FAITH-BASED INITIATIVES: RECOMMENDATIONS OF THE PRESIDENT'S ADVISORY COUNCIL ON FAITH-BASED AND COMMUNITY PARTNERSHIPS AND OTHER CURRENT ISSUES

HEARING

BEFORE THE

SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

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THURSDAY, NOVEMBER 18, 2010

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON THE CONSTITUTION,
CIVIL RIGHTS, AND CIVIL LIBERTIES,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:39 a.m., in room 2141, Rayburn House Office Building, the Honorable Jerrold Nadler (Chairman of the Subcommittee) presiding.

Present: Representatives Nadler, Conyers, Watt, Scott, Johnson, Jackson Lee, Sensenbrenner, King and Franks.

Staff present: (Majority) David Lachmann, Subcommittee Chief of Staff; Heather Sawyer, Counsel; and Paul Taylor, Minority Counsel.

Mr. NADLER. This hearing of the Subcommittee on the Constitution, Civil Rights, and Civil Liberties will come to order. I will first recognize myself for an opening statement.

Today's hearing examines the current status of the faith-based and community partnerships, and particularly the report of the President's Advisory Council. Although I was gratified by the President's decision to take a fresh look at this important but difficult issue and was especially appreciative of the outstanding work done by members—by the members of the Advisory Council, I, like many of my colleagues, remain frustrated by the glacial pace of reforms.

Today's hearing is timely. Just yesterday the Administration finally issued its revision of Executive Order 13279, setting out "fundamental principles and policy-making criteria for partnerships with faith-based and other neighborhood organizations." It has been long anticipated and it contains some very important reforms.

I am glad that we have with us this distinguished panel, which I hope will be able to provide this Subcommittee with their thoughts on the new Executive order.

Difficult issues remain. What has been especially frustrating since President Bush first launched the initiative is that so many of the problems that the initiative sought to address simply never existed in the first place.

I don't think any Member of Congress, or indeed, anyone involved in the delivery of social services from the neighborhood level on up minimizes the critical contributions made by people of faith and by social service providers that have a religious affiliation, nor is there any question that these organizations have long worked with government and administered publicly-funded programs in ways that have done a great deal of good for the communities we represent and for the Nation as a whole. And it is also without question that these partnerships existed and thrived long before the faith-based and community initiative.

Despite some grandiose, if specious, claims to the contrary, these organizations were not barred from receiving public funding simply because of a religious affiliation or because they had a religious name in their title. Every Member of this Committee has, no doubt, worked with many religiously-affiliated organizations in their districts and has helped get funding for such organizations to deliver all manner of social services, senior housing, and the like.

But if the faith-based and community initiative was a solution in search of a problem it brought with it a host of real problems, many of which pose a real threat to the religious liberties of program participants and employees. Promises that have been made about providing participants with secular or other religiously-appropriate alternatives have gone unfulfilled. Without these alternatives the patina of respect for the religious rights of those most in need—not to mention the legal pretense of constitutionality—is stripped away.

Furthermore, the promise that this initiative would mobilize the armies of compassion has been broken precisely because some of the initiative's most vocal supporters have also been the first to cut off that army supply line by slashing funding for those very programs.

As David Kuo—I hope I am pronouncing that right—the deputy director of the White House Office of Faith-Based and Community Initiatives in the Bush administration, wrote, "The achievements of the Bush faith-based initiative are a whisper of what was promised. Irony of ironies, it leaves the faith-based initiative specifically, and compassionate conservatism in general, at precisely the place Governor Bush pledged it would not go. It has done the work of praising and informing but it has not been given the resources to change lives. In short, like the hurting charities it is trying to help, the initiative has been forced to, quote—'make bricks without straw.'" And that is the end of the quote from Mr. Kuo.

It is no secret that I have been disappointed with this Administration's handling of these difficult issues, not to mention with the previous Administration's handling of these difficult issues. On the matter of ending employment discrimination in federally-funded programs, about which the President was so eloquent in 2008, we have heard nothing. We haven't even been able to find out, for example, whether the Office of Legal Counsel memo asserting that the Religious Freedom Restoration Act creates a free exercise right to discriminate in employment in federally-funded programs is under review, much less what might be done with it.

I realize that the employment issue is not within the Advisory Commission's mandate, but it is still of pressing importance to the Members of this Committee.

I regret the Administration was unable to provide a witness today who might be able to answer our questions about the Executive order and about the Administration's progress on related issues. Nonetheless, I am pleased to welcome our panel today, and I look forward to their testimony. They are certainly no strangers to this Committee, and I have, over the years, had the privilege of working with each of them on many projects, starting with the Religious Freedom Restoration Act, which we passed the year I first joined this House a while ago.

I look forward to their testimony, and I yield back the balance of my time.

The Chair now recognizes the distinguished Ranking Member for an opening statement.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman.

President George W. Bush began a faith-based initiative designed to grant faith-based organizations equal access to competitions for the administration of Federal social service programs. Part of the effort resulted in the legal memo from the White House Office of Legal Counsel issued on June 29, 2007.

That memo protects the right of faith-based organizations to take part in such program while staffing their organizations on a religious basis, allowing them to preserve their religious character. The memo remains in force today.

Under a properly implemented faith-based program, programs must be administered to beneficiaries without regard to religious, but the organizations doing the administering can themselves be religious, and that is in accordance with said law. Nothing in the Civil Rights Act of 1964 says a religious organization loses its right to staff on a religious basis when it uses Federal funds. Indeed, when it enacted Title 7 in 1964 Congress was well aware that religious institutions of higher education that staffed on a religious basis were receiving federally-funded grants and student aid, and under the G.I. bill established in 1944 military veterans were able to attend religious colleges and universities of their choice and the tuition costs were either offset or fully covered through a Federal voucher payment sent to the selected school.

So Congress was well aware when it enacted religious exemptions in Title 7 that Federal funds would be going to religious organizations that made staffing decisions based upon religion. Members of faith-based organizations should enjoy the same rights to associate with others who share their unique vision that other non-religious groups enjoy. To deny them the same right would be to discriminate against people on the basis that they are religious and have a religious rather than purely secular way of looking at the world.

For example, Planned Parenthood may refuse to hire those who don't share its views on abortion, but equal treatment requires the churches, mosques, and synagogues to have the same right to staff their organization with like-minded individuals.

Earlier this year the Government Accountability Office issued a report finding that between 2002 and 2009 Planned Parenthood re-

ceived $657 million in taxpayer dollars while it continued to staff its organization with like-minded people. If Planned Parenthood can receive Federal funds and continue to staff based upon ideological views regarding abortion, and if religion is to be treated equally, religious organizations should also retain their ability to staff on a religious basis when they receive Federal funds.

If churches cannot continue to hire and staff on a religious basis they no longer remain churches while joining Federal social service efforts. Indeed, insofar as the courts have had to determine whether or not an organization is a church for tax purposes it has looked to whether it is a coherent group of individuals and families that join together to accomplish the religious purposes of mutually-held beliefs.

If churches, as churches, are to be invited to join Federal social service efforts, their ability to remain a coherent group of individuals that join together to accomplish the religious purposes of mutually-held beliefs must be protected.

President Clinton recognized that many years ago when he signed into law four congressional acts that explicitly allow religious organizations to retain the right to staff on a religious basis when they receive Federal funds. These laws are the Substance Abuse and Mental Health Services Act, the Community Services Block Grant Act of 1998, the Welfare Reform Act of 1996, and the Community Renewal Tax Relief Act of 2000.

Even the Washington Post recognizes that protecting the staffing rights of religious organizations is not radical. In a May 2003 editorial the Post stated, "The House of Representatives passed a bill last week that would allow faith-based organizations that provide federally-funded training to discriminate in the hiring on the basis of religion." The change in the Workforce Investment Act is not radical.

Religious groups, including many religious universities that receive Federal money, are generally exempt from Federal laws against religious discrimination and hiring. And the 1996 welfare reform bill allowed faith-based groups access to other social service funds without their forfeiting this exemption.

Protections that preserve a religious organization's right to remain religious while neutrally administering Federal social services have long been accepted on a bipartisan basis, and so it is no surprise to me that the current Administration has not denied them.

Thank you.

Mr. NADLER. Thank you.

I now recognize the distinguished Chairman of the full Committee for an opening statement.

Mr. CONYERS. I just said no. I was kidding.

Thank you very much, Mr. Chairman, for allowing me to make a comment or two. I have never said no before, so I just wanted to see what it—how you would react to it. You didn't disappoint me.

This is a very timely hearing. The Executive order comes out yesterday, and we have a hearing—whose brilliant foresight do we give credit to that?

Mr. NADLER. I don't entirely discount the possibility that the timing of the hearing may have had some effect on the timing of the issuance of the Executive order.

Mr. SENSENBRENNER. The gentleman will yield, I concede that point.

Mr. CONYERS. Well, interesting question. Now, I am so glad that our former Chairman, Jim Sensenbrenner, is here for this important hearing, and I am not surprised that he believes that the previous Administration's position that religious organizations are exempt from the commitment to equal opportunity in federally-funded employment and that they can discriminate based on religion. That doesn't surprise me at all.

But what does surprise me is that here, the day after an Executive order is issued, we cannot get a representative from the present Administration to attend the hearing. And so I would like to get the approval of the Chair and the Ranking Member and our Subcommittee Chairman on Crime, Bobby Scott, to be able to communicate to the White House that they ought to get someone over here right away before the lame duck session ends.

Mr. SENSENBRENNER. Will the gentleman yield again?

Mr. CONYERS. With pleasure.

Mr. SENSENBRENNER. I would be happy to cosign a letter and will await your co-signature of letters after January 3, when we are trying to get Administration witnesses over here.

Mr. CONYERS. Well, I try to interpret that as, that after January 5, my weight in letters of this kind will become more important, not less important. So I thank you for joining us.

The whole idea that we can hold this hearing after knowing and receiving information that the President has explicitly sought from the council members an agreement not to deal with employment discrimination needs to be explained further. And there are ways that we can get people from the White House over here, and I don't think that in the 21st century and in the wake of this Administration that we need to wait to see what more reporting and findings and recommendations come down.

I would like to know now, while you are the Chairman and I am the Chairman, the way the 111th is proceeding we may have plenty of time for such a hearing. And so I am glad that I have gotten your agreement and approval to take such action.

This is no way for us to try to do business, and so I am impressed that we have not one but two members of the council with us today.

Reverend Lynn and Professor Rogers, we welcome you because this isn't a matter of one branch of government drawing a bill over a subject of this immediate importance and we have to guess or try to figure out what and why and when something further is coming. The President explicitly campaigned and has made many remarks about this, not only as a candidate but as a senator. And we don't propose to wait any longer, and I look forward to your comments and participation in the hearing.

Thank you, Chairman Nadler.

Mr. NADLER. Thank you.

And I now recognize the distinguished gentleman from Virginia for an opening statement.

Mr. SCOTT. Thank you, Mr. Chairman. And I would like to thank you for convening this important hearing as well as thanking our witnesses for being with us today.

And I would like to commend the members of the Advisory Council on Faith-Based and Neighborhood Partnerships and the members of the council's task force for their work. Their recommendations find common ground on which to lay a foundation for strengthening the constitutional and legal partnerships between the government and non-governmental social service providers, as well as provide clarity and transparency in the provision of these services, while all the time protecting our Nation's commitment to religious freedom.

Unfortunately, their work is far from done. The most egregious aspect of the so-called faith-based initiative, the right of religious social service providers to discriminate in employment with government funds, remains unresolved.

One of the founding principles of our great Nation is the freedom to worship or not worship as one chooses. Faith plays a central role in the lives of many Americans and our communities benefit from the countless acts of justice and mercy that faith inspires people to commit.

Faith-based organizations are all part of the front lines of meeting challenges like homelessness, youth violence, and other social programs. At the same time, the history of our Nation and its First Amendment protections do not and should not allow public funds to be used to proselytize or discriminate.

In the 1960's several civil rights acts were passed in order to end the Nation's sorry history of racial bigotry. Since that time it has been illegal to discriminate in employment against protected classes and make job decisions based on race or religion.

Now, I mention protected classes, and I would like to respond to the gentleman from—the Ranking Member from Wisconsin, who mentioned the Planned Parenthood example that is frequently used. Position on abortion is not a protected class. There is a difference between Planned Parenthood hiring people based on their position on some social issue as opposed to, "We don't hire Blacks," or, "We don't hire Jews." Race and religion are protected classes, and that is what is protected in our civil rights laws.

One exemption exists for religious organizations but that discrimination is allowed in the context of a religious organization using its own money.

Long before that the country recognized the disgusting practice of discrimination in employment while using Federal funds.

Almost 70 years ago—1941—President Franklin Roosevelt issued an Executive order prohibiting discrimination by all defense contractors. In other words, the U.S. government said that even if you can build a cheaper and better rifle we are not going to buy it from you if you discriminate in your employment. In 1965, President Johnson expanded that policy in an Executive order banning discrimination in all government contracts.

No discrimination with Federal funds has been the policy of this government for decades, at least until the so-called faith-based initiative. Under traditional laws many religious organizations have been sponsoring federally-funded social service programs for over a

century. Until recently, they were funded like all other private organizations are funded. They are to use the funds for the purpose for which they were appropriated; they were prohibited from using taxpayers' money to advance their religious beliefs; and they were subject to laws that prohibit discrimination in employment.

Let's be clear. Religious organizations can still discriminate in positions paid for with their own money, just not those paid for with Federal funds. And many religiously-affiliated organizations, such as Catholic Charities, Lutheran Services of American, Jewish Social Services, have been receiving funds—millions and even billions of dollars—for decades.

Incredibly, the idea of charitable choice in President Bush's so-called faith-based initiative came about because some people insist on discriminating in employment and therefore were barred from Federal contracts. They now believe that the prohibition against discrimination with Federal funds constituted a barrier that needed to be removed.

Unfortunately, the faith-based initiative specifically removed that so-called barrier, and as a result, religiously-sponsored—religious sponsors of federally-funded programs are now allowed to discriminate in employment with Federal dollars on the basis of religion. That means that a person applying for a job paid for with Federal money can be ineligible for consideration for that job solely based on religion.

And if this bigotry based on religion is tolerated, racial and sexual discrimination disguised as religious discrimination certainly follows. It doesn't take a rocket scientist to figure out that if you get a pass on religion it will be impossible to enforce non-discrimination laws based on race.

Dr. King once said that 11 o'clock on Sunday was the most segregated hour of America, and that is still true today. And so if you discriminate based on religion, based on which church you go to, that has racial implications.

Religious discrimination is also a proxy for discrimination based on sex, based on things like single motherhood, or divorce, or premarital sex. It is shocking that we would even be having a discussion about whether or not civil rights practices are to apply to programs run with Federal dollars.

For decades, when funds were raised from all taxpayers it has been and should continue to be illegal for sponsors to reject applicants solely because of their religion. There is no justification for having to—restoring a practice where you can tell job applicants that, "We don't hire your kind."

