FIRST LIBERTY

March 14, 2023

Submitted via Federal eRulemaking Portal at www.regulations.gov

To:

Department of Education (RIN 1840-AD46, Docket ID ED-2023-OS-0040)
Department of Homeland Security (RIN 1601-AB02, Docket ID DHS-2023-0006)
Department of Agriculture (RIN 0503-AA73, USDA-2023-0003)
Agency for International Development (RIN 0412-AB10, Docket ID AID-2023-0001)
Department of Housing and Urban Development (RIN 2501-AD91, HUD-2023-0003)
Department of Justice (RIN 1105-AB64, Docket ID DOJ-OAG-2023-0002)
Department of Labor (RIN 1290-AA45, Docket ID DOL-2022-0004)
Department of Veterans Affairs (RIN 2900-AR23, VA-2023-VACO-0006)
Department of Health and Human Services (RIN 0991-AC13, HHS_FRDOC_0001)

From:

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Re: Notice of Proposed Rulemaking, Partnerships with Faith-Based and Neighborhood Organizations, 88 Fed. Reg. 2395 (Jan. 13, 2023)

To Whom It May Concern:

First Liberty Institute submits this comment regarding the notice of proposed rulemaking ("NPRM") by the nine above-listed agencies, "Partnerships with Faith-Based and Neighborhood Organizations," RIN 0945- AA18 (the "Proposed Rule"), published at 88 Fed. Reg. 2395 (Jan. 13, 2023).

First Liberty Institute is a nonprofit, public interest law firm. Our mission is to defend religious liberty for all Americans through pro bono legal representation of

individuals and institutions of diverse faiths. We have represented Catholic, Protestant, Islamic, Jewish, Buddhist, Falun Gong, Native American, and other religious practitioners. For over thirty years, First Liberty Institute attorneys have worked to defend religious freedom before the courts, including the U.S. Supreme Court, as well as testifying before Congress and advising federal, state, and local officials about constitutional and statutory protections for religious liberty.

As a public interest law firm that defends religious freedom for all Americans, we have, unfortunately, had to represent individuals, houses of worship, and other faith-based organizations who were made ineligible to participate in government programs—or who were otherwise targeted by the government—because of their religious status or religious exercise. For example, we represented, before the Supreme Court of the United States, parents who were denied the ability to participate in Maine's school tuition program because they wanted to send their children to religious schools. We also represented a California Christian church that was told it could not rent space in a local government's amphitheater because the venue was off-limits for religious organizations. Presently, we are representing two churches in New Jersey that have been denied historic preservation grants solely because their buildings are used for worship.

We also have represented clients for whom the scope of Title VII's protections for religious employers—and the interaction between Title VII and the Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb *et seq*. ("RFRA")—are of critical importance. For example, we currently represent a Christian business that is defending against a claim that a faith-motivated exclusion in its health plan violates Title VII.

In our experience, many conflicts with religious liberty stem from government's outdated and erroneous understanding of the Establishment Clause, of federal statutory protections for religious liberty, or of both. The proposed rulemaking suffers from both these deficiencies.

In short, First Liberty Institute opposes the proposed rulemaking because: (I) in addressing the Title VII religious employer exemption, it takes a cramped and erroneous view of the scope of that exemption and fails to account for the supplementary protection offered by RFRA; and (II) in continuing to distinguish between direct and indirect Federal financial assistance and in proposing to make the latter dependent on the availability of secular providers, it rests on an outdated and erroneous understanding of the Establishment Clause, poses Free Exercise Clause and RFRA concerns, and dissuades many religious providers from reaching un-served and under-served communities. In addition, (III) the NPRM's regulatory impact analysis ("RIA") fails to properly assess the benefits of faith-based partners and the burdens on them and ignores the economic as

well as qualitative costs. These three errors run through all nine sets of the proposed regulatory changes; therefore, our comments apply to all nine sets of the proposed regulatory changes.

I.

The proposed rulemaking would amend language in each of the nine sets of regulations dealing with the religious employer exemption found in sections 702(a) and 703(e) of the Civil Rights Act of 1964 ("Title VII"). The proposed amendments would delete existing regulatory text that acknowledges the exemption provides a defense to claims other than religious-discrimination claims. The preamble makes clear that the proposed change rests on the agencies' changed view that "the Title VII religious exemption does not permit such organizations to discriminate against workers on the basis of another protected classification, even when an employer takes such action for sincere reasons related to its religious tenets . . . ."

