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February 19, 2020

The Honorable Alex M. Azar II
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

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

Dear Secretary Azar:

I write in opposition to the proposed rule to modify regulations governing partnerships between the federal government and faith-based grantees in taxpayer funded social service programs. This harmful proposal seeks to expand the breadth of permissible religious discrimination against employees who work in programs that are funded by the U.S. Department of Health and Human Services (HHS or the Department) and operated by faith-based grantees. Taken together, these proposed policy changes are misguided and harmful to both employees and beneficiaries in federally funded programs. Accordingly, I urge the Department to immediately withdraw this proposed rule.

The release of eight departments' proposed rules to undermine the rights of beneficiaries and employees in federally funded programs on National Religious Freedom Day underscores this Administration's fundamental misunderstanding of religious liberty as envisioned by our founders.

On National Religious Freedom Day, the United States of America celebrates the Virginia Statute for Religious Freedom (Virginia Statute) and the adoption of religious liberty as a core value to our democracy as delineated in the First Amendment to the Constitution. Over two centuries ago, the Virginia Statute, drafted by Thomas Jefferson, was adopted by the Virginia General Assembly. It would later serve as the basis for the First Amendment to the Constitution, outlining the right to free exercise of religion and the prohibition of the establishment of religion by the government. The Virginia Statute warns us against allowing religious views to supersede

civil rights by stating, “our civil rights have no dependence on our religious opinions any more than our opinions in physics or geometry.”¹ In Jefferson’s absence, James Madison would shepherd the religious freedom bill through the Virginia General Assembly to win its passage.² In the first United States Congress, then Congressman James Madison drew upon the Virginia Statute and offered an amendment to the Constitution that read in part, “[t]he Civil Rights of none shall be abridged on account of religious belief or worship.”³ Former Supreme Court Justice Wiley B. Rutledge noted Virginia’s role in the development of the First Amendment, “[t]he great instruments of the Virginia struggle...became the warp and woof of our constitutional tradition.”⁴ Thus, the history of the First Amendment is deeply rooted in the history of the Virginia Statute and the understanding that civil rights cannot and should not be diminished according to one’s religious belief and conscience.⁵ Unfortunately, with these proposed rules, the Administration contravenes the weight of this history and seeks to embolden religious discrimination against beneficiaries and employees in federally funded programs.

The rule proposed by the U.S. Department of Health and Human Services seeks to allow expansive taxpayer funded religious employment discrimination in its programs.

The rule proposed by the Department seeks to allow expansive and pervasive religious taxpayer funded discrimination against employees in programs that are operated by faith-based grantees. One of President George W. Bush’s signature domestic initiatives was the Faith-Based Initiative.⁶ Central to this initiative was a proposal to apply so-called Charitable Choice rules across federal programs to specify how faith-based grantees contract with the federal government.⁷ Charitable Choice stipulates that religious organizations are entitled to the religious exemption under *Title VII of the 1964 Civil Rights Act* (Title VII)⁸ making it clear that religious organizations operating grant programs with federal funds can apply a taxpayer funded religious test to employees working in federal social service programs.⁹ President Bush’s Faith-Based Initiative legislation, applying Charitable Choice rules across the spectrum of federal social service programs, failed in Congress due to the controversy of permitting federally funded

¹ *Act for Establishing Religious Freedom, January 16, 1786*, DBVa Library of Virginia, <https://edu.lva.virginia.gov/dbva/items/show/180> (last visited Feb. 10, 2020).

² *Id.*

³ *Religion and the Founding of the American Republic*, Library of Congress, <http://www.loc.gov/exhibits/religion/rel06.html> (last visited Feb. 10, 2020).

⁴ Merrill D. Peterson, *Jefferson and Religious Freedom*, *The Atlantic* (Dec. 1994), <https://www.theatlantic.com/past/docs/issues/96oct/obrien/peterson.htm>.

⁵ *See id.* (“The justices on the bench and the advocates at the bar were much influenced in their understanding of the ‘free exercise’ clause by their understanding of the Virginia statute and the circumstances that had produced it.”).

⁶ *Radio Address of the President to the Nation*, The White House, <https://georgewbush-whitehouse.archives.gov/government/fbci/president-initiative.html> (last visited Feb. 10, 2020).

⁷ *Id.*

⁸ 42 U.S.C. § 2000e-1(a).

