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November 24, 2017

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Attention: RFI Regarding Faith-Based Organizations

Thank you for this opportunity to comment on the request for information (RFI) entitled "Removing Barriers for Religious and Faith-Based Organizations to Participate in HHS Programs and Receive Public Funding."

The RFI asks whether the Department of Health and Human Services (HHS) should remove "regulatory or other barriers" to allow faith-based organizations to partner with the federal government or take action to "affirmatively accommodate[]" these organizations. As explained below, the answer is no.

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." Its activities "impact health, public health, and human services outcomes throughout the life span." HHS-funded programs are critical to the health and well-being of many people across the country and therefore they must be as effective, available, and accessible as possible.

Religious freedom is a fundamental American value protected by our Constitution and our laws. It guarantees us the right to believe or not as we see fit. But it doesn't give anyone the right to use religion to harm others. Indeed, religion cannot be used as an excuse to discriminate against people by denying them HHS-funded services or HHS-funded jobs.

What some faith-based providers identify as barriers are actually neutral and generally applicable program requirements that apply equally to all HHS contractors and grantees. Policies like those that bar discrimination are a vital component of HHS-funded programs because they advance equality and fairness and ensure everyone has access to the services they need.

In particular, the kind of religious exemptions envisaged by the RFI would result in harm and discrimination: they would allow taxpayer-funded service providers to discriminate in hiring or in providing services, or even refuse to provide some services otherwise required under their grants or contracts. These religious exemptions would make it harder for people—particularly women, LGBTQ people, religious minorities, and nonbelievers—to get a taxpayer-funded job or access the services they need.

Discrimination and denial of service have no place in government programs: they are contrary to our nation's values and would violate the Constitution. HHS, therefore, must reject requests to

create religious exemptions that would undermine the effectiveness, availability, and accessibility of HHS-funded services.

Federal Protections for Religious Liberty Do Not Require New "Affirmative" Accommodations

The Constitution Bars Religious Accommodations that Harm Others

The Establishment Clause of the First Amendment limits the government's ability to "affirmatively accommodate[]" faith-based organizations that partner with the government. The constitutional requirement is straightforward: "an accommodation must be measured so that it does not override other significant interests";[1] have a "detrimental effect on any third party";[2] or "impose unjustified burdens on other[s]."[3] Allowing faith-based contractors and grantees to discriminate in the name of religion would clearly harm those who are denied HHS services and employment. Moreover, giving faith-based contractors and grantees the right to refuse to provide services amounts to giving them "the right to use taxpayer money to impose [their beliefs] on others."[4]

The Religious Freedom Restoration Act Does Not Require These Kinds of Exemptions for Grantees and Contractors

The Religious Freedom Restoration Act (RFRA)[5] asks whether the law places a "substantial burden" on religious exercise. If yes, the government regulation must "further a compelling government interest" by using the "least restrictive means." Minimal burdens do not trigger RFRA protection[6] and even substantial burdens on religious exercise must be permitted where the countervailing interest is significant. Thus, RFRA 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.

Moreover, a requirement in a contract or grant that advances the objectives of the HHS program contracts is not a "substantial burden."[7] A contractor or grantee's obligations to serve all

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[1] *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005); *see also Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709-10 (1985).

[2] *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 n.37 (2014) (citing *Cutter*, 544 U.S. at 720). In *Hobby Lobby*, all Justices 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., dissenting, joined by Breyer, Kagan, & Sotomayor, JJ.). *See also Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring).

[3] *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").

[4] *ACLU of Mass. v. Sebelius*, 821 F. Supp. 2d 474, 488 n.26 (D. Mass. 2012), *vacated as moot sub nom., ACLU of Mass. v. U.S. Conference of Catholic Bishops*, 705 F.3d 44 (1st Cir. 2013). *See also Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125-26 (1982).

[5] 42 U.S.C. §§ 2000bb-2000bb-4.

[6] *See Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) (interpreting parallel statute, Religious Land Use and Institutionalized Persons Act (RLUIPA)); *see also Goehring v. Brophy*, 94 F.3d 1294, 1299 n.5 (9th Cir. 1996) (Even if a plaintiff's beliefs "are sincerely held, it does not logically follow . . . that any governmental action at odds with these beliefs constitutes a substantial burden on their right to free exercise of religion.")

[7] *See Locke v. Davey*, 540 U.S. 712 (2004) (distinguishing between coercive actions that substantially burden free exercise and a condition on funding that was "a relatively minor burden"); *see also Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2986 (2010) (student group seeking official university recognition ("effectively a

beneficiaries and to provide the very services required by the contract or grant clearly advance the objectives of the program and ensure people can access the services they need. Faith-based organizations voluntarily partner with HHS and if they do not want to fulfill these responsibilities under a contract or grant, they can decline the funding.[8] Furthermore, these faith-based organizations are unfettered in their religious exercise outside the scope of the federally funded program and can continue to operate in ways that they see fit with their own funds.[9]

Finally, even if the nondiscrimination provision did impose a "substantial burden" on a faith-based organization's religious exercise, the government clearly has a compelling interest both in not subsidizing discrimination[10] and in ensuring those who most need services are provided them. In addition, this provision is the least restrictive means of furthering these interests.[11] Indeed, the Constitution prohibits the government from funding discrimination or providing aid to private institutions that engage in discrimination.[12]

There Are No Barriers to Faith-Based Organizations Partnerships with the Federal Government

Faith-Based Organizations Frequently Partner with HHS

Faith-based organizations have a longstanding tradition of partnership with HHS, playing an important role in delivering health and social services to communities in need. Based on this history, it is clear that effective government collaboration with faith-based groups does not require the sanctioning of government-funded discrimination.