The agencies' cramped view of the religious employer exemption is wrong, and the proposed deletions of the regulatory text should be abandoned. In particular, the agencies' changed view about the scope of the religious employer exemption contradicts the text of Title VII, flouts the great weight of federal-court precedent interpreting the exemption, and in many applications risks violating RFRA.

A.

The text of the religious employer exemption makes plain that it provides an affirmative defense to any claim brought under Title VII, not simply claims of religious discrimination, and that it therefore allows religious employers to insist that their employees conform their personal conduct to the employers' religious tenets.

The exemption in section 702(a) provides, "*This subchapter [i.e., Title VII] shall not apply* . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying out by such [entity] of its activities." 42 U.S.C. § 2000e-1(a) (emphasis added). Similarly, the exemption in section 703(e) provides, "*Notwithstanding any other provision of this subchapter [i.e., Title VII] . . . it shall not be an unlawful employment practice* for a school, college, university, or any other educational institution or institution of learning to hire and employ employees of a particular religion if such [entity]" meets certain requirements. 42 U.S.C. § 2000e-2(e) (emphasis added).

The emphasized text makes clear that these religious-employer exemptions provide affirmative defenses to *any claim* brought under Title VII, not just claims of religious discrimination. In asserting the contrary, the NPRM not only glosses over the text of the religious employer exemption, but also Title VII's definition of "religion": "The term 'religion' includes all aspects of religious observance and practice, as well as belief . . . ." 42 U.S.C. § 2000e(j). By allowing certain religious employers to limit employment to those "of a particular religion," the religious employer exemption allows those employers to insist not only on conformity of employees' beliefs, but also conformity of employees' observances and practices—*i.e.,* employees' conduct—to the employers' religious tenets.

B.

Numerous federal courts have confirmed the plain meaning of the above-discussed statutory provisions and rejected the NPRM's cramped, revisionist reading of the religious employer exemption. They have concluded that the exemption allows religious employers to maintain employee belief and conduct standards or otherwise provides an affirmative defense to Title VII claims other than just religious discrimination claims. These cases include:

- *EEOC v. Mississippi College*, 626 F.2d 477, 485 (5th Cir. 1980) ("We conclude that if a religious institution of the kind described in § 702 presents convincing evidence that the challenged employment practice resulted from discrimination on the basis of religion, § 702 deprives the EEOC of jurisdiction to investigate further to determine whether the religious discrimination was a pretext for some other form of discrimination.")

- *Larsen v. Kirkham*, 499 F. Supp. 960, 966 (D. Utah 1980) ("First, her notion that the religious school exemption permits no more than a religious school's preference for those ostensibly affiliated with the religion operating it ignores both reason and policy. It implies that the practice of religion is something separate from what is meant by the term "religion" as it appears in § 703(e). This is clearly at odds with the definition of "religion" contained in § 701(j) and which plaintiff urges the court to apply to the term "religion" as it appears in the exemption.")

- *Maguire v. Marquette Univ.*, 627 F. Supp. 1499, 1506 (E.D. Wis. 1986), *aff'd in part, vacated in part on other grounds*, 814 F.2d 1213 (7th Cir. 1987) ("The second question is whether plaintiff's allegation that she is a Catholic requires the Court to involve itself in ecclesiastical concerns. Because the First Amendment prevents the Court from involving itself in the area, the Court finds that the exception to

Title VII created by 42 U.S.C. § 2000e–2(e)(2) should be read to allow the hiring committee of a theology department in a college controlled by a religious society broad latitude when it makes a decision to hire 'employees of a particular religion.'")

- *Little v. Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991) ("[W]e are . . . persuaded that Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices . . . . Against this background and with sensitivity to the constitutional concerns that would be raised by a contrary interpretation, we read the exemption broadly. We conclude that the permission to employ persons 'of a particular religion' includes permission to employ only persons whose beliefs and conduct are consistent with the employer's religious precepts. Thus, it does not violate Title VII's prohibition of religious discrimination for a parochial school to discharge a Catholic or a non-Catholic teacher who has publicly engaged in conduct regarded by the school as inconsistent with its religious principles.")