⁹ Fundamentally, the extension of the Title VII religious exemption to federally funded positions flies in the face of the legislative history of that exemption as supporters justified the exemption by indicating that religious organizations were using their private funds for these positions. *See* Melissa Rogers, *Federal Funding and Religion-based Employment Decisions, in* *Sanctioning religion? Politics, Law, and Faith-based Public Services*, 105-24 (David K. Ryden et al. eds., 2005).

religious employment discrimination in grant programs funded with taxpayer money.¹⁰ After failing to pass this legislation in Congress, the Bush Administration issued regulations to apply Charitable Choice rules, including the expansion of the Title VII religious exemption, to all federally funded social service programs. I strongly opposed these proposals at the time, because they permitted religious employment discrimination in federally funded programs.

Under Title VII, religious employers are afforded an exemption from the religious nondiscrimination provision designed to protect workers against religious discrimination in employment. This exemption allows religious organizations to employ co-religionists in all aspects of their organization when using their own funds. At the time of Congress' deliberations on the exemption in 1964 and in 1972, there was no contemplation that it would apply to organizations receiving direct federal funds; in fact, the extension of the Title VII religious exemption to federally funded positions as part of Charitable Choice provisions flies in the face of the legislative history of that exemption as supporters to expand the exemption to nonreligious positions justified their amendment by indicating that religious organizations were using their private funds for these positions.¹¹

The current proposed rule seeks to expand upon the misguided Bush-era policy to make it clear that religious employers not only can condition employment on the basis “of a particular religion”¹² but also on “acceptance of or adherence to the religious tenets of the organization”.¹³ This action is in spite of the fact that previous polls on this issue indicated “[t]he public ... continues to overwhelmingly reject the idea that religious groups that receive funding for social service programs should be able to hire only people who share their religious beliefs[]”.¹⁴ It is particularly troubling that the proposed rule would so broadly expand the religious exemption that it would allow religious organizations, including possibly for-profit companies, claiming sincerely held religious beliefs to discriminate in federally funded positions against, for example, Catholics, Jews, LGBTQ individuals, pregnant and unmarried couples, interracial married couples, divorced men and women, single parents, and other workers who do not conform to the employers' beliefs. This expansion in discrimination continues to shift the weight of the Federal Government from supporting the victim of discrimination to supporting the so-called right to discriminate with federal funds. That is a profound change in the civil rights landscape.

Furthermore, Congress has twice specifically rejected allowing taxpayer funded employment discrimination based on adherence to an employer's religious tenets. During Congress' consideration of the very first Charitable Choice provision in the *Temporary Assistance for*

¹⁰ Joe Richardson, Cong. Research Serv., RL32736, Charitable Choice Rules and Faith-Based Organizations, 5 (2006).

¹¹ See Melissa Rogers, *Federal Funding and Religion-based Employment Decisions*, in *Sanctioning religion? Politics, Law, and Faith-based Public Services*, 105-24 (David K. Ryden et al. eds., 2005).

¹² Title VII § 702.

¹³ Ensuring Equal Treatment of Faith-Based Organizations, 85 Fed. Reg. 2974, 2986 (January 17, 2020) (to be codified at 45 CFR Parts 87 and 1050).

¹⁴ Seventy-four percent of individuals polled strongly oppose allowing faith-based organizations operating a federally funded social service program to hire based on religion and religious belief. See *Faith-Based Programs Still Popular, Less Visible*, Pew Research Center Religion & Public Life (Nov. 16, 2009), <https://www.pewforum.org/2009/11/16/faith-based-programs-still-popular-less-visible/>.

Needy Families (TANF) program, “the conference agreement deleted the provision in the Senate substitute which permitted recipient organizations to require their employees to adhere to the organizations’ religious tenets...”¹⁵ More recently, in 2017, Congress stripped out of the Fiscal Year 2017 *National Defense Authorization Act* (NDAA) a similar provision that would have allowed employers, using taxpayer funds, to discriminate on the basis of adherence to religious tenets.¹⁶ Accordingly, the purported expansion of religious freedom under the proposed rule is a one-way street that comes at the expense of the religious liberty and conscience of employees working for taxpayer funded faith-based grantees. This proposed rule furthers a political and religious agenda requiring taxpayers to fund discriminatory practices in contradiction to clear congressional deliberations on this issue.

The proposed rule removes key protections for beneficiaries in programs that are directly funded by the Department under the guise of promoting equal treatment for faith-based grantees.

