanic-Serving Institutions Program, and Strengthening Institutions Program, 85 F.R. 3190 (Jan. 17, 2020), <https://www.federalregister.gov/documents/2020/01/17/2019-26937/uniform-administrative-requirements-cost-principles-and-audit-requirements-for-federal-awards-direct>.

¹⁸ *National Institute of Family Life Advocates v. Becerra*, 138 S. Ct. 2361, at 7 (2018).

requires covered facilities to post California’s precise notice, no matter what the facilities say on site or in their advertisements.”¹⁹

Similarly, the Obama Executive Order compelled *only* faith-based organizations to provide a government-scripted, speaker-based disclosure. However, as has been indicated by the Departments own legal analysis:

There is . . . no need for prophylactic protections that creates administrative burdens on faith-based providers and that are not imposed on other providers,” as “Faith-based providers of social services, like other providers of social services, are required to follow the law and the requirements of the grants and contracts they receive,” and “there is no basis on which to presume that they are less likely than other social services providers to follow the law.”²⁰

In conformance with the constitutional rules and principles asserted above, Executive Orders 13798, Promoting Free Speech and Religious Liberty, and 13831, Establishment of a White House Faith and Opportunity Initiative, along with Department guidance, appropriately instruct federal agencies to protect religious exercise and not impede it.²¹

III. ROLE OF RELIGIOUS ORGANIZATIONS IN SOCIETY

Religion and the social networks and organizations surrounding it are crucial in transmitting civic norms and habits. In fact, religious Americans are up to twice as active civically as secular Americans. “Religiosity is by far the strongest and most consistent predictor of a wide range of measures of civic involvement, such as belonging to a community organization, especially a health-related one, youth-serving organizations, neighborhood and civic associations, fraternal and service organizations, and even professional and labor groups.”²²

Religious organizations and similar nonprofits have been contributing to American society for generations. “Their continued efforts provide important services within our national welfare system, including healthcare, social work, disaster relief, education, and charitable giving.”²³ Historically, some sweeping societal changes that are universally accepted as being positives have come from religious initiatives as well: the Abolition Movement and the Civil Rights Movement received strong support from religious institutions. It is in fact difficult to imagine our society without the contributions of religious organizations to our

¹⁹ *Id.* at 19.

²⁰ Proposed Rule: Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, Direct Grant Programs, State-Administered Formula Grant Programs, Developing Hispanic-Serving Institutions Program, and Strengthening Institutions Program, *supra* note 17.

²¹ U.S. DEPARTMENT OF LABOR PROPOSES A RULE CLARIFYING CIVIL RIGHTS PROTECTIONS FOR RELIGIOUS ORGANIZATIONS, News Release, <https://www.dol.gov/newsroom/releases/ofccp/ofccp20190814>, (Aug. 14, 2019).

²² Amicus Curiae Brief of American Center for Law & Justice in Support of Petitioners, *Zubik v. Burwell*, 134 S. Ct. 2751 (2014) (No. 13-354).

²³ *Id.*

conception of care and justice. As George Washington emphasized when discussing the importance of religion in his famous Farewell Address:

Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism who should labor to subvert these great pillars of human happiness— these firmest props of the duties of men and citizens. The mere politician, equally with the pious man, ought to respect and to cherish them. A volume could not trace all their connections with private and public felicity. Let it simply be asked, Where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths which are the instruments of investigation in courts of justice?²⁴

Religious accommodations have enjoyed bipartisan support for many years, though only recently have some tried to make them into a contentious partisan issue. For example, President Obama famously recognized the important role religious nonprofits play in serving local communities:

Now, as we move to implement this rule, however, we've been mindful that there's another principle at stake here—and that's the principle of religious liberty, an inalienable right that is enshrined in our Constitution. . . . In fact, my first job in Chicago was working with Catholic parishes in poor neighborhoods, and my salary was funded by a grant from an arm of the Catholic Church. And I saw that local churches often did more good for a community than a government program ever could, so I know how important the work that faith-based organizations do and how much impact they can have in their communities.²⁵

President Obama was correct in saying that religious liberty is an inalienable right and noting how religious groups make worthwhile contributions to secular society. Studies have shown time and again that involvement in religious organizations and/or religious networks is one of the strongest predictors of philanthropic generosity and civic involvement that are available.²⁶

There are immense benefits created by living in a society that is more giving, and such benefits are distributed more widely than people might first assume. “Eighty-eight percent of givers to religious causes also gave to secular causes, while sixty percent of those who did not give to any religious causes did not give to any secular causes, either.”²⁷ Again, looking at giving as a fraction of income, “seventy percent of above-average givers to religious causes are also

²⁴ *Id.* at 8 (*Citing* President George Washington, Farewell Address (Sept. 17, 1796), in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 220 (James D. Richardson ed., 1896).