- *Killinger v. Samford Univ.*, 113 F.3d 196, 200 (11th Cir. 1997) ("The Section 702 exemption's purpose and words easily encompass Plaintiff's case; the exemption allows religious institutions to employ only persons whose beliefs are consistent with the employer's when the work is connected with carrying out the institution's activities.")

- *Wirth v. Coll. of the Ozarks*, 26 F. Supp. 2d 1185, 1188 (W.D. Mo. 1998) ("This is precisely the situation for which the exemptions were enacted; the exemptions allow religious institutions to employ only persons whose beliefs are consistent with the views of the religious organization.")

- *Hall v. Baptist Memorial Health Care Corp.*, 215 F.3d 618, 624 (6th Cir. 2000) ("The decision to employ individuals "of a particular religion" under § 2000e–1(a) and § 2000e–2(e)(2) has been interpreted to include the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer.")

- *Curay-Cramer v. Ursuline Academy of Wilmington*, 450 F.3d 130, 136 (3d Cir. 2006) ("In this context, there are circumstances, like those presented here, where a religious institution's ability to 'create and maintain communities composed solely of individuals faithful to their doctrinal practices' will be jeopardized by a plaintiff's claim of gender discrimination." (quoting *Little*, 929 F.2d at 951))

- *Saeemodarae v. Mercy Health Service*, 456 F. Supp. 2d 1021, 1039 (N.D. Iowa 2006) ("More specifically, '[t]he decision to employ individuals of a particular religion under § 2000e–1(a) and § 2000e–2(e)(2) has been interpreted to include the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer.'" (quoting *Hall*, 215 F.3d at 624))

- *O'Connor v. Roman Catholic Church Diocese of Phoenix*, 2007 WL 1526736, at *5 (D. Ariz. May 23, 2007) ("The § 702 exemption allows religious employers to discriminate in favor of members of their own faith. As Plaintiff's job description unequivocally demonstrates, being an active practicing Catholic in full communion with the Church was a required term of her employment. Determining whether a particular marriage conforms with the Catholic Church's teachings on marriage and whether an individual is in full communion with the Church are clearly matters of religious interpretation. Accordingly, the Court finds that Defendant is exempt from liability under Title VII pursuant to the § 702 exemption and Plaintiff's retaliation claim will be dismissed with prejudice.")

- *Kennedy v. St. Joseph's Ministries*, 657 F.3d 189, 194 (4th Cir. 2011) ("This conclusion conforms with the purpose behind the exemption as well: 'Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices, whether or not every individual plays a direct role in the organization's religious activities.'" (quoting *Little*, 929 F.2d at 951))

- *Bear Creek Baptist Church v. EEOC*, 571 F. Supp. 3d 571, 591 (N.D. Tex. 2021) ("The plain text of this exemption, therefore, is not limited to religious discrimination claims; rather, it also exempts religious employers from other forms of discrimination under Title VII, so long as the employment decision was rooted in religious belief.")

Courts adhering to the plain text of the religious employer exemption have done so for good reason: the government violates the Establishment Clause when it arrogates to itself the power to determine who is and is not a co-religionist. *See Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2069 (2020). Indeed, several courts have proffered this Establishment Clause concern as an additional reason to reject the NPRM's counter-textual approach to the religious employer exemption. Such cases include:

- *Larsen*, 499 F. Supp. at 966 ("In short, nothing in the language, history or purpose of the exemption supports such an invasion of the province of a religion to decide whom it will regard as its members, or who will best propagate its doctrine. That is an internal matter exempt from sovereign interference.")

- *Killinger*, 113 F.3d at 201 ("We, as a federal court, must give disputes about what particulars should or should not be taught in theology schools a wide-berth. Congress, as we understand it, has told us to do so for purposes of Title VII. Also, such a construction allows us to avoid the First Amendment concerns which always tower over us when we face a case that is about religion.")

- *Little*, 929 F.2d at 949, 951 ("In this case, the inquiry into the employer's religious mission is not only likely, but inevitable, because the specific claim is that the employee's beliefs or practices make her unfit to advance that mission. It is difficult to imagine an area of the employment relationship *less* fit for scrutiny by secular courts. . . . Against this background and with sensitivity to the constitutional concerns that would be raised by a contrary interpretation, we read the exemption broadly.")

- *Mississippi College*, 626 F.2d at 485 ("This interpretation of § 702 is required to avoid the conflicts that would result between the rights guaranteed by the religion clauses of the first amendment and the EEOC's exercise of jurisdiction over religious educational institutions.")