The so-called faith-based initiative represented a profound change in policy. Since 1965, if an employer had a problem hiring the best-qualified applicant because of discrimination based on race or religion that employer had a problem because the weight of the Federal Government was behind the victim of discrimination. But with the faith-based initiative, we shifted the weight of the Federal Government to support—from supporting the victim to supporting the employer's right to discriminate. This is a profound change in civil rights protections.

And if we don't enforce discrimination laws in Federal contracts in secular programs, where is our moral authority to tell a private

employer, who may be devoutly religious, what he can and can't do with his own private money. A policy of religious discrimination in employment is wrong in the private sector and it is certainly wrong with Federal funds.

We need to be—unfortunately the Executive order did not address this profound issue. It failed to address the employment issue, and we are disappointed that they failed to present a witness so we can inquire why that was done.

Mr. Chairman, I would like to insert to the record the rest of my statement——

Mr. NADLER. Without objection.

Mr. SCOTT [continuing]. And I look forward to the testimony of the witnesses, particularly in light of the question that we will have on employment discrimination. And I will yield to the Chairman of the Committee.

Mr. CONYERS. Thank you. I merely want to associate myself with an excellent statement. I yield back.

Mr. SCOTT. I yield back.

Mr. NADLER. I thank the gentleman.

Without objection, all Members will have 5 legislative days to submit opening statements for inclusion in the record. Without objection, the Chair will be authorized to declare a recess of the hearing, which we will do in the event of votes on the floor, but only in such an event.

We will now turn to our panel of witnesses. As we ask questions of our witnesses the Chair will recognize Members in the order of their seniority and in the usual order—usual procedure of this Committee.

I will now introduce the witnesses. Melissa Rogers serves as the director of the Wake Forest University School of Divinity Center for Religion and Public Affairs and as a nonresident senior fellow at the governance program of the Brookings Institution. In 2009 President Barack Obama appointed her to his Advisory Council on Faith-Based and Neighborhood Partnerships. There she chaired the task force on the reform of the office of faith-based and neighborhood partnerships, whose recommendations we will be discussing today.

Professor Rogers previously served as the executive director of the Pew Forum on Religion and Public Life. Prior to her leadership at the Pew Forum Professor Rogers served as general counsel of the Baptists Joint Committee on Religious Liberty, based in Washington, D.C. She earned her B.A. from Baylor University and her J.D. from the University of Pennsylvania Law School.

Douglas Laycock is a professor of law and of religious studies at the University of Virginia. He is a fellow of the American Academy of Arts and Sciences and the vice president of the American Law Institute.

Before joining UVA's faculty in 2010 Professor Laycock served as the Yale Kamisar Collegiate Professor of Law at the University of Michigan Law School. Prior to that he taught for 25 years at the University of Texas and for 5 years at the University of Chicago. Professor Laycock earned his B.A. from Michigan State University and his J.D. from the University of Chicago Law School.

Reverend Barry Lynn is an ordained minister in the United Church of Christ and has served as the executive director of Americans United for Separation of Church and State since 1992. Along with Professor Rogers, he served on the task force on the reform of the office of faith-based and neighborhood partnerships.

Reverend Lynn began his career working at the national office of the United Church of Christ, including a 2-year stint as legislative counsel for the church's office of church and society, in Washington. From 1984 to 1991 he was legislative counsel for the Washington office of the American Civil Liberties Union. Reverend Lynn earned his law degree from Georgetown University Law Center and received his theology degree from Boston University School of Theology in 1973.

I am pleased to welcome all of you. Your written statements in their entirety will be made part of the record.

I would ask you to summarize your testimony in 5 minutes or less. To help you stay within that time there is a timing light at your table. You have all testified here before; you know what the light means. When 1 minute remains the light will switch from green to yellow, and then to red when the time is up.

Before we begin it is customary for the Committee to swear in its witnesses. If you would please stand and raise your right hands to take the oath?

Let the record reflect that the witnesses answered in the affirmative.

You may be seated. Thank you very much.

I will now recognize Professor Rogers.

Use your mike and speak into it. A little closer to the mike.

Ms. ROGERS. Pull it a little closer, is that better?

Mr. NADLER. That is better.

TESTIMONY OF MELISSA ROGERS, DIRECTOR, CENTER FOR RELIGION AND PUBLIC AFFAIRS, WAKE FOREST UNIVERSITY DIVINITY SCHOOL

Ms. ROGERS. Okay. Thank you.

Thank you, Chairman Nadler, and thanks also to Ranking Member Sensenbrenner, Chairman Conyers, Representative Scott, Representative Watt, and the other Members of this Subcommittee. I appreciate the invitation to be here with you today and I appreciate your interest in the work of the Advisory Council.

And I am also grateful for our partnership in years past on free exercise matters like the Religious Freedom Restoration Act. It has been wonderful to work with you.

Let me say that I don't speak today for the full Advisory Council or any of the organizations with which I am affiliated, but I do speak as one who has long worked on issues related to partnerships between the government and nonprofits, both religious and secular. I also speak as a lifelong Baptist and, as a Baptist, I believe that the mandates to care for our neighbors and to provide religious freedom for all people are not only legal, policy, and ethical matters, they are also scriptural imperatives.

In March the Advisory Council urged President Obama to take a wide range of actions to strengthen the constitutional and legal footing of the partnerships that it forms with nonprofits to serve

people in need. And those involved in the council process have some serious differences on church-state matters, yet through some painstaking and long periods of work we were able to reach consensus on some key recommendations.

As you have already noted, yesterday President Obama signed an Executive order that implemented many of these recommendations. This order is a major step forward in our efforts to create more clarity, transparency, accountability, and constitutional compliance in these partnerships.

Let me just quickly mention, if I could, six of the changes the Executive order makes. First, the new order says that beneficiaries have the right to an alternative provider if they object to their provider's religious character, and the beneficiaries have to receive written notice of this and other rights at the outset.

Second, the new order clarifies some fuzzy rules about uses of direct government aid, making it clear that such aid can't be used for explicitly religious activities, meaning activities that contain overt religious content, like prayer, worship, and proselytizing. The new order also directs an interagency working group to provide regulations and guidance on the need to cleanly separate any privately-funded religious activities from programs that are subsidized by direct government aid. At the same time, the order makes it clear that religious providers can retain a religious name and religious symbols in their building.

Third, the order says government-funded programs have to be monitored to ensure that church-state rules and other rules are being followed, but the government must do so in ways that don't create excessive church-state entanglement.

Fourth, the new Executive order says that the government must post things like grant and guidance documents on the Web, as well as lists of nonprofits that receive Federal social service funds.

Fifth, the order says that decisions about awards of Federal social service funds must be free of even the appearance of political interference, and that those decisions have to be made on the basis of merit and not on religious affiliation or lack thereof.

And sixth, as I have already mentioned, the order creates what I think is the first interagency working group to create uniform policies around these and other issues.

Now, the new order doesn't call for churches to form separate corporations if they wish to receive direct government aid, and that is a change that 13 council members, including me, advocated as a way of insulating churches from government oversight. Also, as you have already noted in your remarks, one important issue—the employment issue—was put outside the council's charge.

But the order adopts key consensus recommendations of the council, and I believe it is a great achievement, not only because it does so much to bring these efforts into line with religious liberty principles, but also because it does so with the backing of people who have been divided over these issues for a very long time. As you know, about 15 years ago some controversial policies started popping up in this area and we have been fighting ever since; but now we have got some common ground policies—not on everything, but on some important matters—and that is an important advance.

As you know, in my written testimony I have addressed the issue of religion-based decision-making by faith-based groups in government-funded jobs. As I have already noted, the White House instructed the council not to address this issue, and it has said that it is dealing with the issue through a separate process, one that is not connected to the council process.

It is critical to note that this debate about government-funded—is about government-funded jobs, not privately-funded jobs. I fully support the ability of all religious organizations to make decisions on the basis of religion regarding jobs that they fund themselves. My Baptist church, or course, should be able to call a Baptist preacher; and a synagogue, of course, should be able to call a Rabbi.

But subsidizing jobs with government money changes the calculus. We have a longstanding tradition—something that has already been mentioned—of equal opportunity in federally-funded employment, and I believe that is a tradition that we should continue.

In my view, it is wrong to allow any religious group, including my own, to place a religious test on a job that is funded by a government grant. Because current rules and policies permit this in some instances I believe this matter must be addressed. So I want to thank you for the opportunity to be with you, and I look forward to our discussion.

[The prepared statement of Ms. Rogers follows:]

PREPARED STATEMENT OF MELISSA ROGERS

TESTIMONY
OF
MELISSA ROGERS,
DIRECTOR, CENTER FOR RELIGION AND PUBLIC AFFAIRS
WAKE FOREST UNIVERSITY DIVINITY SCHOOL AND
NONRESIDENT SENIOR FELLOW, THE BROOKINGS INSTITUTION
BEFORE THE
SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES
OF THE COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES
REGARDING
"FAITH-BASED INITIATIVES: RECOMMENDATIONS OF THE PRESIDENT'S ADVISORY COUNCIL ON FAITH-BASED AND COMMUNITY PARTNERSHIPS AND OTHER CURRENT ISSUES"
THURSDAY, NOVEMBER 18, 2010

Chairman Nadler, Ranking Member Sensenbrenner, and members of the subcommittee, I would like to thank you for the invitation to testify before you today. I am grateful for your interest in the work of the President's Advisory Council on Faith-Based and Neighborhood Partnerships and for your leadership on constitutional and civil rights issues. In particular, I would like to thank the members of this subcommittee and your staffs for your leadership on the Religious Freedom Restoration Act (RFRA) and the Religious Land Use and Institutionalized Persons Act (RLUIPA), two landmark federal free exercise statutes.

My name is Melissa Rogers. I direct the Center for Religion and Public Affairs at Wake Forest University's Divinity School and serve as a nonresident senior fellow at The Brookings Institution. I also serve as chair of President Obama's Advisory Council on Faith-Based and Neighborhood Partnerships. In the past, I have held positions as executive director of the Pew Forum on Religion and Public Life and general counsel of the Baptist Joint Committee for Religious Liberty.

I do not speak today for any of these institutions or organizations. Instead, I speak as someone who has long worked on issues related to partnerships between the government and community organizations, both religious and secular. I also speak as one who believes that the American imperatives of serving our neighbors and respecting religious freedom are scriptural imperatives as well.

In this testimony, I will describe some of the Advisory Council's recommendations to President Obama and his administration. I will also touch on some related issues the Council did not address.

I. Advisory Council Recommendations

In early 2009, President Obama created the Advisory Council on Faith-Based and Neighborhood Partnerships, a body of twenty-five leaders affiliated with secular and religious organizations. The members of the Advisory Council are:

- Diane Baillargeon, President and CEO, Seedco
- Anju Bhargava, President, Asian Indian Women of America; Founder, Hindu American Seva Charities
- Bishop Charles Blake, Presiding Bishop, Church of God in Christ
- Noel Castellanos, CEO, Christian Community Development Association
- Dr. Arturo Chavez, President and CEO, Mexican American Catholic College
- The Rev. Cannon Peg Chemberlin, President, National Council of Churches; Executive Director, Minnesota Council of Churches
- Fred Davie, Senior Director, The Arcus Foundation
- Nathan J. Diament, Director of Public Policy, Union of Orthodox Jewish Congregations of America
- Dr. Joel C. Hunter, Senior Pastor, Northland, a Church Distributed
- Harry Knox, Director, Religion and Faith Program, Human Rights Campaign Foundation

- Bishop Vashti Murphy McKenzie, Bishop, Thirteen Episcopal District, African Methodist Episcopal Church
- Dalia Mogahed, Senior Analyst and Executive Director, The Center for Muslim Studies, Gallup
- The Rev. Otis Moss, Jr., Pastor Emeritus, Olivet Institutional Baptist Church
- Dr. Frank Page, Vice-President of Evangelization, North American Mission Board; Past President, Southern Baptist Convention
- Dr. Eboo Patel, Founder and Executive Director, Interfaith Youth Core
- Anthony R. Picarello, Jr., General Counsel , United States Conference of Catholic Bishops
- Nancy Ratzan, President, National Council of Jewish Women
- Melissa Rogers, Director, Center for Religion and Public Affairs, Wake Forest University Divinity School
- Rabbi David Saperstein, Director and Counsel, Religious Action Center of Reform Judaism
- The Rev. William J. Shaw, President, National Baptist Convention, USA, Inc.
- Father Larry J. Snyder, President and CEO, Catholic Charities USA
- Richard E. Stearns, President, World Vision United States
- Judith Vredenburgh, Immediate Past President and CEO, Big Brothers Big Sisters of America
- Jim Wallis, President and CEO, Sojourners
- The Rev. Dr. Sharon E. Watkins, General Minister and President, Christian Church (Disciples of Christ) in the United States and Canada

President Obama asked the Advisory Council to make recommendations to his administration for strengthening the partnerships the government forms with religious and non-religious groups in six issue areas:

- Economic Recovery and Domestic Poverty
- Environment and Climate Change
- Fatherhood and Healthy Families
- Global Poverty and Development
- Inter-religious Cooperation
- Reform of the Office of Faith-Based and Neighborhood Partnerships

In March 2010, the Council urged the government to take a wide range of actions to improve the lives of people in need.[1] For example, instead of requiring struggling families to travel to multiple sites to access Earned Income Tax Credit, food stamps, and medical, veterans' and other benefits, the Council called on the government to work with nonprofit partners so families may access all of these benefits at single sites. Instead of immediately locking up fathers who are delinquent on their child support payments, the Council advocated the extension of Fathering Courts, programs that identify barriers that

[1] The Council's report may be found at http://www.whitehouse.gov/blog/2010/03/11/a-new-era-partnerships-advisory-council-faith-based-and-neighborhood-partnerships-pr

are preventing fathers from making these payments and linking them with services, including education, counseling, and employment opportunities, that help them to overcome those barriers. In one Kansas City Missouri Fathering Court, 281 graduates and current participants have become significantly more involved in the lives of their children and have contributed more than $ 2.6 million in child support, while the state has avoided more than $2.8 million in incarceration costs. The diverse Advisory Council, made up of members of many different faiths, beliefs and political perspectives, was able to unite around more than 60 proposals like this that have the potential to bring about meaningful change for vulnerable people.

In its report, the Council also offered a number of recommendations aimed at strengthening the constitutional and legal footing of the partnerships the government forms with community-serving organizations, both religious and secular. That might sound improbable, given the religious and political diversity of the Council, as well as some serious differences among Council members about the proper relationship between government and religion. Through painstaking work, however, the Council was able to unanimously endorse a list of important reforms in this area, too.