The Department proposes to delete a current regulatory requirement that applies to faith-based grantees to provide written notice to beneficiaries regarding their rights to not be discriminated against on the basis of religion or their refusal to participate in religious activities. In addition, the current regulation requires that faith-based grantees provide written notice to beneficiaries informing them that any religious activity that is offered by a faith-based grantee must be separate in time *or* location from publicly funded services and that the beneficiaries have a right to an alternative service provider if they object to the religious character of the grantee. The proposed rule seeks to eliminate both the requirement to provide beneficiaries with a notice of rights as well as to eliminate the right to an alternative provider if they object to the faith-based provider. In proposing these changes, the Department argues that “[t]here is...no need for prophylactic protections that create administrative burdens on faith-based providers that are not imposed on similarly situated secular providers.”¹⁷

Ensuring the religious liberty rights of beneficiaries in federally funded programs is not an undue burden. Fundamentally, Congress creates these programs to serve beneficiaries and to meet specific programmatic goals. The proposed rule undermines how beneficiaries are served in federally funded programs and thus, interferes with Congressional intent in authorized programs. Additionally, it is clear that religious organizations may offer religious activities before and after the federally funded program.¹⁸ The elimination of these protections begs the question of how beneficiaries are supposed to know that the religious activity is “voluntary” and that they have a right to access government funded services without being subject to religious indoctrination or discriminated against on the “basis of religion or religious belief, a refusal to hold a religious

¹⁵ David Ackerman, Cong. Research Serv., RL30388, *Charitable Choice: Constitutional Issues and Developments through the 106th Congress* 6 (2000), available at <https://digital.library.unt.edu/ark:/67531/metadc813329/>.

¹⁶ Noel Gutierrez-Morfin, *Controversial 'Religious Liberty' Provision Puts Defense Bill in Limbo*, NBC (Oct. 25, 2016, 5:13 PM), <https://www.nbcnews.com/feature/nbc-out/controversial-religious-liberty-provision-puts-defense-bill-limbo-n669266>.

¹⁷ *Ensuring Equal Treatment of Faith-Based Organizations*, 85 Fed. Reg. 2977 (January 17, 2020) (to be codified at 45 CFR Parts 87 and 1050).

¹⁸ *Id.* at 2986.

belief, or refusal to attend or participate in a religious practice”¹⁹ It is particularly troubling considering that some beneficiaries in programs covered by the proposed rule may be vulnerable individuals, and may become, in essence, a captive audience to religious instruction in order to access services.

The proposed rule also ignores the twenty-year history of these provisions where there were extensive debates over the inclusion of religious activity before, *during*, and after federal programs and how to ensure the rights of beneficiaries to access services notwithstanding any religious activity that may be offered. Many supporters of Charitable Choice, including previous administration officials, acknowledge that the religious experience is exactly what is being offered to beneficiaries.²⁰ The former Deputy Director of the Office of Faith-Based and Community Initiatives under President George W. Bush, David Kuo, acknowledged that congressional supporters, “... wanted to allow groups that aimed to convert people to a particular faith to be able to receive direct federal grants...they wanted to allow evangelism-heavy programs to get federal money.”²¹ Another Bush Administration official, Robert Polito, who was the Director of the Center for Faith-based and Community Initiatives at the Department of Health and Human Services, indicated that administration’s position on this issue, “[i]f tax dollars are used for secular elements of ...[a grant] program- like a computer or van- the rest [of the federally funded program] can have a religious base.”²²

As a member of Congress who participated in numerous debates over the years regarding these provisions, I heard assertions from Charitable Choice’s congressional supporters that programs are successful because of their religious nature and that religion is a methodology for treatment.²³ Thus, the beneficiary protections that currently exist—and that the proposed rule now seeks to remove—were in fact put in place as a direct response to the extensive history of those debates in Congress and the public sphere. The beneficiary protections also attempted to protect the delicate balance between the religious activity of faith-based providers and securing the religious liberty rights of beneficiaries under Charitable Choice provisions.

Moreover, the beneficiary safeguard provisions that provide beneficiaries a written notice of rights, including the right to an alternative provider, were modeled after other previous Charitable Choice provisions, including those that exist in statute.²⁴ For instance, the first Charitable Choice provision was enacted as part of the TANF statute and specifically outlines the

¹⁹ *Id.*

²⁰ See Marvin Olasky, *Rolling the Dice*, World Magazine (Aug. 4, 2001), https://world.wng.org/2001/08/rolling_the_dice.

²¹ David Kuo, *Tempting Faith* 160 (2006).

²² Laura Meckler, *Bush Admin. Rewriting Charity Rules*, The Edwardsville Intelligencer (Sept. 2, 2002, 7:00 PM), <https://www.theintelligencer.com/news/article/Bush-Admin-Rewriting-Charity-Rules-10572847.php>.

²³ *Faith-Based Solutions: What Are the Legal Issues? Hearing Before the S. Comm. on the Judiciary*, 107th Cong. 14 (2000) (Testimony of Representative Robert C. “Bobby” Scott).