- *Maguire*, 627 F. Supp. at 1503 ("Assuming the court was willing to delve into the hiring decisions relating to the theology department at Marquette, one question at trial would be whether in failing to hire the plaintiff as an associate professor of theology the defendant did so because it chose to 'employ employees of a particular religion'; i.e., whether or not the plaintiff is or is not a Catholic. Such an inquiry would require the Court to immerse itself not only in the procedures and hiring practices of the theology department of a Catholic University but, further, into definitions of what it is to be a Catholic. That question is one the First Amendment leaves to theology departments and church officials, not federal judges.")

- *O'Connor*, 2007 WL 1526736 at *4 ("The requirement of being in full communion with the Church, which entails marrying in accordance with Catholic Church's teachings regarding the Sacrament of Marriage, is a matter of religious doctrine insulated from the adjudicatory or interpretive powers of the Court by the First Amendment of the Constitution.")

Moreover, forcing religious employers to employ those whose beliefs or conduct dilute their religious messages also risks violating the Free Speech Clause of the First Amendment. *See Boy Scouts of Am. v. Dale*, 530 U.S. 640, 649–55 (2000).

C.

Separate and apart from Title VII, in many instances, RFRA also requires accommodations to antidiscrimination laws. As the Department of Justice has acknowledged, "prohibiting religious organizations from hiring only coreligionists can 'impose a significant burden on their exercise of religion, even as applied to employees in programs that must, by law, refrain from specifically religious activities.'" *Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act*, 31 Op. O.L.C. 162, 172 (2007) (quoting Direct Aid to Faith-Based Organizations Under the Charitable Choice Provisions of the Community Solutions Act of 2001, 25 Op. O.L.C. 129, 132 (2001)); *see Memorandum from the Att'y Gen. for All Executive Departments and Agencies: Federal Law Protections for Religious Liberty*, 82 Fed. Reg. 49668, 49678 (Oct. 26, 2017).

In our experience representing religious non-profits, we have seen that for many of them, setting employee belief and conduct standards requiring adherence to the organizations' religious tenets is a critical aspect of their exercises of religion as they serve their communities. For these kinds of religious service providers, having employees who profess their faith but who nonetheless speak or act in ways that violate the providers' religious tenets irreparably harms the providers' religious messages and missions. That is why having belief and conduct standards for their employees is an exercise of the providers' religion. *See* 42 U.S.C. § 2000bb-2(4) (defining "exercise of religion").

The agencies' cramped and erroneous view of the Title VII religious employer exemption threatens substantial burdens on such exercises of religion, and therefore, as to these kinds of religious providers, the agencies must meet RFRA's demanding strict-scrutiny standard. 42 U.S.C. § 2000bb-1. It is unlikely that the agencies can meet that high standard. Therefore, even putting aside the correctness of the agencies' constricted view of the religious employer exemption, in many applications, the agencies' accommodation-denying position will violate RFRA.

II.

In the NPRM, all of the agencies aside from USAID propose amending the definition of "indirect Federal financial assistance" to add a sentence that "the availability of adequate secular alternatives is a significant factor in determining whether a program

affords true private choice."[1] And the proposed rules would continue to single out religious providers receiving direct Federal financial assistance for special rules; for example, the rule requiring them to separate their religious activities from the funded programs. *See, e.g.*, 2 C.F.R. § 3474.15; 6 C.F.R. § 19.4; 24 C.F.R. § 5.109; 29 C.F.R. § 2.33; 34 C.F.R. § 75.52; 38 C.F.R. §§ 61.64, 62.62, 75.52, 78.130, 79.80. However, developments in Supreme Court case law have rendered the direct/indirect aid distinction obsolete, and have rendered the non-neutral, religion-targeted direct-aid rules vulnerable to Free Exercise challenge. And just as significant, by imposing the burdens that attend direct aid based on a factor beyond religious providers' control—the unavailability of secular providers—the proposed rule would raise RFRA concerns and discourage many religious providers from reaching un-served and under-served communities.

A.

The agencies' current regulatory framework distinguishes between "direct" and "indirect" Federal financial assistance and imposes special conditions on religious recipients of the former. This framework stems from the following passage in *Zelman v. Simmons–Harris*, 536 U.S. 639 (2002):

> [W]here a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. . . . The incidental *advancement* of a religious mission, or the perceived *endorsement* of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits.