In light of the jurisdiction of this subcommittee and the topic of today's hearing, my testimony focuses on these recommended reforms. This work began with a diverse taskforce of experts drafting recommendations under the auspices of the Reform of the Office of Faith-Based and Neighborhood Partnerships Taskforce ("Reform Taskforce"). The Reform Taskforce included leaders from both inside and outside the Council. These experts hold a wide variety of views on the proper relationship between church and state. For example, some members of the taskforce enthusiastically supported the faith-based initiative of the previous administration, others vigorously opposed it, and still others regarded it as a mixed bag. Members of the taskforce are:

- Dr. Stanley Carlson-Thies, Founder and President, Institutional Religious Freedom Alliance
- Noel Castellanos, CEO, Christian Community Development Association
- Fred Davie, Senior Director, The Arcus Foundation
- Nathan J. Diament, Director of Public Policy, Union of Orthodox Jewish Congregations of America
- Bridget McDermott Flood, Executive Director, Incarnate Word Foundation
- The Rev. Dr. Welton C. Gaddy, President, The Interfaith Alliance
- Harry Knox, Director, Religion and Faith Campaign, Human Rights Campaign Foundation
- The Rev. Barry Lynn, Executive Director, Americans United for Separation of Church and State
- Anthony R. Picarello, Jr., General Counsel, United States Conference of Catholic Bishops
- Melissa Rogers, Director, Center for Religion and Public Affairs, Wake Forest University Divinity School
- Ronald J. Sider, President, Evangelicals for Social Action

- The Rev. Brent Walker, Executive Director, Baptist Joint Committee for Religious Liberty
- Rabbi David Saperstein, Director and Counsel, Religious Action Center of Reform Judaism

As far as we know, the Council process was the first time a governmental entity convened individuals with serious differences on some church-state issues and asked them to seek common ground in this area. The Reform Taskforce did not consider or come to agreement on every issue. Nevertheless, we, and later the full Advisory Council, were able to unite around a number of recommendations for important reforms of the rules governing these partnerships. As noted in our report, policies that enjoy broad support are more durable, and finding common ground on church-state issues minimizes litigation and maximizes time and energy to focus on the needs of people who are struggling.

The Recommendation Process

The Reform Taskforce began its work by gathering existing federal rules, policies, and guidance on social service partnerships and drafting a list of issues we might address.[2] After drafting this list, the taskforce found we had to narrow it in light of time constraints. We used two main criteria to do so. First, we selected cross-cutting issues – ones that have an important impact on a wide range of federally funded social service programs. Second, we chose to address issues where we might be able to find significant consensus.

After dividing up the issues among us, we wrote initial drafts of recommendations and then circulated them to one another. A long and painstaking process of discussion and redrafting ensued. Ultimately, we were able to reach agreement on a number of important recommendations for reform.

Once the Reform Taskforce finalized these draft recommendations, it forwarded them to the full Advisory Council for its consideration. Council members then reviewed the drafts, asking questions and offering suggestions. Based on these comments, the taskforce revised its drafts again, and then the Council offered additional feedback. Ultimately, the Advisory Council unanimously adopted these recommendations and folded them into one Council report.

The Council's recommendations on Reform of the Office of Faith-Based and Neighborhood Partnerships call for several different kinds of actions. Some of them urge the Obama administration to amend a 2002 Executive Order (Executive Order 13279) that sets forth fundamental principles and policymaking criteria for federally funded

[2] The White House has said that it is conducting its own evaluation of the issue of whether religious organizations may make religion-based decisions regarding government-funded jobs. This evaluation is taking place outside the Council process. Members of the Reform Taskforce and the Advisory Council have advanced and will continue to advance our respective views on this matter outside the scope of the Council process. See *infra* 10-21.

partnerships with religious and secular social service providers.[3] Other recommendations call for federal agencies to revise some of the regulations and guidance associated with the distribution of social service funds. Still other recommendations advocate changes in the federal government's communications strategies or in intergovernmental relations.

The following sections describe some of these recommendations. The first section describes issues about which there was consensus on the Advisory Council, which was true of the overwhelming majority of issues we considered. The second section describes two issues where Council members differed.[4]

Consensus Recommendations

In recent years, there's been a great deal of confusion about whether providers could use government grant money to pay for counseling involving religious instruction, for example, or mix religious content into programs funded by government grants. Current rules are fuzzy on these matters, and this has resulted in substantial litigation.[5]

For this reason, the Council called on the Obama administration to amend Executive Order 13279 to make it clear that direct aid cannot be used to pay for explicitly religious activities, meaning any activities that have overt religious content. This helps to ensure that the government does not promote *or* regulate religion.

The Council said the government also should give providers a variety of examples and case studies to illustrate the practical import of these limits. It needs to be clear to providers, for example, that direct government aid cannot be used to pay for activities such as religious instruction, proselytizing, or the production or dissemination of sacred texts or other religious materials.

Likewise, providers often lack specific guidance about how to create a meaningful and practical separation between any privately funded religious activities they offer and nonreligious activities funded by direct government aid. If both of these kinds of activities are offered at the same site, for example, it must be clear to beneficiaries that the programs are separate and distinct. Participants in the government program must be dismissed when that program ends, and there must be an interval between the programs to vacate the room before the privately funded religious program begins. Providers also must emphasize that participation in any religious activities is purely voluntary. In particular, the Council highlighted a settlement agreement that provides some practical guidance along these lines and urged the administration to make guidance like this available to all providers of social services subsidized by direct federal aid. Following

[3] Executive Order 13279, *Equal Protection of the Laws for Faith-Based and Community Organizations* (December 12, 2002) ("Executive Order 13279").

[4] The Council unanimously endorsed the final report that was released in March 2010, affirming recommendations that reflected both consensus and non-consensus issues.

[5] See Melissa Rogers and E.J. Dionne, Jr., *Serving People in Need, Safeguarding Religious Freedom: Recommendations for the New Administration on Partnerships with Faith-Based Organizations*, (Brookings Institution)(2008). The views expressed in this testimony should not be attributed to my co-author.

guidelines like these will help to safeguard beneficiaries' rights, while also keeping the government from meddling in religious activities.

At the same time, we recommended that the Obama administration equally emphasize the fact that providers may receive government funds and maintain a religious identity through things like a religious name and mission statement. To cite an obvious example, no government official should insist that the St. Vincent de Paul Center change its name to the "Mr. Vincent de Paul Center." A provider can have a religious name and mission while using grants funds appropriately and carefully separating government-funded activities from privately funded religious ones.

Some religious providers are comfortable segmenting their funds and activities in these ways – they simply need to know what is required and have clear instructions about how to do it. Other providers will react to this information differently – they will find in it a clear signal that government grants are not for them. Both are positive outcomes. Government grants are not a good fit for every program, even every effective program; it is far better for all concerned to arrive at this kind of determination at the outset.

Current rules also often lack an explicit and comprehensive guarantee of an alternative provider if beneficiaries object to the religious character of their provider. Further, there frequently has been no requirement that beneficiaries receive written notice of this and other rights. In a nation that prizes religious freedom, that is simply unacceptable.

Thus, the Council recommended that the government change its rules to require that beneficiaries of all federal social service programs receive written notice of these rights from the time they enter a government-funded program. If a beneficiary objects to his or her provider, the beneficiary must have access to an alternative secular provider or one that is religiously acceptable to them. Referrals to alternative providers must be made soon after objections are raised, and the alternative provider must be "reasonably accessible and have the capacity to provide comparable service to the individual."

The existing executive order that sets forth governing rules in this area also makes no mention of the government's overarching duty to monitor and enforce legal requirements relating to the use of federal social service funds, including the constitutional obligation to monitor and enforce Establishment Clause standards in ways that avoid excessive entanglement between religion and government. So the Reform Taskforce, and subsequently, the Advisory Council, recommended that this executive order and associated regulations be amended to describe these obligations. The Council also urged the administration to add church-state rules to audit checklists, and to ensure that grant documents reference all rules that follow federal funds.

Additionally, understanding of and confidence in federally funded social service programs administered by nonprofits suffers because it has often been difficult, if not impossible, to access lists of entities receiving these funds. This may have fed the false impression that there's a pot of federal social service money set aside for religious groups (or groups affiliated with particular faiths).

Thus, the Council recommended that all governmental bodies disbursing federal social service funds post online a list of entities receiving such aid and do so in a timely manner. If implemented, this reform would create unprecedented transparency in the federally funded social service system.

For some of the same reasons, we agreed that the government should instruct its own employees and all peer reviewers that they should make decisions about grants based on the merits of proposals, not on religious or political considerations. "[A]n organization should not receive favorable or unfavorable marks [in the peer review process] because it is affiliated or unaffiliated with a religious body, or related or unrelated to a specific religion," the Council said. Similarly, we recommended that Executive Order 13279 be amended to state that the White House Office and agency centers must comply with all applicable constitutional and statutory restrictions, including the Hatch Act's limit on the use of governmental resources for partisan political activities.

Another overarching aim of the Advisory Council was to encourage the government to create greater uniformity in its rules, policies, and guidance materials. Thus, we recommended that there be greater communication and coordination across federal agencies to make these materials as consistent as possible. This would provide clearer messages for the hard-working organizations seeking to partner with government to serve people in need.

The following bullet points summarize some of the other consensus recommendations:

- Require governmental bodies that disburse federal social service funds to post online all guidance documents for nongovernmental organizations that provide those services as well as other documents needed to receive and maintain federal funding (including requests for proposals, grants, and contracts).

- Ensure that each governmental body that disburses federal funds has a mechanism in place to allow that body to take necessary enforcement actions for noncompliance with church-state standards as well as other relevant legal standards.

- Develop specific guidance for nongovernmental intermediaries to instruct them in their obligations regarding monitoring of subgrantees and subcontractors. Subgrantees and subcontractors are subject to the same church-state standards that apply to the nongovernment organizations receiving the primary government grants or contracts (e.g., requirement to separate privately funded explicitly religious activities from government-funded non-religious ones).

- Ensure that organizations that are awarded federal social service funds undergo training about the conditions following these funds.

- Clarify the fact that beneficiaries' right to refuse to "actively participate" in a religious practice includes the right to refuse even to attend such a practice.

- Clearly label programs as involving direct aid (e.g., government grants or contracts) and indirect aid (e.g., social service vouchers or certificates) because current constitutional interpretation establishes different church-state rules for these two types of aid. Council members could not agree on what the law *should be* in this area, but we did agree that it would be beneficial if the administration stated its understanding of what current law *is* on these issues.

- Reduce some of the administrative burdens and other costs associated with obtaining formal recognition of 501(c)(3) tax-exempt status because this would facilitate the voluntary pursuit of that formal recognition and the creation of separate 501(c)(3) entities. This might be done by waiving existing filing fees, expediting processing, and taking other steps to help smaller organizations form separate 501(c)(3) organizations.

- Develop a list of best practices for keeping direct aid separate from explicitly religious activities and accounting procedures and tracking mechanisms that help facilitate and demonstrate the constitutional use of government funds. Promote those means to religious social service providers that may receive such aid.

- Specifically and prominently state, in an executive order and elsewhere, that compliance with constitutional principles is as important as ensuring that social service partnerships are effective and efficient. Make this message an essential part of all communications of the White House Office of Faith-Based and Neighborhood Partnerships and the Centers for Faith-Based and Neighborhood Partnerships scattered across a number of federal agencies.

- Emphasize nonfinancial partnerships with nonprofits (those in which no money passes from the government to the nonprofit) as much as financial partnerships. Nonfinancial partnerships present far fewer constitutional issues, are often preferred by civil society organizations, and are as valuable to government as financial partnerships.

- Promote a more accurate understanding of what the White House Office and agency centers do and do not do. It should be regularly emphasized, for example, that while these offices often notify community groups, both religious and secular, about opportunities to partner with government, they do not and should not play any role in decision-making about which organizations receive federal social service funds.

Again, Council members include those associated with religious and secular service providers; the Union of Orthodox Jewish Congregations and the Religious Action Center of Reform Judaism; World Vision and Hindu American Seva Charities; the United States

Catholic Conference and the Human Rights Campaign; as well as others. When diverse leaders like these can agree on important church-state issues, it is a sign of real progress.

Non-Consensus Issues

Council members disagree about two significant issues. The first issue is whether the government should require houses of worship that would receive direct federal social service funds to form separate corporations to receive those funds. The Council was almost evenly divided on this issue. A narrow majority (13 Council members) believe the government should require houses of worship that wish to receive direct federal social service funds to establish separate corporations "as a necessary means for achieving church-state separation and protecting religious autonomy, while also urging states to reduce any unnecessary administrative costs and burdens associated with attaining this status."

Twelve Council members disagree. In their view, separate incorporation is sometimes the best way to achieve these goals, but it should not be a blanket requirement. The government should not require separate incorporation, these members said, "because it may be prohibitively costly and burdensome, particularly for smaller organizations, resulting in the disruption and deterrence of effective and constitutionally permissible relationships."

The second non-consensus issue was whether the government should allow social services subsidized by direct aid to be provided in rooms that contain religious art, scripture, messages, or symbols. A majority of the Council (16 members) believe the administration should neither require nor encourage the removal of religious symbols where services subsidized by direct government aid are provided, but instead should urge providers to be sensitive and accommodating regarding beneficiaries who object to the presence of religious symbols. If these voluntary measures are insufficient to overcome objections, these Council members also affirm that beneficiaries must have access to an alternative provider to which they do not object.

On the other hand, seven Council members believe federally funded social services should be offered in areas with religious items only when there is no available space in providers' offices without these items and when removing or covering them would be infeasible. Two Council members believe the Administration should permit nongovernmental organizations to offer federally funded social services only in areas containing no religious art, scripture, messages, or symbols.

Administration Consideration of Council Recommendations

On Tuesday, March 9, 2010, the Council presented these and other recommendations to President Obama and members of his administration.[6] Since that time, the Obama

[6] Again, the Advisory Council report may be found at http://www.whitehouse.gov/blog/2010/03/11/a-new-era-partnerships-advisory-council-faith-based-and-neighborhood-partnerships-pr.

administration has conducted a process to consider these recommendations. This process has involved President Obama, leaders from various sectors of the Executive Office of the President, and representatives of federal agencies. It is my understanding that the Obama administration plans to make an announcement in the near future regarding these recommendations.

II. Religion-Based Decisions Regarding Government-Funded Jobs

The most prominent issue the Advisory Council did not consider is whether religious organizations may make religion-based decisions regarding government-funded jobs.[7] Council members have differing views on this issue, and I want to emphasize again that I not speaking for the Council in this testimony.

The debate over this issue does not divide those who are friendly toward religion from those who are hostile toward it; those who believe in religious liberty from those who oppose it; those who care about the poor from those who do not. There are people of good will on all sides of this debate. There are people who cherish their faith and religious liberty on all sides of this debate. And there are people who believe we must do more to serve those in need on all sides of this debate. I hope the issue can be discussed in that spirit.

The following sections briefly discuss some of the relevant constitutional, statutory, and policy issues.

Constitutional Issues

The U.S. Supreme Court has addressed the constitutionality of religion-based employment decisions in the context of a religious organization that did not receive government funds. In the 1987 case of *Corporation of Presiding Bishop v. Amos,* the Court considered a case involving a building engineer who worked at a gymnasium owned by the Church of Jesus Christ of Latter-day Saints (LDS).[8] The LDS church fired the engineer after more than a decade of service because he did not qualify for a "temple recommend," a certificate demonstrating that he was a bona fide member of the church and thus eligible to attend LDS temples.[9] Temple recommends "are issued only to individuals who observe the Church's standards in such matters as regular church attendance, tithing, and abstinence from coffee, tea, alcohol, and tobacco."[10] The engineer argued that, to the extent that the Title VII of the 1964 Civil Rights Act allowed the LDS church to fire him for this reason, it violated the Establishment Clause of the First Amendment.

