

Congress of the United States
House of Representatives
Washington, D.C. 20515

March 14, 2023

The Honorable Miguel Cardona
Secretary
U.S. Department of Education
400 Maryland Ave., SW
Washington, DC 20202

The Honorable Alejandro Mayorkas
Secretary
U.S. Department of Homeland Security
300 7th St., SW
Washington, DC 20024

The Honorable Tom Vilsack
Secretary
U.S. Department of Agriculture
1400 Independence Ave., SW
Washington, DC 20250

The Honorable Marcia Fudge
Secretary
U.S. Department of Housing and Urban
Development
451 7th St., SW
Washington, DC 20410

The Honorable Merrick Garland
Attorney General
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, DC 20530

The Honorable Julie Su
Acting Secretary
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

The Honorable Denis McDonough
Secretary
U.S. Department of Veterans Affairs
810 Vermont Ave., NW
Washington, DC 20420

The Honorable Xavier Becerra
Secretary
U.S. Department of Health and Human
Services
200 Independence Ave., SW
Washington, DC 20201

RE: Partnerships With Faith-Based and Neighborhood Organizations (RINs: 0510-AA00, 0991-AC13, 1105-AB64, 1290-AA45, 1601-AB02, 1840-AD46, 2501-AD91, 2900-AR23)

Dear Secretary Cardona, Secretary Mayorkas, Secretary Vilsack, Secretary Fudge, Attorney General Garland, Acting Secretary Su, Secretary McDonough, and Secretary Becerra:

We write to offer our comments regarding the multi-agency proposed rule entitled *Partnerships With Faith-Based and Neighborhood Organizations* (Proposed Rule) published in the Federal

Register on January 13, 2023.¹ As Ranking Members of House Committees with legislative and oversight jurisdiction over the programs and policies impacted by the Proposed Rule,² we support the Biden Administration's effort to restore important civil rights protections for social service program participants while clarifying the rights and obligations of faith-based providers. We look forward to the Proposed Rule's swift finalization.

Religious organizations have been an essential part of the social safety net throughout our country's history. However, their participation in federally funded programs must co-exist with fundamental civil rights protections for program participants. This is why we appreciate the steps the Biden Administration has already taken to rebalance the scales to protect the religious liberty of faith-based organizations, while furthering the government's compelling interest in providing social services to program participants free from discrimination.

Program Participant Protections

In 2016, the Obama Administration promulgated regulations that strengthened protections for participants in federally funded social service programs.³ These protections included, for example, a notice of rights requirement that advised participants of the prohibition against religious discrimination, a refusal of participation requirement that informed participants they had a right to refuse to attend or participate in a provider's religious activities, and an alternative provider requirement that gave participants the right to object to the religious character of a provider and seek an alternative provider.⁴ However, in 2020, the Trump Administration removed many of these protections through a joint final rule (2020 Rule) issued at the end of his Administration.⁵

For example, the 2020 Rule eliminated the notice requirement—leaving program participants in the dark regarding the rights and protections they are legally afforded.⁶ Simply put, people cannot fully exercise their rights if they are not made aware of them. We therefore appreciate that the Proposed Rule reinstates the requirement that providers give written notice of antidiscrimination protections to participants and applies this requirement to all providers supported by direct Federal Financial Assistance (e.g., by contract, grant, or cooperative agreement).⁷ However, we urge the Departments to extend this requirement to programs supported by indirect Federal Financial assistance—those programs that receive a voucher,

¹ Partnerships With Faith-Based and Neighborhood Organizations, 88 Fed. Reg. 2395 (proposed Jan. 13, 2023) (to be codified at 2 CFR 3474, 6 CFR 19, 7 CFR 16, 22 CFR 205, 24 CFR 5, 28 CFR 38, 29 CFR 2, 34 CFR 75, 34 CFR 76, 38 CFR 50, 38 CFR 61, 38 CFR 62, 45 CFR 87).