Id. at 652 (emphases added).

[1] For the reasons discussed in the 2020 final rule, the NPRM's proposed addition—even if only as a "substantial factor" in marking the boundary between direct and indirect aid—is in tension with *Zelman v. Simmons–Harris*, 536 U.S. 639 (2002). *See Equal Participation of Faith-Based Organizations in the Federal Agencies' Programs and Activities*, 85 Fed. Reg. 82037-01, 82073–74 (Dec. 17, 2020). First Liberty Institute urges the agencies to reconsider their position and adhere to the 2020 rule's correct understanding of *Zelman*. But more fundamentally, for the reasons discussed herein, we urge the agencies to abandon altogether their distinction between direct and indirect Federal financial assistance and the non-neutral, religion-targeted conditions that they impose on direct-aid recipients.

Zelman's assurance that indirect aid does not "advance[ ]" or "endorse[ ]" religious missions and messages was relevant to a now-obsolete understanding of the Establishment Clause. *See id.* at 669 (O'Connor, J., concurring) ("The Court's opinion in these cases focuses on a narrow question related to the *Lemon* test: how to apply the primary effects prong in indirect aid cases?"). At the time *Zelman* was decided, the Court had not abandoned *Lemon v. Kurtzman*, 403 U.S. 602 (1971), which had interpreted the Establishment Clause to require that government action have a "principal or primary effect . . . that neither advances nor inhibits religion." *Id.* at 612. *Lemon* later evolved to incorporate judicial assessments about whether a "reasonable observer" would perceive that the challenged government practice is an "endorsement" of religion. *See, e.g., Cnty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 593 (1989). In its observations regarding indirect aid's lack of "advancement" and "endorsement," *Zelman* plainly was concerned with *Lemon* and its progeny.

In *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022), however, the Supreme Court unequivocally held that it had "long ago abandoned *Lemon* and its endorsement test offshoot," *id.* at 2427, instead holding "that the Establishment Clause must be interpreted by 'reference to historical practices and understandings,'" *id.* at 2428 (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014)). *See id.* at 2434 (Sotomayor, J., dissenting) (Today's decision . . . . overrules *Lemon v. Kurtzman* . . . and calls into question decades of subsequent precedents that it deems 'offshoot[s]' of that decision."). Thus, the agencies' current regulatory framework, by relying on *Zelman*'s *Lemon*-inspired distinction between direct and indirect aid, rests on a defunct understanding of the Establishment Clause.

B.

The agencies' obsolete view of the Establishment Clause isn't just an anachronism—it poses serious concerns under the Free Exercise Clause.

As *Kennedy* instructs, "a plaintiff may carry the burden of proving a free exercise violation in various ways, including by showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable.'" *Id.* at 2421–22 (quoting *Employment Div., Dep't of Human Resources of Ore. v. Smith*, 494 U.S. 872, 877 (1990)). "Failing either the neutrality or general applicability test is sufficient to trigger strict scrutiny." *Id.* at 2422. "'A government policy will not qualify as neutral if it is 'specifically directed at . . . religious practice.'" *Id.* (quoting *Smith*, 494 U.S. at 878). "A policy can fail this test . . . if a religious exercise is . . . its 'object.'" *Id.* (quoting *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993)).

By imposing special rules directed at the religious exercise of direct-aid recipients—such as rules requiring separation of explicitly religious activities from the funded programs—the agencies' current regulations are specifically directed at religious practice and therefore fail the neutrality test. And the agencies likely cannot justify their religion-targeted regulations under strict scrutiny. "[A]s we explained in both *Trinity Lutheran* and *Espinoza*, such an 'interest in separating church and state more fiercely than the Federal Constitution . . . cannot qualify as compelling in the face of the infringement of free exercise.'" *Carson v. Makin*, 142 S. Ct. 1987, 1998 (2022) (quoting *Espinoza v. Mont. Dep't of Rev.*, 140 S. Ct. 2246, 2260 (2020)).

Accordingly, rather than narrow their definition of "indirect Federal financial assistance" by making the availability of secular providers a "significant factor," the agencies should instead delete altogether their definitions of "direct" and "indirect" Federal financial assistance and delete the non-neutral, religion-targeted rules that they impose on religious recipients of direct aid. Failure to do so risks violating the Free Exercise Clause under recent developments in Supreme Court precedent.