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[7] See *supra* n.2.
[8] 483 U.S. 327 (1987).
[9] *Id.* at 330.
[10] *Id.* at n.4.

Title VII is the equal employment opportunity title of the 1964 Civil Rights Act.[11] Title VII applies to employers with fifteen or more employees in an industry affecting interstate commerce[12] and bars them from discriminating in employment on the basis of "race, color, religion, sex, or national origin."[13] However, Title VII exempts religious organizations from its ban on religious discrimination in employment.[14]

As signed into law in 1964, the Act contained an exemption from its religious nondiscrimination requirements for positions engaged in the religious activities of the organization.[15] In 1972, Congress expanded this exemption to allow religious organizations to hire on the basis of religion in all employee positions.[16] This exemption from Title VII is sometimes referred to as the "702 exemption."[17]

In the *Amos* case, the Court rejected the engineer's argument that the 702 exemption violated the First Amendment's Establishment Clause. The Court found the exemption had a genuine secular purpose, saying it was a "significant burden" for religious organizations to have to predict which of their jobs a court would find to be engaged in religious activities and which were not.[18] The 702 exemption spared a religious organization this concern, thus freeing it to define and advance its mission as it saw fit, rather than as the government saw fit. Congress had the power to lift governmental burdens on religious practices, the Court said.[19] Further, the exemption did not have the forbidden primary effect of advancing faith. The Court observed: "A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon* [*v. Kurtzman*], it must be fair to say that the *government itself* has advanced religion through its own activities and influence."[20]

The Court declined, however, to consider whether the Constitution mandated the Title VII exemption. "We have no occasion to pass on the argument . . . . that the exemption to which [the religious organization was] entitled under § 702 is required by the Free Exercise Clause," it said.[21] The Court also did not in any way consider or find that the Constitution required or permitted the government to allow religious organizations to discriminate in employment based on religion with respect to government-funded jobs. The case did not raise the issue, as there was no suggestion that the LDS organization involved in the case received any financial assistance from the state.

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[11] 42 U.S.C. Section 2000e *et seq.* (2010).
[12] 42 U.S.C. Section 2000e(b) (2010)(defining an "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees . . .").
[13] *Id.* at Section 2000e-2(a)(2).
[14] *Id.* at Section 2000e-1(a).
[15] Section 702 of the Civil Rights Act of 1964, P.L. 88-352 (1964) (reprinted in U.S.C.C.A.N. at 287)(the exemption did not apply to job positions "connected with the carrying on by such [religious] corporation[s], association[s] or societ[ies] of [their] religious activities. . . .").
[16] P.L. 92-261 (1972).
[17] In the bill passed by Congress in 1964, this exemption was labeled "Section 702." *See* P.L. 88-352.
[18] 482 U.S. at 336.
[19] *Id.* at 335.
[20] *Id.* at 337.
[21] *Id.* at n.13.

The U.S. Supreme Court has never addressed the specific issue of whether it is constitutional to allow religious organizations to engage in employment discrimination on the basis of religion for government-funded jobs, and legal scholars have divided over this issue.[22] The Court has ruled, however, that it is constitutionally permissible for Congress to attach nondiscrimination conditions to government funding in some cases involving religious entities and government funds. In the 1984 case of *Grove City v. Bell*, for example, the Supreme Court rejected a religious college's arguments that conditioning federal financial assistance on compliance with nondiscrimination on the basis of gender infringed the First Amendment rights of the college and its students.[23] "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that [recipient institutions] are not obligated to accept," the Court said.[24]

Statutory Issues: Title VII of the 1964 Civil Rights Act

As noted above, the 702 exemption to Title VII of the Civil Rights Act allows religious organizations to make religion-based employment decisions. Some have suggested that the 1972 legislative history of the Title VII 702 exemption demonstrates Congressional intent to allow religious groups to discriminate on the basis of religion with regard to federally funded jobs.[25] In fact, a review of that legislative history reveals that the lead sponsors of the 702 amendment rallied support for their amendments by offering examples of religious institutions they said did not receive government financial aid but were supported by private funds. For example, in his argument for allowing religious organizations to make religion-based employment decisions institution-wide, Senator Sam Ervin repeatedly used an example of a religious institution from his home state that, as he stressed, "[was] not supported in any respect by the Federal Government," but by religious adherents.[26]

If the government prohibits religious organizations from discriminating on the basis of religion in government-funded positions, these organizations would not "lose" their Title VII 702 exemption and thus it would not affect the religious organizations' ability to discriminate on the basis of religion with regard to positions outside the context of government funding.[27] For example, a Jewish group would be able to hire a Jewish executive director whose salary was paid with private funds even though the group also runs a program supported by a government grant. For a variety of reasons, it is important

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[22] Compare Alan Brownstein and Vikram Amar, *The "Charitable Choice" Bill that was Recently Passed by the House and the Issues it Raises* (Findlaw, April 29, 2005) and Steven K. Green, *Religious Discrimination, Public Funding, and Constitutional Values*, 30 Hastings Const. L.Q. 1 (2002) with Thomas C. Berg, *Religious Organizational Freedom and Conditions on Government Benefits*, 7 Geo. J. L. & Pub. Pol'y 165 (2009) and Ira C. Lupu and Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DePaul L. Rev. 1 (2005).

[23] Grove City College v. Bell, 465 U.S. 555 (1984).

[24] *Id.* at 575.

[25] See Melissa Rogers, "Federal Funding and Religion-based Employment Decisions," chapter in *Sanctioning Religion? Politics, Law, and Faith-based Public Services*, ed. David K. Ryden and Jeffrey Polet (Lynn Rienner Publishers) (2005).

[26] *Id.* at 109.

[27] *Id.* at 110-111.

for the government to respect the freedom of religious nonprofits to make religion-based employment decisions outside the government-funded context. This protects the religious organization's ability to maintain its religious identity even as it receives government funding.

Statutory Issues: The Religious Freedom Restoration Act

As you know, RFRA requires the federal government to justify substantial burdens on religion with a narrowly tailored compelling governmental interest. [28] Thus, when a claimant demonstrates that the government has substantially burdened his or her religious practice, the government must then prove that such a burden is the unavoidable result of its pursuit of a compelling government interest, such as health or safety. In other words, the RFRA analysis focuses first on whether governmental action places a substantial burden on religious exercise. If the religious claimant cannot demonstrate a substantial burden on religious exercise, then the claim fails.

In a memorandum opinion dated June 29, 2007, then-Deputy Assistant Attorney General of the Justice Department John Elwood argued that "RFRA is reasonably construed" to require the federal government to exempt World Vision, a religious organization, from a requirement of the Juvenile Justice and Delinquency Prevention Act of 1974 (JJDPA) mandating nondiscrimination on the basis of religion in "employment in connection with any programs or activity' funded by a JJDPA grant. [29] On behalf of the Justice Department, Elwood claimed doing otherwise would substantially burden World Vision's religious exercise and that the federal government had no compelling interest to justify such a burden.

My view is that the Department of Justice erred in its analysis of these issues. Under its most robust interpretation of the Free Exercise Clause, the interpretation on which RFRA is based, the U.S. Supreme Court never read that clause to require the government to refrain from placing nondiscrimination conditions on grants or contracts that flow to

[28] As noted above, I formerly served as general counsel of the Baptist Joint Committee for Religious Liberty (BJC), an organization that led the coalition that pressed for the adoption of RFRA in the early 1990s. During my time at the BJC, I helped to defend RFRA's constitutionality in the courts and to encourage states to adopt state RFRA laws. After the Supreme Court's decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the RFRA coalition called for the enactment first of the Religious Liberty Protection Act (RLPA) and then of the Religious Land Use and Institutionalized Persons Act (RLUIPA). I have also long urged the Supreme Court to reverse its decision in *Employment Division v. Smith,* 494 U.S. 872 (1990), a decision that gave rise to RFRA and RLUIPA. See, e.g., *Free Exercise Flip? Kagan, Stevens, and the Future of Religious Freedom* (Brookings Institution, June 23, 2010) at http://www.brookings.edu/papers/2010/0623_kagan_rogers.aspx

[29] Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act, Memorandum Opinion for the General Counsel Office of Justice Programs (June 29, 2007) at http://www.usdoj.gov/olc/2007/worldvision.pdf ("World Vision Memo"). Although this opinion was dated June 29, 2007, the Justice Department did not release it until October 2008. Ira C. Lupu and Robert W. Tuttle, *The State of the Law 2008: A Cumulative Report on Legal Developments Affecting Government Partnerships with Faith-Based Organizations* (Roundtable on Religion and Social Welfare Policy, December 2008) at 33.

religious organizations. Indeed, George Washington University Law School Professors Chip Lupu and Bob Tuttle have observed that Department of Justice's memo "take[s] a much more expansive view of what constitutes a 'substantial burden' under RFRA than the federal government ever has before, or than the lower courts have recognized."[30] Lupu and Tuttle have said that prior to related agency pronouncements, "[n]o agency of the United States had ever taken the position that a condition of participation, imposed on a religious entity in a federal funding program, might violate RFRA."[31]

To be sure, among other cases, Congress modeled RFRA on cases in which the Court struck down the denial of unemployment benefits to employees dismissed because they refused to perform certain work that conflicted with their religious beliefs or obligations.[32] But those cases do not justify the decision the Justice Department made in its World Vision memorandum.

There are large and important differences between unemployment benefits and government grants. As Cornell Law Professor Michael Dorf has explained, "unemployment benefits are a form of insurance, to which employers have contributed premiums on behalf of their employees, and so the withholding of such benefits may be more akin to a penalty than a pure failure to subsidize."[33] Likewise, Professors Lupu and Tuttle have noted that, while the Justice Department memo attempted to suggest that the grant to World Vision was some form of entitlement because it was earmarked for them, "World Vision would have had no claim of legal right to the grant if [the Justice Department] had declined to make it."[34] Lupu and Tuttle contrast this with the fact that the free exercise plaintiff in the *Sherbert* case "did have a claim of legal right to unemployment benefits if the state authorities did not have adequate legal cause to deny those benefits."[35]

Similarly, it is understood that the administration of government grant funds by a nonprofit must meet certain standards, constitutional and otherwise. In contrast, unemployment benefits are not seen in the same light, and Ms. Sherbert was free to treat that money as personal funds upon receipt. While it would be inappropriate for the government to place restrictions on the use of unemployment benefits, it is appropriate and necessary for the government to place certain restrictions on the use of government grants.

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[30] Ira C. Lupu and Robert W. Tuttle, *The State of the Law 2008: A Cumulative Report on Legal Developments Affecting Government Partnerships with Faith-Based Organizations* (Roundtable on Religion and Social Welfare Policy, December 2008) at 34 (footnote omitted).
[31] *Id.* at n.96.

[32] In *Sherbert v. Verner*, the Court held that the state must provide unemployment compensation benefits to a religious claimant who was fired from her job because of her failure to perform job-related duties that she believed her faith prohibited. 374 U.S. 398 (1963).
[33] Michael C. Dorf, *Why the Constitution Neither Protects Nor Forbids Tax Subsidies for Politicking from the Pulpit, and Why Both Liberals and Conservatives May be on the Wrong Side of this Issue* (October 6, 2008) at http://writ.news.findlaw.com/dorf/20081006.html
[34] Ira C. Lupu and Robert W. Tuttle, *The State of the Law 2008: A Cumulative Report on Legal Developments Affecting Government Partnerships with Faith-Based Organizations* (Roundtable on Religion and Social Welfare Policy, December 2008) at n.103.
[35] *Id.*

Also, in the *Sherbert* case, the Court mandated the extension of funds that were used to pay for the subsistence of an unemployed worker. Endangering an unemployed individual's ability to pay for food and housing is not the same as endangering the ability of a religious organization to receive a government grant to provide social services in the way it chooses. Even the Justice Department's World Vision memo recognizes that a refusal to provide it with an exemption from religious nondiscrimination conditions on government funds "may not be as important as the denial of unemployment compensation to an individual . . . ."[36] While it would assumedly have been difficult for Ms. Sherbert to survive without these unemployment benefits, World Vision remained free to reject government grants and thus avoid any burden.[37]

Likewise, the application of this kind of nondiscrimination obligation to government funds flowing to religious organizations would be less onerous than the application of other restrictions the Court has approved in an analogous case.[38] In the 2004 case of *Locke v. Davey*, the Court upheld a law enacted in the state of Washington that provided scholarships to students for postsecondary educational expenses but prohibited students from using the scholarship at a school where they were pursuing a degree in devotional theology.[39] The Supreme Court held that this limitation on the scholarships, a restriction Washington believed to be required by its state constitution, did not violate the federal Free Exercise Clause or any other provision of the federal constitution, even though the state was under no obligation to have such a law under the federal Establishment Clause.

The Court noted that the state law did not prohibit students from using a state scholarship "to pursue a secular degree at a different institution from where they are studying devotional theology."[40] In other words, the Court did not consider the fact that a student might have to attend two different colleges to use these funds to be tantamount to forcing the student to choose between his faith and the scholarship. It concluded that "[t]he State's interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden" on beneficiaries of the scholarship program.[41]

If the Court in *Locke v. Davey* considered the fact that a student might have to attend two different colleges to use state scholarship funds to place only "a relatively minor burden" on the student, the fact that a religious organization would be prohibited from discriminating on the basis of religion with regard to jobs within the government program but permitted to do so vis-à-vis jobs within the same organization but outside the government program hardly seems to create a greater burden on religious exercise.[42] Further, like the statutory structure in *Locke*, a statute that permits religious organizations

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[36] World Vision Memo at 15.
[37] World Vision has said that in recent years it has received approximately eighty-four percent of its cash contributions from churches and co-religionists. Spencer v. World Vision, 619 F.3d 1109 (9th Cir. 2010).
[38] Locke v. Davey, 540 U.S. 712 (2004).
[39] *Id.* at 715.
[40] *Id.* at n.4
[41] *Id.* at 725.
[42] While the Court did not purport to apply RFRA to the facts at issue in *Locke v. Davey*, it seems reasonable to assume that something that is "a relatively minor burden" constitutes less than a "substantial burden" under RFRA.

to compete for federal social service funds, takes steps to protect the autonomy of religious institutions, and prohibits religious discrimination only in the context of government funding would seem to "go[] a long way toward including religion in its benefits."[43]

Still, in its World Vision memorandum, the Justice Department attempted to draw a distinction between *Locke v. Davey* and the case before it. The Department said that, in contrast to the Court's decision in *Locke*, "it does not appear that World Vision's programs could be revised to conform to the Safe Streets Act's nondiscrimination provision without losing their nature as exercises of religion protected by RFRA."[44] But in addition to retaining the ability to configure their programs in the ways described above, the religious organization would remain free to refrain from accepting the grant and thus avoid any burden.

It is worth noting that there is nothing unusual about a religious organization operating solely on the basis of nongovernmental funds. Indeed, it is commonplace. And religious organizations that do so do not operate outside the scope of public life. An organization does not have to partner with government – financially or nonfinancially -- to be a recognized, influential, and respected leader in civic life.