²⁴ President Bush’s Faith-Based Initiative legislation ((CARE Act of 2002, H.R. 7, 107th Cong.(2001)), passed by the House of Representatives with the support of two hundred and seventeen Republican Members of Congress includes both a right to an alternative provider and a right to notice of rights for beneficiaries. See *Final Votes for Roll Call 254*, Office of the Clerk U.S. House of Representatives, <http://clerk.house.gov/evs/2001/roll254.xml> (last visited Feb. 14, 2020).

right of beneficiaries to an alternative provider if they raise an objection.²⁵ Similarly, the Charitable Choice provision subsequently enacted as part of the *Substance Abuse Mental Health Services Act* (SAMHSA) also provides that beneficiaries with objections to a faith-based grantee are entitled to an alternative provider and further, beneficiaries are required to be notified of their rights.²⁶ Thus, the beneficiary protections that the proposed rule now seeks to undo have been part of Charitable Choice since its creation and are vital to protect the religious liberty of beneficiaries.

Finally, the current regulatory safeguards regarding written notice to beneficiaries of their rights, including the right to an alternative provider, were put in place by the Obama Administration after seeking recommendations from a diverse set of stakeholders. The President's Advisory Council on Faith-based and Neighborhood Partnerships (Advisory Council) issued a report with twelve recommendations—including the provisions at issue under the proposed rule—that had unanimous support. The report included the notice and alternative provider recommendation to “[a]ssure the religious liberty rights of the clients and beneficiaries of federally funded programs by strengthening appropriate protections” noting that “[t]here is clear precedent for and consensus for the vigorous protection of the religious of beneficiaries of federally funded programs.”²⁷ The proposed rule now seeks to remove the very protections endorsed by this diverse set of stakeholders, including both critics and supporters of Charitable Choice, on the Advisory Council.

The proposed rule eliminates core safeguards for beneficiaries and adds language that will result in beneficiaries being forced to participate in religious activities in programs funded with indirect federal financial assistance.

The Supreme Court has recognized a constitutional distinction involving the funding of religious entities between those programs funded with direct aid, where the government chooses a provider who may have a religious affiliation to provide services to beneficiaries, and programs funded with indirect aid, where funding is provided to beneficiaries who make a genuine private choice among a range of providers, including religious and secular options. The current regulations reflect the constitutional balance by ensuring a range of choices, including a secular option, for beneficiaries in indirectly funded programs. The proposed rule eliminates the current requirement for a secular option to be offered and coerces beneficiaries in need of services to participate, simply by attending a program, in religious activities if those activities are part of the program.²⁸ Furthermore, the proposed rule will allow religious discrimination against beneficiaries in indirectly funded programs in plain violation of Executive Order 13559, which

²⁵ 42 U.S.C. §604(a).

²⁶ 42 U.S.C. §290kk-1(f).

²⁷ President's Advisory Council on Faith-Based and Neighborhood Partnerships, *A New Era of Partnerships: Report of Recommendations to the President* 140–41 (2010), <https://obamawhitehouse.archives.gov/sites/default/files/microsites/ofbnp-council-final-report.pdf>.

²⁸ “[A] faith-based organization receiving indirect Federal financial assistance need not modify any religious components or integration with respect to its program activities to accommodate a beneficiary who chooses to expend the indirect aid on the organization’s program and may require attendance at all activities that are fundamental to the program.” *Ensuring Equal Treatment of Faith-Based Organizations*, 85 Fed. Reg. 2986 (January 17, 2020) (to be codified at 45 CFR Parts 87 and 1050).

states: “organizations, in providing services supported in whole or in part with Federal financial assistance, and in their outreach activities related to such services, should not be allowed to discriminate against current or prospective program beneficiaries on the basis of religion, a religious belief, a refusal to hold a religious belief”.²⁹ To do this, the proposed rule adds a new definition of “federal financial assistance” that makes clear it does not include “indirect aid”.³⁰ Accordingly, “indirect aid” programs are excluded from the nondiscrimination requirement in the proposed 45 C.F.R. § 87.3(d).³¹

In *Zelman v. Simmons-Harris*, the U.S. Supreme Court upheld the constitutionality of a tuition assistance program that provided funds to eligible families to use at public and private, including religious, schools. In the majority opinion, the Chief Justice wrote, “[i]t permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice.”³² To qualify as a program of “true private choice” it must (a) be “entirely neutral with respect to religion”; (b) provide “benefits directly to a wide spectrum of individuals;” and (c) permit “individuals to exercise genuine choice among options public and private, secular and religious.” The proposed rule eliminates the requirement that a secular option be made available to beneficiaries. Furthermore, the program at issue in *Zelman* prohibited discrimination, including on the basis of religion, against participants, and it also required *all* providers to follow rules and procedures set forth by the state.³³ In contrast, the proposed rule permits religious discrimination against beneficiaries and allows beneficiaries to be compelled to participate in religious activity as part of the provision of services funded by the indirect aid. Given that the proposed rule would permit the Department to provide additional accommodations to faith-based grantees, it is not even clear that faith-based grantees will be required to follow the same rules for the delivery of services to all of its beneficiaries.³⁴

The proposed rule is a misapplication of the narrow ruling of *Trinity Lutheran* to justify changes in existing regulations governing partnerships between faith-based grantees and the Federal Government.