²⁵ Mark Aaron Goldfeder, *There is a Place for Muslims in America: On Different Understandings of Neutrality*, 93 NOTRE DAME L. REV. 59 (2017) (*citing* President Barack Obama, Remarks by the President on Preventive Care (Feb. 10, 2012), <https://obamawhitehouse.archives.gov/the-press-office/2012/02/10/remarks-president-preventive-care>).

²⁶ Goldfeder, *supra* note 26, at 63. (*Citing* ROBERT D. PUTNAM & DAVID E. CAMPBELL, AMERICAN GRACE: HOW RELIGION DIVIDES AND UNITES US 444–58 (2010)).

²⁷ Goldfeder, *supra* note 26, at 63. (*Citing* PUTNAM, *supra* note 25, at 448).

above-average givers to secular causes, while sixty-seven percent of below-average givers to religious causes are also below-average givers to secular causes.”²⁸ All of these statistics hold true even though the average churchgoer tends to be slightly disproportionately poorer.²⁹ While virtually every part of the American philanthropic spectrum benefits disproportionately from giving by religious observant people, this is especially true for organizations serving the vulnerable and the needy.³⁰ Surveys have also shown that churchgoers are significantly more likely to give money to strangers,³¹ family, and friends.³²

This Rule would help protect religious organizations, which are a cornerstone of our society. A byproduct of the religious liberty protected in these organizations has been the growth of an active and pluralistic nonprofit sector including a wide variety of religions, faiths, and denominations. The continued engagement of individuals in this thriving sector promotes diversity and social cohesion and gives Americans across the board the opportunity to live their values, with all of the associated benefits to themselves and to society.

VI. CONCLUSION

The ACLJ urges the Department to adopt the Rule in its entirety. It is imperative that religious liberty is protected and upheld. The Rule is consistent with both the original Executive Order and with Federal law, including the First Amendment to the Constitution. Modifications to the original Executive Order rendered certain aspects of the rules unconstitutional by placing additional burdens upon otherwise qualified, eligible entities solely because of their religious identity or activities. This Rule corrects that unconstitutional discrimination and allows faith-based organizations to keep faithful participating in serving American communities. Religious organizations deserve to have a clear understanding of their obligations and protections under the law.

Aside from protecting our first liberty, the Rule is necessary to implement because of the vast societal good that religious organizations foster throughout the country, promoting philanthropic generosity and civic involvement at the highest levels. Indeed, religious organizations should be encouraged to contract with the federal government, not turned away because of any outstanding uncertainties of their protections under the law. Although these protections are already enshrined in the Constitution, adequate enforcement of the equal treatment of faith-based organizations requires specific and applied clarity, which this proposed Rule provides. Robustly protecting religious freedom will further enable religious organizations to do what they do best, which is to help serve those in need. The ACLJ will continue to remain ever vigilant in ensuring that all religious organizations are protected under the law.

²⁸ *Id.*

²⁹ *Id.* at 64. (Citing PUTNAM, *supra* note 27).

³⁰ PUTNAM, *supra* note 27, at 450.

³¹ *Id.* at 451.

³² *Id.* They were also more likely to give money to a charity, do volunteer work for a charity, give money to a homeless person, donate blood, help someone outside their own household with housework, spend time with someone who is down, and help someone find a job. The survey did not find a single type of good deed that is more common among secular Americans than religious Americans. *Id.*

Finally, the ACLJ commends and supports the Department in their mission to make sure religious organizations are made fully aware that they will receive the equal treatment under the law that the Constitution demands. The proposed changes to the alternative provider referral and notice requirements that previously were established by Executive Order 13559 are crucial in the ongoing battle to protect religious freedom and ensure that religious organizations are free to continue making society stronger. The clarity the Department is providing is admirable, and the Rule should be adopted.

Thank you for the opportunity to provide comment on this critical matter.

A handwritten signature in black ink that reads "Jordan Sekulow". The signature is written in a cursive, flowing style.

Jordan Sekulow
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AMERICAN CENTER FOR LAW & JUSTICE