Statutory Issues: Congressional Intent and the Religious Freedom Restoration Act

Some have argued that Congress intended with RFRA to block the application of certain nondiscrimination provisions that follow government funding to religious entities.[45] In the World Vision memo, the Justice Department correctly notes that a July 1993 Senate Committee Report on this Act said RFRA "confirms that granting Government funding, benefits or exemptions, to the extent permissible under the establishment clause, does not violate the act; but the denial of such funding, benefits or exemptions may constitute a violation of the act, as was the case under the free exercise clause in *Sherbert v. Verner*."[46]

What the Department of Justice memo does not report, however, is that another section of that same Senate report states: "[P]arties may challenge, under the Religious Freedom Restoration Act, the denial of benefits to themselves as in *Sherber*[*t*]. The act does not, however, create rights beyond those recognized in *Sherbert*."[47] As noted above, the *Sherbert* case involved a denial of unemployment compensation to an individual, a situation markedly different from a refusal to allow a government grantee to discriminate on the basis of religion with regard to government-funded jobs.

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[43] Locke v. Davey, 540 U.S. at 724.

[44] World Vision Memo at 25.

[45] See Melissa Rogers, "Federal Funding and Religion-based Employment Decisions," chapter in *Sanctioning Religion? Politics, Law, and Faith-based Public Services*, ed. David K. Ryden and Jeffrey Polet (Lynn Rienner Publishers) (2005).

[46] *Religious Freedom Restoration Act of 1993*, Report of the Senate Committee on the Judiciary, Senate Report No. 103-111 (July 27, 1993) at 14 (as partially quoted in World Vision Memo at n.13).

[47] *Religious Freedom Restoration Act of 1993*, Report of the Senate Committee on the Judiciary, Senate Report no. 103-111 (July 27, 1993) at 12 (emphasis added).

Indeed, this section of the Senate RFRA report also says it was not the intent of the law to try to affect issues such as "whether religious organizations may participate in publicly funded social welfare and educational programs . . . ."[48] Instead, the report notes, those kinds of cases "have been decided under the establishment clause and not the free exercise clause," and this "act does not change the law governing these cases."[49] Thus, the Senate Judiciary Committee explained, a number of provisions were added to the legislation "to clarify that this is the intent of the committee," including "a section which provides that the granting of benefits, funding, and exemptions, to the extent permissible under the establishment clause, does not violate [RFRA]; and a further clarification that the jurisprudence under the establishment clause remains unaffected by the act."[50] Congress' understanding, therefore, was that whether (and under what conditions) religious organizations could receive social service funds was an Establishment Clause rather than a Free Exercise Clause matter, and the intent of RFRA was not to affect the development of Establishment Clause cases.

Given the state of Establishment Clause jurisprudence at the time, these issues were not prominent at this time.[51] By the time Congress considered the Religious Liberty Protection Act (RLPA) (legislation intended to have virtually an identical effect as RFRA), however, these issues had taken a place at the center of the church-state stage.[52] Like the coalition that supported RFRA, the coalition that backed RLPA had differing views on the extent of the government's power to attach nondiscrimination conditions to government funding. In light of the newfound prominence of these issues, language was inserted in RLPA to make it clear that the legislation was not an attempt to move the law in this area. Relevant language from the House-passed RLPA was entitled, "Other

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[48] *Id.*

[49] *Id.*

[50] *Id.* This is the full statement on these issues from the 1993 Senate Judiciary Committee report:

> [C]oncerns have been raised that the act could have unintended consequences and unsettle other areas of the law. Specifically, the courts have long adjudicated cases determining the appropriate relationship between religious organizations and government. In particular, Federal courts have repeatedly been asked to decide whether religious organizations may participate in publicly funded social welfare and educational programs or enjoy exemptions from income taxation pursuant to 26 U.S.C. 501(c)(3) and similar laws. Such cases have been decided under the establishment clause and not the free exercise clause. In fact, a free exercise challenge to Government aid to a religiously affiliated college was rejected by the Supreme Court in Tilton v. Richardson. This act does not change the law governing these cases. Several provision[s] have been added to the act to clarify that this is the intent of the committee. These include the provision providing for the application of the article III standing requirements; a section which provides that the granting of benefits, funding, and exemptions, to the extent permissible under the establishment clause, does not violate the Religious Freedom Restoration Act; and a further clarification that the jurisprudence under the establishment clause remains unaffected by the act.

Id. (footnote omitted).

[51] See Melissa Rogers and E.J. Dionne, Jr., *Serving People in Need, Safeguarding Religious Freedom: Recommendations for the New Administration on Partnerships with Faith-Based Organizations*, (Brookings Institution)(2008).

[52] In 1997, the Supreme Court invalidated the application of RFRA to states and localities, which gave rise to RLPA. City of Boerne v. Flores, 521 U.S. 507 (1997).

Authority to Impose Conditions on Funding Unaffected." [53] It stated in part: "Nothing in this Act shall (1) authorize a government to regulate or affect, directly or indirectly, the activities or policies of a person other than a government as a condition of receiving funding or other assistance; or (2) restrict any authority that may exist under other law to so regulate or affect, except as provided in this Act."[54]

And, of course, the congressional coalition that backed RFRA and RLPA included members of Congress who opposed religious discrimination in government-funded jobs then and oppose it today. In sum, it is simply incorrect to claim that Congress intended RFRA to trump religious nondiscrimination conditions on government funds flowing to religious organizations.

Policy Issues: Equal Opportunity in Federally Funded Employment

There are strong public policy arguments for prohibiting religion-based decision-making in government-funded jobs. One of those arguments is the longstanding tradition of equal opportunity in government-funded employment regardless of religion or creed. Through a 1941 executive order, for example, President Franklin Roosevelt required all defense contracts to contain "a provision obligating the contractor not to discriminate against any worker because of race, creed, color, or national origin. . . ."[55] A preamble to this executive order emphasizes a "firm belief that the democratic way of life within the

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[53] Section Five of the House-passed RLPA stated:

> **SEC. 5. RULES OF CONSTRUCTION.**
>
> (a) RELIGIOUS BELIEF UNAFFECTED-Nothing in this Act shall be construed to authorize any government to burden any religious belief.
>
> (b) RELIGIOUS EXERCISE NOT REGULATED-Nothing in this Act shall create any basis for restricting or burdening religious exercise or for claims against a religious organization, including any religiously affiliated school or university, not acting under color of law.
>
> (c) CLAIMS TO FUNDING UNAFFECTED-Nothing in this Act shall create or preclude a right of any religious organization to receive funding or other assistance from a government, or of any person to receive government funding for a religious activity, but this Act may require government to incur expenses in its own operations to avoid imposing a burden or a substantial burden on religious exercise.
>
> (d) OTHER AUTHORITY TO IMPOSE CONDITIONS ON FUNDING UNAFFECTED-Nothing in this Act shall-
>
> (1) authorize a government to regulate or affect, directly or indirectly, the activities or policies of a person other than a government as a condition of receiving funding or other assistance; or
> (2) restrict any authority that may exist under other law to so regulate or affect, except as provided in this Act.

[54] *Id.*

[55] See Melissa Rogers, "Federal Funding and Religion-based Employment Decisions", chapter in *Sanctioning Religion? Politics, Law, and Faith-based Public Services*, ed. David K. Ryden and Jeffrey Polet (Lynn Rienner Publishers) (2005).

Nation can be defended successfully only with the help and support of all groups within its borders. . . ." [56]

In 1951, President Harry Truman took "[a] major step" to extend this tradition by "iss[uing] a series of executive orders directing certain government agencies to include nondiscrimination clauses in their contracts." When President Kennedy issued an executive order in 1961 establishing a presidential committee on equal employment opportunity, he observed: "[I]t is the plain and positive obligation of the United States Government to promote and ensure equal opportunity for all qualified persons, without regard to race, creed, color, or national origin, employed or seeking employment with the Federal Government and on government contracts. . . ." And President Lyndon B. Johnson signed a 1965 executive order signed requiring all government contracting agencies to include in every government contract a requirement that the contractor not discriminate against any employee on the basis of "race, creed, color or national origin."[57] Through these actions, the federal government took the laudable step of ensuring that otherwise qualified people could not be disqualified from the competition for federally funded jobs simply because of their faith affiliation or lack thereof.

Those who favor allowing religious organizations to make religion-based decisions in government-funded employment have been quick to say that they do not wish "to exclude people from a particular religion from employment."[58] I certainly take them at their word. But, as U. C. Davis Law Professor Alan Brownstein has noted, various forms of employment discrimination traditionally have been prohibited by our government for at least two independent reasons.[59] We have objected not only to bad motive that drives discrimination, but also to the exclusionary impact created by discrimination.[60] Even assuming an employment decision is made about a government-funded job without any animus on the part of the employer, it still means an employer denied an otherwise qualified applicant simply because of his or her religious identity and beliefs.

There is also a fairness issue here. It is not fair to exclude citizens from eligibility for jobs their tax money subsidizes simply because they are not the "right" religion.

Some who argue that the government should allow religion-based decision-making in government-funded jobs say they are merely seeking to engage in the same kind of mission-based hiring as many other secular nonprofits that receive government grants. They say environmental groups that receive government funds, for example, are

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[56] *Id.*
[57] *Id.* But see Executive Order 13279 in which former President George W. Bush created an exemption from this 1965 executive order for a government contractor or subcontractor that is a religious organization so as to allow such contractors or subcontractors to discriminate on the basis of religion in employment. Executive Order 13279 (December 12, 2002)("Section 202 of this Order shall not apply to a Government contractor or subcontractor that is 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 on by such corporation, association, educational institution, or society of its activities.")
[58] World Vision Memo at 23.
[59] Conversation with Professor Alan Brownstein.
[60] *Id.*

permitted to make employment decisions in government-funded jobs based on the employee's or prospective employee's commitment to certain beliefs about the environment. The argument is that these groups would not hire someone who is hostile to environmentalism, and they do not have to do so, even when they make decisions about government-funded jobs. Therefore, religious groups should have the same freedom, they claim.

A paper I co-wrote in 2008 offered the following response to this argument:

> The government may and sometimes must treat religion differently than it treats other beliefs and activities.
>
> If one were to focus solely on this special limit regarding government funding, it could well appear that religion is being subjected to more restrictive treatment than secular pursuits. But doing so ignores the special protection religion enjoys. The government is often required to observe stringent limits that result in unique protection for free exercise and religious autonomy. The federal Religious Freedom Restoration Act, for example, prohibits unnecessary and substantial burdens on religious exercise and provides no similar protections for secular environmentalism or any other secular activity. Many are happy to recognize the validity of this kind of special treatment by government. It certainly is not a "level playing field," but advocates of religious freedom welcome this "unequal treatment." Some of these same people balk, however, at certain special treatment that might limit religious organizations' use of governmental funds. A strong case can be made that the more equitable and consistent position is to recognize there is a rough symmetry of exemption and limitation under First Amendment principles. [61]

Policy Issues: Mission-Based Employment Decisions in Federally Funded Jobs

Another way the government could address this issue is to adopt a policy that would have the effect of prohibiting religious nonprofits from discriminating on the basis of religion in government-funded jobs but would not single out religion for different treatment. Let me explain.

When the government and a nonprofit agree to partner, it is because they share a mission such as feeding the hungry or moving people from welfare to work. To be sure, the overlap in missions is not complete – there are elements of the government's mission that the nonprofit does not embrace and elements of the nonprofit's mission that the government does not endorse. The partnership is intended to advance the mission that is shared by the government and the nonprofit, not the other aspects of the entities' missions that do not overlap.

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[61] See Melissa Rogers and E.J. Dionne, Jr., *Serving People in Need, Safeguarding Religious Freedom: Recommendations for the New Administration on Partnerships with Faith-Based Organizations*, (Brookings Institution)(2008) at 39.

The government, therefore, could place a condition on all of its grants and contracts that would instruct grantees and contractors that they should use the shared mission as the focus for employment decisions regarding government-funded positions and eschew reliance on other distinctive factors tied to the nonprofit's identity, whether those factors are religious or nonreligious. For example, if the program is aimed at feeding hungry people, the nonprofit that receives government funding for such a program would be permitted to make employment decisions on the basis of that mission as well as other standard factors, such as experience, academic achievement, collegiality, and character. This would have the effect of preventing a religious organization from discriminating on the basis of faith for a government-funded job, but it would also prohibit a feminist social service organization from discriminating on the basis of feminist beliefs for a government-funded job. In short, it is not clear to me why the government should allow its funds to be spent to advance a mission unrelated to the mission it seeks to promote.

I recognize that this may be a novel proposal, and that it could require substantial changes in current policies and practices. Further, let me say that I appreciate the crucial need to ensure that the delivery of federally funded social services is not interrupted, both in this context and in all others discussed in this testimony. Any and all changes in policies should of course be implemented in ways that respect this important goal.

III. Conclusion

I appreciate the opportunity to testify before this subcommittee, and I look forward to discussing these and other issues at the hearing.

Mr. NADLER. Thank you.

Professor Laycock?

I think you were better off a moment ago, but maybe not close enough to the mike. Is the light on?

TESTIMONY OF DOUGLAS LAYCOCK, ARMISTEAD M. DOBIE PROFESSOR OF LAW, HORACE W. GOLDSMITH RESEARCH PROFESSOR OF LAW, PROFESSOR OF RELIGIOUS STUDIES, UNIVERSITY OF VIRGINIA SCHOOL OF LAW

Mr. LAYCOCK. The green light? There we go. Well, it was on but it wasn't on brightly enough, turns out to be the answer.

Thank you, Mr. Chairman. It is good to be back before this Committee.

Let me begin by saying that I am a firm supporter of separation of church and state, but separation is not an end in itself; it has an underlying purpose. Separation is not about aesthetics or mechanics for their own sake; it is not about taking pictures off the walls or making sure that no government dollar ever touches anything religious. It is far more important than that.

The purpose of separation of church and state is to separate the religious choices and commitments of the American people from the overriding power and influence of government, to ensure that Americans and their voluntary associations can act on their faith or on their lack of faith without government interfering and trying to persuade them or coerce them to change their faith commitments or the way they carry out those faith commitments.

So how do we provide that protection in the context of charitable choice? As several of the Committee Members mentioned, government has used grants and contracts to the private sector for a very long time; it has used both religious and secular providers for a very long time.

But before the first charitable choice legislation in 1996 there was very little in the way of visible rules to protect religious liberty. Some government officials liked religious providers and some didn't, and many of them felt free to act on those preferences, to discriminate in favor of religion or against religion.

The charitable choice provisions of the Welfare Reform Act enacted clear religious liberty principles for the first time. I can't speak to what the political motivations of the sponsors were, but the substance of that act stated some very important religious principles—religious liberty principles—no discrimination between religious and secular providers, no surrender of religious identity for the religious providers, no discrimination on the basis of religion against the recipients of the services, no coercion to participate in religious activities, the guarantee of an alternative secular provider to any recipient who asks for one, audit of the government money only, as long as it was segregated from the religious provider's money, no use of government funds to support the religious activities. Much of that was being written down for the first time.

The Bush administration Executive orders that expanded these programs were much less explicit about many of those protections. Some of them were simply omitted.