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state subsidy") "face[d] only indirect pressure to modify its membership policies" with university nondiscrimination policy); *see generally* Ira C. Lupu & Robert W. Tuttle, Roundtable on Religion & Social Welfare Policy, *The State of the Law – 2008* 33-37 (2008), *available at* http://www.rockinst.org/pdf/faith-based_social_services/2008-12-state_of_the_law.pdf. *Cf. Christian Legal Soc'y v. Martinez*, 130 S. Ct. 2971, 2986 (2010) (student group seeking government subsidy "may exclude any person for any reason if it forgoes the benefits."); *Alpha Delta Chi-Delta Chapter v. Reed*, 648 F. 3d 790, 803 (9th Cir. 2011). Nor does an obligation to provide certain services under a grant or contract amount to requiring the funded organization to adopt a particular belief. *See USAID v. Alliance for Open Soc'y Int'l*, 133 S. Ct. 2321, 2330-31 (2013).

[8] Because faith-based organizations can reject a contract or grant and "maintain their practices," these kinds of obligations are not coercive and therefore do not impose a substantial burden. *The State of the Law – 2008* at 34. Contracts and grants to carry out social services are wholly distinct from government benefits, like unemployment insurance, *Teen Ranch v. Udow*, 389 F. Supp. 2d 827,838 (W.D. Wis. 2005), and nothing requires the government to contract with religiously affiliated organizations, *see id.; see also Lyng v. Northwest Indian Cemetery Protective Ass'n.*, 485 U.S. 439, 451 (1988) (quoting *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring) (explaining religious liberty protections ensure what government may not do, not "what the individual can exact from the government")).

[9] *See generally Alliance for Open Soc'y Int'l*, 133 S. Ct. at 2329-30. Nor is it a burden, that because the organizations do not get taxpayer funds, they perceive their "'practice of religious beliefs [is] more expensive.'" *Goodall v. Stafford County Sch. Bd.*, 60 F.3d 168, 171 (4th Cir. 1995) (quoting *Braunfeld v. Brown*, 366 U.S. 599 605 (1961) (plurality opinion)).

[10] *E.g.*, *Bob Jones Univ. v. United States*, 461 U.S. 574, 575 (1983); *Dole v. Shenandoah Baptist Church*, 899 F.2d 1389, 1398 (4th Cir. 1990).

[11] *See,* e.*g.*, *Dole*, 899 F.2d at 1398; *cf. Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783 (2014) (explaining that prohibitions on discrimination are "precisely tailored" to achieve a compelling government interest).

[12] *E.g.*, *Norwood v. Harrison*, 413 U.S. 455, 465-66 (1973).

Indeed, 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."

The Last Two Administrations Have Engaged in this Process Already

In 2001, pursuant to an executive order, HHS and other departments conducted audits to identify "all existing barriers to the participation of faith-based and other community organizations in the delivery of social services."[13] Based on the audits, President George W. Bush signed additional executive orders that led to a rulemaking process and new regulations across the government, including at HHS. The "Equal Treatment for Faith-Based Organizations" regulations that apply to discretionary and formula and block grants[14] made drastic and unprecedented changes to the Department's grant-making and contracting rules. In the name of eliminating barriers, this 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, again pursuant to an executive order,[15] a presidential advisory council comprising "leaders and experts in fields related to the work of faith-based and neighborhood organizations"[16] examined the rules that govern the partnerships between faith-based organizations and the government. 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."[17] The Council made twelve unanimous recommendations to President Barack Obama focused on improving the constitutionality and clarity of the rules and increasing protections for beneficiaries. The recommendations were implemented through an executive order[18] 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.

Conclusion

The focus of HHS-funded programs should be to assist individuals by increasing access to health care and critical human services. Denying individuals the services they need undermines the very purpose of these programs and expanding religious exemptions will fall hardest on those who already face barriers to accessing services and care.

HHS-funded programs exist to benefit the individual recipients of services, not to benefit faith-based contractors or grantees. Thus, HHS must prioritize the needs of beneficiaries and not create any exemptions that permit contractors or grantees to discriminate in who they hire or who they

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[13] Exec. Order No. 13,198, 66 Fed. Reg. 8497 (Jan. 31, 2001).
[14] 45 C.F.R. §§ 87.1 & 87.2.
[15] Exec. Order No. 13,498, 74 Fed. Reg. 6533 (Feb. 9, 2009).
[16] President's Advisory Council on Faith-Based and Neighborhood Partnerships, *A New Era of Partnerships: Report of Recommendations to the President* at v (2010), https://obamawhitehouse.archives.gov/sites/default/files/microsites/ofbnp-council-final-report.pdf.
[17] *Id.* at 120.
[18] Exec. Order No. 13,559, 75 Fed. Reg. 71,319 (Nov. 22, 2010).

serve. Nor may it create exemptions allowing taxpayer-funded organizations to refuse to provide services otherwise required under their grants or contracts.

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

Sincerely,

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