C.

Even putting aside the serious constitutional concerns with maintaining the agencies' current framework for "direct" and "indirect" aid, the NPRM's proposed addition to the regulatory text poses serious concerns under RFRA and dissuades religious social-service providers from reaching the un-served and under-served communities that need them most.

By making the availability of secular providers a "significant factor" in whether religious providers can qualify as indirect-aid recipients—and thus in whether they can maintain their religious activities as part of the programs they provide—the proposed rule would substantially burden the religious exercise of providers who are called to reach un-served and under-served communities with religious programming. Under the proposed rule, where the agencies determine that "providers that offer secular programs are as a practical matter unavailable," they would "requir[e] existing providers to observe the same conditions that the rule attaches to direct aid." In other words, they would require the providers to separate, in time or location, their religious activities from the funded program.

In our experience, many religious social-service providers have a religious calling to serve those communities most in need—those that lack other adequate social-service providers—and to incorporate their religious activities in the services that they provide.

For example, we currently represent a Christian homeless ministry whose mission is to serve "the lost and the least," and which cannot separate its religious activities from the services that it provides.

The proposed narrowing of the definition of "indirect Federal financial assistance" would render these kinds of religious providers unable to fulfill their mission to bring religious programming to communities that lack adequate social services. By conditioning their receipt of Federal financial assistance—a public benefit—on the severing of their religious activities from the program, the proposed rule would substantially burden their exercise of religion. That would trigger RFRA's demanding strict scrutiny test—a test that the agencies are unlikely to meet. 42 U.S.C. § 2000bb-1. It is implausible that dissuading religious providers from ministering to un-served communities—those most in need, who lack *any* social service options—serves any useful government interest, much less a compelling one. Such a rule harms those most in need by depriving them of the only social-service option they would otherwise have. And as the Supreme Court has instructed, "an 'interest in separating church and state more fiercely than the Federal Constitution . . . cannot qualify as compelling.'" *Carson*, 142 S. Ct. at 1998 (quoting *Espinoza*, 140 S. Ct. at 2260).

Rather than penalize religious social-service providers for reaching out to the most disadvantaged communities that lack adequate social services, and rather than penalize those disadvantaged communities by depriving them of what may be their only opportunity to receive services, the agencies should instead jettison their outdated direct/indirect aid framework and remove the burdens that they impose on recipients of direct Federal financial assistance.

III.

The regulatory impact analysis fails to properly assess the benefits of faith-based partners and the burdens on them and ignores the economic as well as qualitative costs. Furthermore, the proposed rule would contradict President Biden's statement of Administration policy on January 20, 2021, to provide equal opportunity to *religious minorities* and *underserved communities*.[2] In its regulatory impact analysis, the proposed rule fails to assess the negative impact on prospective grant applicants and existing applicants. In our experience, religious Americans would no longer submit a

[2] E.O. 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/.

grant application, decide not to renew an existing grant, or leave social service work entirely rather than violate their sincerely held beliefs.

In the United States, thousands of religious charities are inspired by hundreds of faith traditions to carry out critical social services work for underserved communities.[3] Religious Americans and faith-based organizations are responsible for the overwhelming amount of social services and are more likely to volunteer as part of their religious identity. The highly religious volunteer at a rate of 45% during the week (compared to only 28% who are not highly religious), and 23% do so mainly through a religious organization or house of worship.[4] The highly religious also donate money, time, or goods to help the poor at a rate of 65% compared to only 41% of all other U.S. adults.[5] More people—across all age groups—volunteer in religious settings than any other.[6]

Strong government partnerships with houses of worship, faith-based organizations, and religious Americans are beneficial to all, particularly vulnerable communities in our country and worldwide. A diversity of faiths comprising 344,894 congregations use government grants, contracts, and fees for social services.[7] For example, religious congregations are estimated at responsible for a value of $418.9 billion to the U.S. society.[8] Church-based social support is critical to health and well-being,

[3] Brian J. Grim and Melissa E. Grim, The Socio-economic Contribution of Religion to American Society: An Empirical Analysis, 12:3 Interdisciplinary Journal of Research on Religion (2016), https://www.religjournal.com/pdf/ijrr12003.pdf.