President Obama's Executive order yesterday, as Professor Rogers just summarized, makes the rules explicit for all programs and

it creates a task force to work on further implementation issues, which is where the real difficult problems often occur. And that leaves employment as the principal disputed issue.

The 1996 legislation says, the President's Advisory Council says, the President's Executive order says religious organizations with government grants and contracts need not surrender their religious identity. Nothing—nothing—is more important to religious identity than the ability to hire employees who actually support the religious mission and will faithfully execute it, and if you want to take that away you are saying the groups—the religious groups that participate in these programs have to secularize themselves in a very dramatic way. It uses the coercive power of the purse to force religious social service providers to become much more secular than they were.

And we have a longstanding commitment in this country against invidious discrimination. Mr. Scott called it bigotry, and that is right. It is against the irrational exclusion of racial and religious minorities, and people on the basis of sex in contexts where those criteria are simply not relevant.

If you are a religious organization, religious affiliation is relevant. It is not about bigotry; it is not about irrational exclusion. It is about the First Amendment. It is about assembling a group of like-minded people in pursuit of a common religious mission and a common activity.

Religion is a protected class but it was never intended to protect—to make religion irrelevant in religious contexts. That doesn't protect religion; that doesn't protect religious minorities. It forces any religious organization, majority or minority, that participates in these programs to abandon an essential part of its mission.

The government says, "Here is a large pot of money. If you run good programs you can win grants, you can expand your operation, you can help more people in need, but if and only if you surrender your right to hire people who support your mission." That violates the fundamental purpose of separation of church and state.

It uses the power of the purse to coerce religious organizations to become less religious and more secular, and that would be a fundamental policy mistake. This Committee should not try to force the Administration into doing that.

One reason that separationists have historically opposed government funding of religious organizations is the fear that regulation and conditions will come with the money and the religious organization will be corrupted. There is no clearer example of that sort of corruption than forbidding these organizations to hire people who actually support their mission. I think the Administration's failure to act on the hiring issue is well advised.

[The prepared statement of Mr. Laycock follows:]

House Subcommittee on the Constitution, Civil Rights, and Civil Liberties

Hearing on Faith-Based Initiatives: Recommendations of the President's Advisory Council on Faith-Based and Community Partnerships and Other Current Issues

November 18, 2010

Statement of Douglas Laycock

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House Subcommittee on the Constitution, Civil Rights, and Civil Liberties

Hearing on Faith-Based Initiatives: Recommendations of the President's Advisory Council on Faith-Based and Community Partnerships and Other Current Issues
November 18, 2010

Statement of Douglas Laycock
University of Virginia Law School

Thank you for the opportunity to testify on the faith-based initiatives and the recommendations of the President's Advisory Council. This statement is submitted in my personal capacity as a scholar. I hold endowed professorships at the University of Virginia Law School, and an emeritus position at the University of Texas at Austin, but of course neither university takes any position on any issue before the Committee.

I have taught and written about the law of religious liberty for thirty-four years now. I have represented both religious organizations and secular civil liberties organizations—groups across the political and theological spectrums. My commitment on these issues is not to one side or the other in any political or cultural conflict, but to genuine religious liberty for all Americans.

I. Overview

The various programs grouped under the heading of Faith-Based and Neighborhood Partnerships are designed to deliver important services to Americans in need. Many Americans respond better to religious motivations than to secular motivations; other Americans respond better to secular motivations than to religious ones. It is therefore reasonable to expect that a menu of religious and secular providers of government-funded services will help more Americans more effectively than either religious or secular providers alone.

These faith-based programs are also designed to better protect the religious liberty of both providers and recipients of government-funded social services. Government agencies have long used religious providers to deliver important services. But before the first charitable choice legislation in 1996, there were no visible rules to protect the religious liberty of either providers or recipients, and the relevant constitutional rules remain undeveloped and little known.

Properly implemented, these programs protect the religious liberty of service providers by prohibiting discrimination between religious and secular providers and between religious providers of different faiths. Funding under most of these programs is delivered through grants and contracts awarded to providers, or what the religious liberty community calls "direct funding." Avoiding discrimination in these direct-funding programs requires that grants and contracts be awarded on the basis of clear and neutral criteria.

These programs further protect the liberty of service providers by protecting the religious autonomy and religious identity of religious providers. If a religious provider is best qualified to deliver the services that government wants to provide, the religious provider should get the grant or contract without having to surrender its religious identity. The government should not use the power of the purse to bribe or coerce these religious providers into surrendering their religious mission or surrendering control of the religious parts of their operations.

Properly implemented, these programs protect the religious liberty of recipients of government-funded services by prohibiting both religious and secular providers from discriminating among recipients on the basis of religion or on the basis of a recipient's willingness to participate in religious observances or practices. It follows from these nondiscrimination rules that a government-funded provider cannot require recipients of services to participate in religious observances or practices.

Again with the important caveat of "properly implemented," these programs further protect the religious liberty of recipients by guaranteeing a secular provider to any recipient who requests one. A state cannot use its power of the purse to bribe or coerce citizens into participation in religious programs.

Properly implemented, programs that fund the best providers of services, whether religious or secular, are better for the providers of services and better for the recipients—better in programmatic terms and better in religious liberty terms. But without careful attention to implementation, it would be easy for these programs to make things worse, secularizing religious providers with heavy-handed conditions on funding, forcing recipients of services into religious programs for lack of any good alternative, or even both at the same time.

II. The President's Advisory Council and Its Recommendations

The President's Advisory Council on Faith-Based and Neighborhood Partnerships made twelve recommendations. I will briefly review those recommendations in light of the ways in which the faith-based initiatives are designed to protect religious liberty.

A. Recommendations 1, 2, and 3

The Council's first three recommendations mostly concern the nitty gritty of delivering government-funded services under these programs. That is a subject on which I claim no expertise. I would merely emphasize that well-defined programs with clear criteria for awards of grants and contracts are relevant to the religious liberty side of these programs, because such criteria make it much easier to avoid discriminating between religious and secular providers and to identify and correct any discrimination that may occur. There have also been allegations of political discrimination in these programs, and clear criteria for awards are equally important to avoiding that problem.

B. Recommendation 4

The Council's fourth recommendation is to re-emphasize to both granting agencies and social service providers the importance of religious liberty and of religious and political neutrality in the implementation of these programs.

I fully agree with these recommendations. I would add that when we emphasize "fidelity to constitutional principle" as an objective of these programs (Advisory Council's Report at 127), "constitutional principle" does not refer merely to limitations designed to constrain the religious content of these programs. It is not just the constitutional constraints on these programs, but also the programs themselves, that serve fidelity to constitutional principle. Religious freedom is best protected when government does not discriminate either in favor of or against religion.

I share the Advisory Council's sense that there is widespread misinformation and misunderstanding about the proper workings of these programs. Grants and contracts are administered by many federal, state, and local officials, most of whom are expert in their service program and not in religious liberty, and many of whom are overworked and underfunded. It is essential that such officials understand their religious liberty obligations under these programs, and if we want that to happen, the information has to be available prominently, in plain English, and in the sources of information they customarily look to concerning the grants and contracts that they administer.

The Advisory Council urges government officials to "instruct participants in the grant-making process to refrain from taking religious affiliations or lack thereof into account in this process." (Report at 128). That principle is absolutely fundamental to these programs, and if the Advisory Council believes that that is not already clear, it suggests that we have a long way to go in educating the bureaucracy about the proper working of these programs.

C. Recommendation 5

Recommendation 5 urges the government to clarify the explicitly religious activities that cannot be funded with federal funds. Again I agree. And here, the information must reach not just the many government officials awarding grants and contracts; it must reach the religious grantees.

D. Recommendation 6

Recommendation 6 is to give equal emphasis to protections for religious identity and to requirements that the religious and secular activities of government-funded service providers be separated in time or space.

Protection for the religious identity of religious service providers is essential to religious liberty and to the integrity of the faith-based initiative. Unless we protect the distinct identities of religious and secular service providers, these programs become destructive of religious liberty rather than protective of it. I regret that this recommendation was not more thorough going and that it was not unanimous. I will return at the end to the issue of employment, which is the most critical point about protecting religious identity.

The Advisory Council also emphasizes that religious activities must be supported with private funds, must be voluntary for recipients, and must be "separate in time or location from programs funded by direct government aid." (Report at 132). The requirements that religious activities be supported with private funds and voluntary for recipients are important and largely uncontroversial.

The requirement that any privately funded religious activities be separated in time or location from any government-funded secular services has come to be part of the conventional wisdom concerning these programs, and it is now embodied in federal regulations. But I do not believe that such separation is required by the Constitution.

Such separation is an administratively created prophylactic rule that protects religious liberty in some ways and constrains it in others. Separation of secular and religious functions makes it easier for religious providers to comply with their obligation not to coerce recipients of services into participating in religious activities. On the other hand, such separation interferes with religious identity and it prohibits religious free speech even when offered to individuals or audiences willing or eager to hear it. Such separation of religious and secular components of a program makes it more difficult to achieve the goal of offering genuinely secular and genuinely religious alternatives with respect to services that can be delivered either way. That goal enhances religious liberty and probably enhances programmatic success as well. The separation requirement now embedded in federal regulations is probably counterproductive.

The Supreme Court has not announced such a separation requirement in the twenty-four years since it began its shift to the view that equal funding for all providers, on a religion-neutral basis, is consistent with the Establishment Clause. The Committee should not assume that this administrative requirement of separation is also a constitutional requirement.

E. Recommendation 7

The Advisory Council's seventh recommendation is that the government emphasize and state more clearly the distinction between direct and indirect aid. Direct aid is aid paid directly from the government to the religious service provider, usually pursuant to a grant or contract. Indirect aid is aid delivered through the independent choices of private citizens, usually through some form of voucher.

I agree that this distinction is central to the Supreme Court's case law, although I predict that it will become less important over time. But even if some of today's doctrinal distinctions fade away, an important practical issue will remain.

If funds are distributed to service providers through the independent choices of the recipients of services, then there is

little risk that government officials will discriminate between religious and secular service providers, or between religious service providers of different faiths. From the government's perspective, the distribution of funds is mechanical: the money goes to the provider chosen by each recipient of services.

But if government awards grants or contracts to providers chosen by the funding agency, then government discretion is inherent in the process, and the risk of deliberate or inadvertent discrimination is ever present. Then it becomes critical to have clear criteria and procedures in place to ensure that grants and contracts are awarded without regard to religion.

F. Recommendation 8

Recommendation 8 is to increase transparency of these programs. This includes more specific recommendations to post online all the rules and governmental guidance for these programs, the forms needed to apply for and administer grants and contracts, and a list of service providers that receive federal funds.

These recommendations would protect religious liberty in multiple ways. Posting rules and guidance online would help to disseminate that information and make it easier for funding agencies and funded service providers to comply. It would make the information more readily accessible to all and reduce the disadvantages now faced by service providers who are not familiar with the process for awarding grants and contracts. Posting lists of providers awarded grants and contracts would increase the odds that any discrimination for or against religious providers would be detected. These are all good recommend-dations.

G. Recommendation 9

Recommendation 9 is a set of recommendations for monitoring compliance with the religious liberty rules that govern these programs.

This is a very important set of recommendations. These tend to be low visibility programs, hard to monitor from the outside. There is a risk that funding agencies will discriminate between religious and secular providers, either because of failure to understand the rules or because of active hostility to the rules. And there is a risk that funded service providers will coerce religious participation or discriminate against nonbelieving recipients of services, again through either misunderstanding or willfulness.

Compliance cannot be left merely to the good faith and understanding of the many different federal, state, and local funding agencies or the many different funded service providers. I fully endorse the recommendations for monitoring compliance.

H. Recommendation 10

Recommendation 10 is to strengthen the implementation of protections for the religious liberty of recipients of government-funded services. This is critical. These protections will not enforce themselves.

Recipients of government-funded services are often uninformed, struggling with other serious problems, and dependent on the service provider. We cannot assume that they either know their rights or will assert them.

The guarantee of a secular alternative to religious providers is fundamental to these programs. But it may be difficult to implement in a world where these programs are often underfunded and oversubscribed. Government may have to increase funding and the number of spaces in programs, or else reserve existing spaces, to ensure that a secular provider is available for all recipients who request one.

I. Recommendation 11

Recommendation 11 is that the Internal Revenue Service make it easier and less expensive for religious organizations to

obtain formal recognition of their status as tax-exempt organizations under §501(c)(3). This is a sound recommendation.

Churches and similar places of worship in other faiths, their integrated auxiliaries, and conventions and associations of churches and similar places of worship, are automatically entitled to tax exemption under §501(c)(3). But claiming their automatic exemption gives them no document from the IRS to prove their tax-exempt status. To get that, they have to go through the whole elaborate process required of organizations whose charitable status may be much less apparent.

There needs to be an intermediate solution, by which organizations that are automatically exempt under §501(c)(3) can get documentation of that exemption with reasonable cost and effort. This is what the Advisory Council has recommended.

J. Recommendation 12

Recommendation 12 is to promote other means of protecting religious liberty in these programs. One such means suggested is to develop a list of best practices among religious providers, and to make that list available to all religious providers. This is a good recommendation.

I would add that the government should compile a similar list of best practices among funding agencies, and make that list available to all funding agencies.

Much of the Advisory Council's discussion of Recommendation 12 is devoted to the question of whether religious service providers should form a separate corporation to receive government funds. And by a vote of 13-12, the Advisory Council recommends that government require such separate corporations.

This recommendation is a mistake. The separate corporation is a formality that does little or nothing to protect religious

liberty. Corporate status exists in the lawyer's office and the accountant's office; it is largely meaningless on the ground.

The employees who actually provide the services are the ones who must comply with the rules for protecting the religious liberty of recipients. They may respect the religious autonomy of recipients, or they may try to force religious ministrations on recipients who do not want them. They may take either course as employees of a church, and they may take either course as employees of a separate corporation. It is the employees in direct contact with service recipients who are critical, not a corporate structure that employees may not understand or even know about.

I agree that it is important to keep government funds separate from private funds, but that can be done with separate bank accounts, with or without a separate corporation. There are substantial incentives to separate bank accounts, most obviously in the audit requirements. Funds provided by government grant or contract are subject to government audit, and as the 1996 legislation recognized, if the government funds are commingled with other funds, the entire commingled fund becomes subject to audit. If the government funds are segregated, then the government has no reason to audit anything else. 42 U.S.C. §604A(h)(2) (2006). Separate corporations are not needed to reinforce this strong incentive to segregating funds.

III. The Issue of Employment

An issue the Advisory Council did not address is whether a religious organization that receives a federally funded grant or contract must forfeit its right to prefer employees who share the organization's faith commitments. If a religious organization provides social services eligible for government funding, but provides those services with a workforce committed to the organization's religious teachings and mission, may or must that organization be excluded from government funding on the ground of its employment practices?

In its Recommendation 6, the Advisory Council emphasized the importance of protecting the religious identity of religious providers who accept government funds. Nothing is more important to religious identity than the ability to hire employees who support the religious mission and will faithfully implement it. No protection for religious liberty in these programs is more important than protecting the right to hire such employees.