² The proposed rule affects nine federal departments and agencies: The U.S. Departments of Agriculture, Education, Health and Human Services, Homeland Security, Housing and Urban Development, Justice, Labor, and Veterans Affairs and the U.S. Agency for International Development. The comments in this letter correspond to the eight departments and RINs indicated; this letter will be submitted electronically to the departments indicated.

³ Fundamental Principles and Policymaking Criteria for Partnerships With Faith-Based and Other Neighborhood Organizations, 81 Fed. Reg. 19355 (Apr. 4, 2016).

⁴ 88 Fed. Reg. at 2398-2399.

⁵ Equal Participation of Faith-Based Organizations in the Federal Agencies' Programs and Activities, 85 Fed. Reg. 82037 (Dec. 17, 2020).

⁶ *Id.* at 82047.

⁷ 88 Fed. Reg. 2398-2399.

certificate, or other government-funded payment.⁸ Participants in both types of programs deserve to “be made aware of [the] rights and protections that are due them.”⁹ In addition, we ask the Departments to ensure that the notices are clear about how people can seek recourse if they experience discrimination in government-funded services and how these complaints will be addressed.

We also support the Proposed Rule’s modified alternative provider requirement.¹⁰ A program participant may be uncomfortable receiving social services in an environment where certain religious symbols are prominently displayed.¹¹ To the extent that the provider cannot accommodate the participant’s concerns, the participant should be able to go to an alternative provider.¹² Thus, we urge the Departments to require the inclusion of this alternative provider information in the written notice of rights that must be given to “a prospective beneficiary prior to the time they enroll in the program or receive services from the program. . . . [or,] at the earliest available opportunity.”¹³

We applaud that the Proposed Rule would further strengthen participant protections by removing language added by the 2020 Rule that states that “providers at which beneficiaries choose to expend indirect aid ‘may require attendance at all activities that are fundamental to the program.’”¹⁴ In practice, this language could be interpreted to allow faith-based providers to *require* program participants to participate in religious activities as a condition of receiving services in any program involving a participant’s use of indirect aid. Such a requirement would violate participants’ civil rights and run afoul of the religious liberty principles articulated in Executive Order 13279, which includes protections against religious discrimination—such as the right to refuse to participate in religious activities—for participants in federal programs.¹⁵

Indirect Federal Financial Assistance

The Proposed Rule clarifies the definition of “indirect Federal financial assistance” to ensure that program participants using indirect aid with religious service providers are doing so “wholly as a result of their own genuine and independent private choice.”¹⁶ The 2020 Rule redefined

⁸ *Id.* at 2399.

⁹ *Id.* at 2398.

¹⁰ *Id.* at 2399.

¹¹ President’s Advisory Council on Faith-Based and Neighborhood Partnerships, *A New Era of Partnerships: Report of Recommendations to the President*, p. 132 (Mar. 2010), <https://obamawhitehouse.archives.gov/sites/default/files/microsites/ofbnp-council-final-report.pdf>.

¹² *Id.*

¹³ 88 Fed. Reg. at 2410 (quoting proposed language for the written notice for beneficiary protections for the Department of Education, § 75.712(b)). For the Department of Education’s proposed regulations for its written notice, the provision states that the notice “must also inform each beneficiary or prospective beneficiary of the option to seek information as to whether there are any other federally funded organizations in their area that provide the services available under the applicable program.” *Id.* at 2410, 2411. However, for the other relevant departments, the proposed regulations state that the notice “may inform” each beneficiary or prospective information regarding the alternative provider information. *Id.* at 2413 (DHS), 2415 (USDA), 2418 (HUD), 2420 (DOJ), 2421 (DOL), 2424 (Veteran Affairs), 2426 (HHS).

¹⁴ *Id.* at 2399 (quoting 85 Fed. Reg. 82139 (Dec. 17, 2020) (revising 28 CFR 38.5(c))).