The Department proposes to revise the current regulations governing partnerships between faith-based entities and the Federal Government as some of the requirements placed upon faith-based organizations are “in tension with the nondiscrimination principles articulated in [*Trinity*

²⁹ Exec. Order No. 13,559, 75 Fed. Reg. 71319 (Nov. 17, 2010).

³⁰ The proposed rule defines “indirect aid” as funds that are “received by a service provider when the service provider is paid for services rendered by means of a voucher, certificate, or other means of government-funded payment provided to a beneficiary who is able to make a choice of a service provider.” At the same time, it states that “federal financial assistance does not include a tax credit, deduction, exemption, guaranty contract, or the use of any assistance by any individual who is the ultimate beneficiary under any such program.” (See Ensuring Equal Treatment of Faith-Based Organizations, 85 Fed. Reg. 2985 (January 17, 2020) (to be codified at 45 CFR Parts 87 and 1050).

³¹ The definition of federal financial assistance does not include indirect aid. 85 Fed. Reg. 2985.

³² *Zelman v. Simmons-Harris*, 536 U.S. 639, 662 (2002).

³³ *Id.* at 645, 646.

³⁴ The proposed rule creates two new appendices that make it clear that faith-based grantees might be afforded additional exemptions.

Lutheran Church of Columbia, Inc. v. Comer 137 S. Ct. 2012 (2017)]”. (*Trinity Lutheran*).³⁵ In *Trinity Lutheran*, the Court was asked to decide whether a church-run early childhood education center was eligible to participate in a Missouri state grant program that provided recycled tires to resurface playgrounds.³⁶ The Court held that the State of Missouri violated the Free Exercise clause of the First Amendment to the Constitution by denying the church’s eligibility to participate in the state grant program solely because of the church’s religious status.³⁷ Although the Court found that Missouri cannot refuse to provide funding solely because of the religious nature of a daycare center, the majority opinion also clarified the narrowness of its ruling when it stated that the case “involves express discrimination based on religious identity with respect to playground resurfacing,” and that the Court was “not address[ing] religious uses of funding or other forms of discrimination.”³⁸

In the proposed rule, the Department misapplies the limited holding in *Trinity Lutheran* because: the ruling in its own terms applied to playground resurfacing; nothing in the ruling requires or permits beneficiaries be stripped of their religious liberty rights in taxpayer funded programs, whether directly or indirectly funded; and nothing in the ruling requires or permits employees to submit to a religious test in federally funded grants. Rather, the proposed rule is a reflection of this Administration’s distorted view of religious liberty as a one-way street, where religious freedom is expanded for faith-based grantees and employers at the expense of the religious liberty rights and exercise of conscience of employees working in programs funded with federal taxpayer dollars and beneficiaries receiving services in federal grant programs.

In conclusion, the proposed rule is misguided and will lead to violations of the religious liberty rights and conscience of employees and beneficiaries in federally funded programs. For Department funded programs, it steadfastly advances the religious freedom of religious providers while subjecting employees to a taxpayer funded religious test for their jobs and eviscerating safeguards for beneficiaries. These policies do real damage to our nation’s founding principle of religious freedom and undermine the core value of an individual’s freedom of conscience to not “otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.”³⁹

³⁵ Ensuring Equal Treatment of Faith-Based Organizations, 85 Fed. Reg. 2976 (January 17, 2020) (to be codified at 45 CFR Parts 87 and 1050).

³⁶ *Trinity Lutheran*, 137 S. Ct. 2012, 2017 (2017).

³⁷ *Id.* at 2019-20.

³⁸ *Id.* at 2024 n.3.

³⁹ *Act for Establishing Religious Freedom, January 16, 1786*, DBVa Library of Virginia, <https://edu.lva.virginia.gov/dbva/items/show/180> (last visited Feb. 10, 2020).

The Honorable Alex M. Azar II
February 19, 2020
Page 9

I strongly urge the Department to immediately withdraw the proposed rule.

Sincerely,



ROBERT C. "BOBBY" SCOTT
Chairman