Protecting recipients of services from religious coercion is *equally* important, but it is not *more* important. The issue in each case is the same: the power of government funding should not be used to coerce either providers or recipients of government-funded services into becoming more or less religious then they would be of their own free will. Neither providers nor recipients should be coerced into participating in religious activities against their will or into abandoning or limiting religious activities against their will.

From the beginning of the modern civil rights era, Congress has protected the right of religious organizations to employ "individuals of a particular religion." 42 U.S.C. §2000e-1(a) (2006); 42 U.S.C. §2000e-2(e)(2) (2006). Religious organizations should not forfeit this statutory right (which in at least some contexts is also a constitutional right) when they accept a government grant or contract to provide social services.

An offer of funding conditioned on forfeiting the right to employ adherents of the faith would force the religious organization either to abandon its religious exercise in order to fund its program, or to forfeit potential funding in order to maintain its religious exercise. Such conditional offers of funding would convert the faith-based initiative from a program that protects religious liberty, by prohibiting discrimination between religious and secular providers, into a program that attacks religious liberty by bribing or coercing religious providers into surrendering their religious identity. Opponents of the faith-based initiative, who would exclude religious providers from participating in government-funded programs in the first place, can get their way indirectly if they can require all the religious providers to secularize their workforces as a

condition of participation. If all the workforces are secularized through bans on consideration of religion in hiring, there will soon enough be no genuinely religious providers participating. Both the religious liberty goals and the programmatic goals of the faith-based initiative would be defeated.

Requiring religious providers to surrender their right to hire would be fundamentally wrong as a matter of policy. It would also be illegal. As the Supreme Court has long recognized, requiring a person to surrender part of his religious exercise as a condition of receiving government funding amounts to a financial penalty on the exercise of religion. In the first modern case under the Religion Clauses, a case much cited by strict separationists, the Court said that a state may not exclude any persons, "because of their faith or lack of it, from receiving the benefits of public welfare legislation." *Everson v. Board of Education*, 330 U.S. 1, 16 (1947). In *Sherbert v. Verner*, the Court said that loss of financial benefits on account of Sabbath observance "puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship." 374 U.S. 398, 404 (1963). In *Thomas v. Review Board*, 450 U.S. 707, 718 (1981), the Court said that conditioning benefits on abandonment of religious practice puts "substantial pressure on an adherent to modify his behavior and violate his beliefs," and that when this happens, "a burden upon religion exists." "While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." The Court repeated each of these statements in *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136, 140–41 (1987), and it reaffirmed them again in *Frazee v. Illinois*, 489 U.S. 829, 832 (1989). These cases are part of the law of the Religious Freedom Restoration Act, which was enacted specifically "to restore the compelling interest test as set forth in *Sherbert v. Verner*." 42 U.S.C. §2000bb(b)(1) (2006).

Funding without conditions protects the religious liberty of the groups that are funded. What about the religious liberty of those who would work for government-funded charities? What about the charge of "government-funded discrimination"?

The way to protect the religious liberty of those who would work for charities is to fund a diverse array of charities without discrimination. Many government-funded charities will be secular, and those that are religious will come from a variety of faiths. When these employers are considered collectively, there will be jobs for employees of all faiths and of none. We cannot protect an individual right to work for specific religious organizations without destroying the separate religious identities of those organizations.

The whole notion of a right to work for a religious organization without regard to whether the applicant shares the organization's religious commitments is founded in a category mistake. Religion became part of the canonical list of civil rights categories when Congress's attention was focused on employment in the commercial sector. The goal was to ensure that religious minorities could participate in business, work in the professions or any other occupation, and receive services from "establishments doing business with the general public." S. Rep. 88-872, 1964 U.S. Code, Cong. & Admin. News 2355, 2355. No one ever intended to require synagogues to appoint Baptist rabbis, or Catholic Charities to hire atheist social workers. That is why Title VII contains express exceptions to keep that from happening.

Government funding does not change the competing interests in religious liberty. A claimed right to work for a religious organization without supporting that organization's religious commitments is still fundamentally inconsistent with religious liberty; it is still destructive of a religious organization's right to exercise its religion.

One traditional reason for opposing the grant of government funds to religious organizations has been that government money would corrupt religious organizations, because the money would inevitably come with conditions that would force religious organizations to distort their mission or abandon tenets of their faith. This is a genuine risk, and programs under the faith-based initiative should be designed to minimize the danger. It is counterproductive at the level of first principle to

claim that such corrupting conditions are actually *required*—that government cannot grant funds to religious charities unless it requires them to abandon religious hiring, or any other tenet of their faith. If there are going to be grants to religious organizations, these grants should be structured in a way that protects religious liberty, not in a way that burdens it.

A ban on religious hiring by religious organizations would also be unworkable. No one seriously believes that the major Jewish charities will hire a Christian or Muslim Executive Director, or that Catholic Charities will put Jews and Protestants in its top positions, or that an evangelical Protestant church will appoint a nonbeliever to head its §501(c)(3) affiliate. Not even the most rigorous opponents of a religious organization's right to hire members of the faith seem to expect that. Disqualifying all religious charities that hire members of their own faith even for executive positions would immediately disqualify all religious charities.

Most religious charities want a critical mass of believers in rank-and-file positions too. Some want believers in every position. Allowing religious charities to hire believers for executive positions, while disqualifying charities that hire believers for "too many" positions, would burden these charities' exercise of religion as described above. It would also require intrusive government inquiries into many jobs at each organization, and it would require difficult line drawing to distinguish positions in which religious hiring is permitted from other positions in which it is not. Such intrusive government inquiries into religious organizations are a Religion Clause problem in themselves. It was to avoid the burden of such inquiries, and to avoid the burden of negative answers, that Congress amended Title VII to allow religious organizations to prefer believers for work in *all* their activities, not merely their "religious" activities. *Compare* Civil Rights Act of 1964, §702, 78 Stat. 253, 255; *with* Equal Employment Opportunity Act of 1972, §3, 86 Stat. 103, 103–04.

None of this analysis is changed by the Supreme Court's decision in *Christian Legal Society v. Martinez*, 130 S. Ct. 2971

(2010). That decision upheld an alleged rule that recognized student organizations at the Hastings Law School must be open to all students, with no membership requirements based on status or belief. There are two things to note about that case. First, the opinion interpreted the Constitution; it did not interpret the Religious Freedom Restoration Act.

Second, the opinion carefully avoided addressing the most important constitutional difficulty. The original rule at Hastings tracked the general pattern of civil rights laws in the United States. The rule prohibited religious discrimination; it did not prohibit political or ideological discrimination. The Christian Legal Society argued that this was viewpoint discrimination. Student organizations with political viewpoints could protect their identity by insisting on *political* loyalty, but student organizations with religious viewpoints could not protect *their* identity by insisting on *religious* loyalty.

Hastings worked very hard to keep that issue from being decided, announcing in the midst of litigation that its unwritten policy had always been that every student organization must be open to every student, with qualifications that dribbled out later. The Supreme Court worked hard to avoid deciding that issue, accepting Hastings' repeated changes and clarifications of its policy. So the Court declined to consider whether it is constitutional to single out religious organizations as the only organizations that could not insist that their members support their cause. *See id.* at 2982–84.

Of course the federal civil rights laws track the usual categories; religious discrimination is prohibited but political and ideological discrimination is not. So environmental organizations are not required to hire employees who are opposed to environmental protection, and no statute changes that situation if the environmental organization receives a federal grant for a demonstration project. An environmental organization is entitled to insist that its employees support the cause.

A religious organization has the same right to insist that its employees support its cause. This right is guaranteed by the exemptions for religious organizations in Title VII. Neither Congress nor the executive branch should change the law so that religious organizations forfeit that guarantee if they accept a federal grant. Such a change would be destructive of religious liberty, not protective of it.

IV. A Further Note on the Religious Freedom Restoration Act

I explained above why the Religious Freedom Restoration Act protects the right of religious organizations to hire employees who share the organization's faith commitments. There is another step to that argument. It depends on close textual analysis of the statute, so I have saved it for this separate section.

It is sometimes suggested that RFRA is simply inapplicable to federal grant programs. That is inconsistent with the statutory text, which says that RFRA "applies to *all* federal law, and to the implementation of that law." 42 U.S.C. §2000bb-3(a) (2006) (emphasis added). It is also inconsistent with the expressly stated intent to codify *Sherbert v. Verner*, which was a case in which government withheld a grant of funds.

Even more specifically, it is inconsistent with the express indication in the statutory text that Congress thought about grant programs and expressly declined to exclude them from the Act. This last point is textually complex, depending on a double negative that is spread over two sentences, but it is important to parse it through. Section 2000bb-4 first says that RFRA does not affect the Establishment Clause. Then it says that "[g]ranting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall *not* constitute a violation of this chapter." "This chapter" is all of RFRA. So RFRA does not prohibit grants to religious organizations.

Mr. NADLER. I thank the witness.
Reverend Lynn?

TESTIMONY OF BARRY W. LYNN, EXECUTIVE DIRECTOR, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE

Rev. LYNN. [Off mike.]—the single most important action that remains is to undo President Bush's Executive orders and regulations that permit a religious entity that receives a government grant or contract to make hiring decisions for the very programs that are federally funded on the basis of religion. This is sometimes referred to as preferential hiring, but it is more accurately labeled simply as discrimination and it is ethically and legally wrong.

President Obama knew this when he spoke as a candidate in 2008 and affirmed that you can't use grant money to discriminate against the people you hire on the basis of their religion, and I would say the American people know it as well and that is why 73 percent of Americans polled that same year said that a religious group that wanted to engage in discriminatory hiring should not get tax dollars at all. It is terribly wrong to reject the best-qualified person for a secular job at a faith-based institution because he or she does not pass a religious litmus test.

In my experience a Baptist does not ladle out rice in a soup kitchen differently than does a Buddhist. A Catholic does not tuck in the sheets at a homeless shelter in a way that differs from how it would be done by a Quaker.

Some who lead religious organizations wouldn't call what they want to do unethical or illegal, or even wrong. They simply say they are more comfortable working with people who believe as they do—people like themselves.

Many of us have heard all that before. We heard it about race; we heard it about gender. But level of comfort is not a constitutionally permissible basis for selecting what job another person can seek.

Discriminatory hiring has very real consequences. Saad Mohammad Ali, a refugee from Iraq, had volunteered for 6 months at the charity World Relief up in Seattle. A coworker suggested he apply for a paid position as an Arabic-speaking caseworker. Just days later he was called and told not to bother applying because he was, after all, a Muslim and not a Christian.

If World Relief were funded entirely with private dollars it would be allowed to make such judgments under Title 7 of the Civil Rights Act. Many of us might not like that but that is what the law permits.

But when a religious entity gets dollars from taxpayers—the taxpayers whose beliefs range from atheism to Zoroastrianism, from A to Z—the calculus quite properly changes. The civil rights framework of our country comes into play and such discrimination must be legally impermissible.

I don't want to impair the religious character of any church, or temple, or synagogue, or charitable group. But the free exercise of religion is not burdened when a group voluntarily accepts government funds knowing that it contains constraints on certain religiously-motivated conduct like hiring only your own followers.

The First Amendment to the United States Constitution is not an excuse to refuse to play by American rules when you are playing with Americans' dollars. And the rules at the Federal level do matter all over this country.

A state-funded Methodist social service agency in Georgia felt that it had the right to deny a man named Alan Yorker a job as a psychologist. What had he done? He filled in his job application with the name of his Rabbi and his synagogue in the spaces marked "pastor" and "church" and then was told, "We don't hire people of your faith."

Mr. Yorker filed a lawsuit. It has been settled in his favor.

Some members of the President's Advisory Council claim that if we "burden religious providers with hiring rules they will not accept government funds and this will reduce their ability to help people in need." This sometimes, to me at least, sounds more like a threat than it does a moral rationale.

Indeed, if World Vision, which refuses to hire non-Christians, refused to take the $343 million worth of government grants it receives there are dozens of other charities, religious and secular, eager to apply for those grants. Most religious charities have always hired the best people they could find to work out their social missions without asking them to swear allegiance to any specific religious creed and they would continue to do so.

Prohibiting discrimination on the basis of religion requires relatively simple action. Congress can do it with a few lines of statute or the President with a short Executive order undoing that wrong initiated less than a decade ago.

This is not hard. It is not reform of the health care system. It is not extricating the United States from Afghanistan.

It is, Mr. Scott, not rocket science.

It is simple justice. Thank you.

[The prepared statement of Rev. Lynn follows:]

Testimony of the

Rev. Barry W. Lynn

Executive Director

Americans United For Separation of Church and State

Submitted To

U.S. House of Representatives Committee on the Judiciary
Subcommittee on Constitution, Civil Rights, and Civil Liberties

Written Testimony for the Hearing Record on

"Faith-Based Initiatives: Recommendations of the President's Advisory Council on Faith-Based and Community Partnerships and Other Current Issues"

November 18, 2010

Mr. Chairman, Ranking Member Sensenbrenner, and Members of the Subcommittee, thank you for this opportunity to present testimony on behalf of Americans United for Separation of Church and State (Americans United) on the current status of the Faith-Based Initiative. Americans United is a religious liberty organization based in Washington, D.C., with more than 120,000 members and supporters across the country. Founded in 1947, the organization educates Americans about the importance of church-state separation in safeguarding true religious liberty.

In addition to its own efforts to protect religious liberty, Americans United has served as the Chair of the Coalition Against Religious Discrimination (CARD) since CARD's formation in the mid-1990s. CARD is a broad and diverse group of leading religious, civil rights, educational, labor, health, and women's organizations that came together specifically to oppose insertion of the legislative proposal commonly known as "charitable choice" into authorizing legislation for federal social service programs. Since then, CARD has continued to oppose efforts that further entrench and expand related policies in federal programs.

Religious freedom issues are of particular importance to me personally, as I am both an ordained minister in the United Church of Christ and an attorney. In addition, I served on the Reform Taskforce of the President's Advisory Council on Faith-Based and Neighborhood Partnerships, and, therefore, have an additional perspective on the Council's final recommendations.

At the outset, let me be clear that we do not need a Faith-Based Initiative at all. Religious organizations have a longstanding tradition of providing social services, including in some cases, with the use of government funds. Such participation long predates the Faith-Based Initiative.

Traditionally, religiously affiliated organizations that have accepted government funds to provide such services have played by the same rules as other non-religious providers. Despite the rhetoric surrounding the "faith-based" debate, these proposals are not necessary and never were necessary for government collaboration with faith-based groups. The Faith-Based Initiative was a solution in search of a problem.

Nonetheless, President Barack Obama kept his campaign promise to continue the Faith-Based Initiative, including maintaining the White House Faith-Based Office. My hope is that the Administration will also keep the President's promise to reform the Faith-Based Initiative in significant ways. Unfortunately, nearly two years have passed since the inauguration and the White House and all federal agencies are still operating under the same harmful religious liberty standards and civil rights rules created by the previous Administration.

This inaction is deeply disappointing, but it also has real life consequences. Each day that no action is taken, applicants for federally funded jobs are subject to blatant religious discrimination and the religious liberty rights of social service beneficiaries are compromised.