¹⁵ See Sec. 2(d), Exec. Order No. 13279, 67 Fed. Reg. 77411 (Dec. 16, 2002).

¹⁶ 88 Fed. Reg. at 2400 (quoting *Zelman v. Simmons-Harris*, 536 U.S. 639, 652 (2002)).

“indirect Federal financial assistance” by removing the requirement that participants have “at least one adequate secular option” to choose for their use of indirect aid.¹⁷ This change contradicted the constitutional principles established by the Supreme Court in *Zelman v. Simmons-Harris*, which noted that when determining whether there has been coercion by the government to use aid with a religious organization—an Establishment Clause violation—there must be an evaluation of “all options” that were available to the participant.¹⁸ Thus, the Proposed Rule seeks to realign the definition of “indirect Federal financial assistance” more closely with *Zelman*.¹⁹ The proposed change ensures that participants are not effectively *required* to participate in religious activities to receive federally funded benefits and underscores that deciding which provider to use is actually their choice. We support this change along with the clarification that “the availability of adequate secular alternatives is a significant factor in determining whether a program affords true private choice.”²⁰ However, we urge the Departments to consider making the availability of adequate secular alternatives a requirement, not just a significant factor, to ensure that participants truly have freedom of choice for their indirect aid.

Title VII’s Religious Exemption & References to Religious Exemptions

No one should be disqualified from a taxpayer-funded job solely based on their religion, religious practices, or lack thereof. Nonetheless, the Departments’ regulations allow religious providers that accept Federal financial assistance to take the exemption under Title VII of the *Civil Rights Act of 1964*, which permits certain religious organizations to engage in employment discrimination on the basis of religion.²¹ The 2020 Rule broadened this exemption by adding language indicating that organizations are permitted to hire employees “on the basis of their acceptance of or adherence to the religious tenets of the organization.”²² Although we disagree with taxpayer-funded employment discrimination, we support the Proposed Rule’s removal of the 2020 Rule’s language because it goes beyond the statutory text and may be interpreted to permit religious organizations to discriminate against workers on the basis of another protected characteristic—such as race and sex (including pregnancy, sexual orientation, or gender identity)—under the guise of religion.²³ We urge the Departments to take additional steps to ensure that workers—such as social workers, soup ladlers, and counselors—are not subjected to employment discrimination, particularly in programs that receive federal funding. Finally, the Proposed Rule eliminates the myriad references to religious exemptions added by the 2020 Rule. These exemptions could lead to the denial of needed services. Therefore, we support the removal of these unnecessary references to religious exemptions that are not required under law.

In conclusion, the social safety net in this country has both provided critical services to millions of individuals for over 100 years and been a source of employment in local communities. To ensure that individuals, especially historically underserved individuals and those who have

¹⁷ *Id.* at 2399 (quoting 81 Fed. Reg. 19353, 19419 (2016)).

¹⁸ 88 Fed. Reg. at 2400 (quoting *Zelman*, 536 U.S. at 655-56 (emphasis in original)).

¹⁹ *Id.* at 2401.

²⁰ *Id.*

²¹ *Id.* at 2402; see 42 U.S.C. § 2000e-1(a).

²² *Id.* at 2402.

²³ *Id.*

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historically been subject to discrimination, can have full access to federally funded social services and employment, free from discrimination, the Administration should endeavor to achieve a careful balance between recognizing the religious liberty rights of faith-based providers while also strengthening and enforcing the civil rights protections of program participants and employees. Additionally, to ensure fidelity to constitutional principles and the Departments' programmatic goals, and ultimately, to serve participants in the most effective and equitable way possible, the Departments should take additional steps to monitor and enforce their regulations and invest in training for staff and providers regarding their rights and responsibilities. We urge the Departments to finalize this Proposed Rule as expeditiously as possible.

Sincerely,



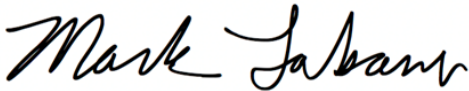
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