[4] Michael Lipka, How highly religious Americans' lives are different from others, Pew Research Center (Apr. 12, 2016), https://www.pewresearch.org/fact-tank/2016/04/12/how-highly-religious-americans-lives-are-different-from-others.

[5] Michael Lipka, How highly religious Americans' lives are different from others, Pew Research Center (Apr. 12, 2016), https://www.pewresearch.org/fact-tank/2016/04/12/how-highly-religious-americans-lives-are-different-from-others.

[6] Wolfer, Terry A., Dennis R. Myers, Edward C. Polson, and Betsy Bevis. 2017. "Baby Boomers as Congregational Volunteers in Community Ministry" *Religions* 8, no. 4: 66. https://doi.org/10.3390/rel8040066.

[7] Brian J. Grim and Melissa E. Grim, The Socio-economic Contribution of Religion to American Society: An Empirical Analysis, 12:3 Interdisciplinary Journal of Research on Religion (2016), https://www.religjournal.com/pdf/ijrr12003.pdf

[8] Brian J. Grim and Melissa E. Grim, The Socio-economic Contribution of Religion to American Society: An Empirical Analysis, 12:3 Interdisciplinary Journal of Research on Religion (2016), https://www.religjournal.com/pdf/ijrr12003.pdf.

particularly for African Americans."[9] Absence in the proposed rule is any analysis how the Federal government concluded that its proposed rule does not impact tribes. Federal law—as passed by Congress—explicitly protects the free exercise rights of Native Americans, and the Establishment Clause is a restriction on the U.S. government, not on the sovereignty of foreign domestic nations.[10]

In the federally-funded social programs across all nine agencies in these rules, houses of worship, faith-based for-profit and non-profit entities, and religious Americans are active and responsible for positive outcomes for those they serve and the society as a whole. For example, in the area of education, religious congregations provide an estimated value of $91.3 billion in the United States.[11] Faith-based programs provide nearly 60% of emergency shelter beds for the homeless in 11 cities.[12] Connections to a faith-community, family, and friends results in a 64% less likelihood to be homeless than those who have weak relationships with them.[13] Diverse faiths—Jewish, Muslim, Hindu, Catholic, and Protestant—have a significant role in developing urban areas in the United States.[14]

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[9] Christopher G. Ellison, Reed T. DeAngelis, and Metin Güven, *Does Religious Involvement Mitigate the Effects of Major Discrimination on the Mental Health of African Americas?* RELIGION AND MENTAL HEALTH OUTCOMES (Sept. 2017).

[10] American Indian Religious Freedom Act protects the "inherent right of freedom to believe, express, and exercise the traditional religions." 42 U.S.C. 1996. The Religious Land Use and Institutionalized Persons Act prohibits a substantial burden affects, or removal of that substantial burden would affect, commerce… with Indian tribes." 42 U.S.C. §§ 2000cc.

[11] Brian J. Grim and Melissa E. Grim, The Socio-economic Contribution of Religion to American Society: An Empirical Analysis, 12:3 Interdisciplinary Journal of Research on Religion (2016), https://www.religjournal.com/pdf/ijrr12003.pdf.

[12] 3 Byron Johnson, William H. Wubbenhorst, and Alfreda Alvarez, "Assessing the Faith-Based Response to Homelessness in America: Findings from Eleven Cities," Baylor Institute for Studies of Religion (2017) https://www.baylorisr.org/wp-content/uploads/2019/09/ISR-Homeless-FINAL01092017-web.pdf.

[13] Kevin Corinth and Claire Rossi-de-Vries, "Social Ties and the Incidence of Homelessness, 28 Housing Policy Debate 592 (2017), https://www.tandfonline.com/doi/full/10.1080/10511482.2018.1425891.

[14] Paul D., Numrich and Elfriede Wedam. 2015. Religion and Community in the New Urban America. New York: Oxford University Press.

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Ultimately, America's disadvantaged populations are best served by ensuring that as many quality social service providers are free to participate as desire to do so. Many providers choose to offer programs because of their religious convictions. Protecting their right to serve in accordance with their religious convictions comports with the best of our Nation's traditions, and protecting the ability of religious providers to offer their services provides the most options for those in need, many of whom are best served by religious providers.

For the foregoing reasons, First Liberty Institute opposes the aforementioned aspects of the proposed rule and urges the agencies to correct the above-discussed deficiencies in their final rule.

Sincerely,

Justin Butterfield

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