Thus, I appear before you today, to express my opinion that it is past time for President Obama's Administration to fix the Faith-Based Initiative as promised. In particular, it should act promptly to (1) implement the Council's consensus recommendations released on March 9, 2010; (2) resolve church and state issues about which consensus could not be reached; and

(3) take steps to end the Bush-era policies of federally funded employment discrimination and to affirmatively protect the civil rights of workers in all federal programs.

Background

In the mid-1990s, then-Senator John Ashcroft authored specific legislative proposals known as "charitable choice." These provisions served as the forerunner to the Faith-Based Initiative. They were inserted with little debate or scrutiny into a handful of 1990s-era social service programs, such as Temporary Assistance for Needy Families (TANF) and those created by the Substance Abuse and Mental Health Services Administration (SAMHSA) Act. Indeed, the haste with which Congress acted in authorizing charitable choice is demonstrated by the fact that the early charitable choice statutes vary in confusing ways and conflicting provisions often appear within the same statute.[1]

President Bill Clinton signed these charitable choice provisions into law but issued signing statements indicating that his Administration would not "permit governmental funding of religious organizations that do not or cannot separate their religious activities from [federally funded program] activities," because such funding would violate the Constitution.[2] In short, the Clinton Administration interpreted the provisions as constrained by the constitutional mandates that prohibit the direct government funding of houses of worship and government-funded employment discrimination.[3]

President George W. Bush's Administration vastly expanded charitable choice through the Faith-Based Initiative. Shifting from previous government policy, the Administration made changes that would allow direct government funding of houses of worship as well as sanctioning and promoting government-funded religious discrimination. Furthermore, that Administration took steps to apply charitable choice rules to nearly every federally funded social service program.

In 2001, the Bush Administration proposed legislation (H.R. 7) to expand charitable choice by statute to nearly all federal social service programs. The measure failed in Congress, in large part because of the civil rights and religious liberty concerns that Americans United and CARD raised. The Bush Administration thereafter systematically imposed charitable choice on nearly all federal social service programs through executive orders and federal regulations, allowing religious organizations to participate in federal grant programs without the traditional safeguards that protect civil rights and religious liberty.

Some programs—such as Head Start, AmeriCorps, and those created by the Workforce Investment Act—contain specific statutory provisions barring religious discrimination that cannot be superseded by executive order. As a result, the Bush Administration attempted to repeal these statutory provisions as applied to religious organizations. Each time, Congress, at the urging of Americans United and CARD, rejected these efforts.

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[1] *Compare* 42 U.S.C. § 290kk *with* 42 U.S.C. § 360xx-65.
[2] *E.g.*, William J. Clinton, Statement on Signing the Consolidated Appropriations Act, FY 2001 (Dec. 21 2000).
[3] *See* 151 Cong. Rec. H8317-18 (daily ed. Sept. 22, 2005) (statement of Rep. Emanuel) (stating that the Clinton Administration did not "support," "introduce [language]," "promulgate[] . . . rules," or "enforce[]" rules or policies exempting religious organizations from the ban on government-funded religious discrimination).

Failing in its attempts to repeal these laws in Congress, the Bush Administration's Department of Justice Office of Legal Counsel (OLC) issued its June 29, 2007, Memorandum[4] making the far-fetched assertion that the Religious Freedom Restoration Act of 1993[5] (RFRA) provides religious organizations a blanket exemption to binding anti-discrimination laws.[6]

In effect, the Bush Administration accomplished by executive fiat what it could not by enacting laws.

At the end of the Bush Administration, nearly every social service program was governed by the Faith-Based Initiative: The traditional safeguards that had protected religious liberty had been stripped, and civil rights protections barring the federal funding of religious discrimination had been abrogated. The Administration had even instituted a policy of allowing federally funded religious discrimination in instances where federal law specifically barred such discrimination.

Today, as a legal matter, we stand in precisely the same place.

The Obama Administration

In a July 1, 2008, speech in Zanesville, Ohio, then-candidate Obama announced a vision for a dramatically revised Faith-Based Initiative. He committed himself to changing the current program to ensure that federal funds "can only be used on secular programs." He also committed himself to overturning the Bush-era policy of sanctioning government-funded religious discrimination: "[I]f you get a federal grant, you can't use that grant money to proselytize the people you help and you can't discriminate against them—or against the people you hire—on the basis of their religion." And, he promised his Administration would "ensure that taxpayer dollars only go to those programs that actually work." After eight years fighting against the harms of the Faith-Based Initiative, those of us who support civil rights and civil liberties were greatly relieved to hear these words.

On February 5, 2009, President Obama signed an executive order that created the President's Advisory Council on Faith-Based and Neighborhood Partnerships, but he did not change a single rule or policy from the previous administration. The Council—made up mostly of religious leaders—comprised both those who supported and opposed charitable choice at its inception. The President tasked the Council to make recommendations "for changes in policies, programs, and practices" of the Faith-Based Initiative but removed the issue of employment discrimination from its purview.

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[4] Memorandum for the General Counsel, Office of Justice Programs, from John P. Elwood, Deputy Assistant Attorney General, Office of Legal Counsel *Re: Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act* (June 29, 2007) (OLC Memo).

[5] 42 U.S.C. §§ 2000bb-2000bb-4.

[6] At issue in the memorandum was whether World Vision, which had been awarded a $1.5 million grant by the Office of Justice Programs ("OJP") pursuant to the Juvenile Justice and Delinquency Prevention Act of 1974 ("JJDPA") Pub. L. No. 93-415, 88 Stat. 1109 (codified as amended at 42 U.S.C. §§ 5601-5792a (2000 & Supp. III 2003)), could be exempted from the JJDPA's explicit bar on religious hiring discrimination. The memorandum concluded that World Vision did not need to adhere to the statutory requirement that program funds not be used to fund religious discrimination. OLC Memo at 1.

Americans United was deeply disappointed that the Obama Administration did not simply make the necessary changes to restore civil liberties and civil rights protections in that executive order. Americans United, along with CARD, had offered suggestions to the Administration that could readily have been inserted into an executive order to fix every one of the noted problems with the Initiative. Nonetheless, we committed to work with the Administration to try to bring about needed reform. I even joined the Council's Taskforce for the Reform of the Faith-Based Initiative to help to recommend the safeguards that are necessary for a constitutional version of social service programs.

In March 2010, the Council issued "A New Era of Partnerships: Report of Recommendations to the President." Within the Report are twelve recommendations on how to reform the Office of the Faith-Based and Neighborhood Partnerships. These recommendations offered legal changes that the Council believed the Administration should make to existing executive policy. Eight months after their submission, however, the Administration has yet to implement any of the consensus recommendations on reform.

The Administration, having removed the issue of employment discrimination from the Council's purview, has also failed to take any concrete action on its own. It has not repealed any of the executive orders or regulations permitting such discrimination. And despite our repeated requests, the Administration also has not ordered the Office of Legal Council to review its June 29, 2007, Memorandum that justifies ignoring statutory laws barring federally funded discrimination.

The slow turn-around of the Council recommendations and apparent total inaction on the employment discrimination issue has had the effect, intended or otherwise, of perpetuating a deeply harmful status quo. The Bush-era rules, which even the Council agrees are lacking in constitutional protections, have governed the distribution of billions of dollars of social service funding and will continue to do so until the Administration decides to act. Recently, several religious organizations that want to discriminate with federal funds have further entrenched discrimination policies into their programs.

The need for action, therefore, is compelling.

The Council's Consensus Recommendations on Reform

As I noted earlier, I was a member of the Reform Taskforce and so had a role in the development of the Council's reform recommendations. I would have preferred that the final Council recommendations were stronger and offered more protections. But, in the end I do support the Council's consensus recommendations and believe that the Administration should act promptly to implement them.

When considering the Council consensus recommendations, it is important to note that all the Council members, including Council members who supported charitable choice at its inception, agree that the religious liberty safeguards in charitable choice and the Faith-Based Initiative are insufficient and must be changed.

Separation Requirements

Current executive orders, regulations, and guidance prohibit federal money from being used for "inherently religious activities."[7] The term "inherently religious" is too narrow and incomplete: the Constitution clearly prohibits federal funding of a much broader range of religious activities. Thus, these provisions are both inaccurate and misleading. Furthermore, the guidance in this area has not been standard across federal agencies and some state and local agencies have simply promulgated incorrect and harmful rules.[8]

Indeed, in 2006, a Government Accountability Office (GAO) Report found that all of the religious social service providers it interviewed said they understood the separation requirements, yet many engaged in improper activities.[9] One provider "said that he began each program session, which provided services to children, with a nonsectarian prayer that at times included a brief reading from the Bible."[10] In our own work, we have found groups using public funds to purchase Jesus key chains and Christian devotional booklets;[11] to pay for children to attend a Christian camp "designed to build hope, leadership, and self-esteem through relationships with Christ";[12] and to pay the salaries of substance abuse counselors and a chaplain at a homeless shelter that welcomes clients with Bibles and introduces them to God.[13]

The Council, therefore, urged the President to modify this language to bar the funding of "explicitly religious activity" and suggested that the Administration adopt better guidance to ensure that federally funded programs neither include nor fund religious activities. The Council concluded that executive directives should be amended to more clearly assert that federally funded social service programs must be separated in time or space from any religious activity. It recommended that the executive branch ensure that no federally funded programs can condition service upon a beneficiary's attendance at a religious activity or event. The Council also asked the President to adopt separation rules that would be applied uniformly to all federally funded programs, including the many programs administered by sub-grantees.

Political Influence & Religious Bias

David Kuo, a former staff member in President Bush's White House Faith-Based Office alleged, in his book *Tempting Faith*, that the Faith-Based Initiative was essentially used as a political

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[7] Exec. Order No. 13,279, 67 Fed. Reg. 77,141 (Dec. 16, 2002). *See, e.g*, 45 C.F.R. Part 87.2(c).
[8] Government Accountability Office, GAO-06-616 *Faith-Based and Community Initiative: Improvements in Monitoring Grantees and Measuring Performance Could Enhance Accountability* 34 (June 2006) (GAO Report 06-616); President's Advisory Council on Faith-Based and Neighborhood Partnerships *A New Era of Partnerships: Report of Recommendations to the President* 132 (Mar. 2010) (Council Report).
[9] GAO Report 06-616 at 34.
[10] *Id.* at 35.
[11] *Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 432 F. Supp. 2d 862, 890 (S.D. Iowa 2006), *aff'd* 509 F.3d 406 (7th Cir. 2007).
[12] U.S. Dep't of Justice Weed and Seed grant to West Palm Beach Police Department, application and status reports, 2001-2006 (excerpt: FY 2001-2002 Competitive Solicitation) (obtained through a Freedom of Information Act request).
[13] U.S. Dep't of Housing & Urban Dev. Continuum of Care grant to Riverside Christian Ministries, Inc., application, 2005 (obtained through a Freedom of Information Act request); pages from Riverside Christian Ministries' website (archived from 2005).

tool. He asserted that the Initiative was established because "it had the potential to successfully evangelize more voters than any other."[14] According to Kuo, the Bush White House Faith-Based Office held events jointly with the Republican Party or with vulnerable Republican candidates in key election states.[15]

The Washington Post concluded that "Republicans are using the prospect of federal grants from the Bush administration's 'faith-based initiative' to boost support for GOP candidates, especially among black voters in states and districts with tight congressional races" in 2002.[16] *The New York Times* recognized this politicization, noting that a 2001 White House Faith-Based Office conference was really "a bid to woo African-American clergy members, and possibly their parishioners—to their party."[17]

The first head of the White House Faith-Based Office during the Bush Administration, John DiIulio, admitted that there is no evidence that faith groups do a better job at performing social services than do their secular counterparts.[18] Kuo revealed, however, that grant reviewers were giving religious organizations an advantage over secular organizations competing for funding. One reviewer even admitted that "when I saw one of the non-Christian groups in the set I was reviewing; I just stopped looking at them and gave them a zero."[19]

The Council, recognizing the danger of politicization and religious bias, has suggested amending Executive Order 13279 to affirmatively bar "political interference or even the appearance, thereof." Also it has suggested that the federal government instruct grant reviewers and others in the grant-making process "to refrain from taking religious affiliations or lack thereof into account."

I believe that it will be difficult to truly ward off the temptation to use the Faith-Based Office for political gains or to ensure there will be no religious bias, when the entire existence of the Office indicates a bias towards religion. Nonetheless, the Council recommendations are an important step in curbing both practices.

Beneficiary Protections

Beneficiaries of government services are often in vulnerable situations and cannot be assumed to know their religious liberty rights or how to enforce them. The Council, therefore, also unanimously urged the President to strengthen protections for social service beneficiaries and clients. The recommendations state that beneficiaries who attend publicly funded programs operated by faith-based organizations must have a right to an alternative religious *or* secular provider and must be informed of this right when they first enter the program. The Council also urged that staff and volunteers who interact with beneficiaries and clients be educated about

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[14] David Kuo, *Tempting Faith: An Inside Story of Political Seduction* 170 (2006).
[15] *Tempting Faith* at 201, 206-07.
[16] Thomas B. Edsall & Alan Cooperman, "GOP using the Faith Initiative to Woo Voters," *Washington Post*, Sept. 25, 2002.
[17] Elizabeth Becker, "Republicans Hold Forum with Blacks in Clergy," *New York Times*, Apr, 26, 2001.
[18] Noah Feldman, "Take it on Faith," *New York Times*, Dec. 16, 2007, *reviewing* John J. DiIulio, Jr., *Godly Republic: A Centrist Blueprint for America's Faith-Based Future* (2007).
[19] *Tempting Faith* at 215-16.

these rights so that they can help them navigate the system. Thankfully, the Council agreed that the need to ensure the religious freedom of beneficiaries far outweighs any potential complications associated with implementing such protections.

Transparency and Monitoring

As noted above, the 2006 GAO investigation into the government's provision of social services through the Faith-Based Initiative found clear constitutional violations.[20] Yet "few program offices" in the GAO review included references to compliance with church-state separation safeguards in their monitoring guidelines for social service grantees.[21] Accordingly, the GAO recommended that the government improve the monitoring of grantees.

The Council, in turn, urged the President to increase monitoring of all social service providers, including faith-based organizations, that receive government funds. Acknowledging that the government has a "constitutional obligation to monitor and enforce church-state standards" in federally funded programs, the Council recommended that the President amend Executive Order 13279 to describe that obligation, the Administration ensure the obligation is included in monitoring tools, and the appropriate monitoring and enforcement are also applied to sub-grantees.[22]

Another common problem with the Faith-Based Initiative is the inability to access documents and information. Americans United has struggled throughout the years to obtain grant information and other documents through open-records requests—often receiving files that appeared incomplete. We and others literally could not even determine basic information to learn which organizations received government funds and to whom these funds may have been passed through sub-grants. The Council admitted that "it has not been easy for us to locate and access information" and documents.[23] Imagine, then, how difficult it would be for an average citizen to find grant applications or documents. Thus, the Council requested that government agencies be required to post information, including the identification of grantees and sub-grantees, on the internet. The public has the right to know which organizations the government is choosing to fund to carry out its critical services.

The Non-Consensus Council Recommendations on Reform

Separate Incorporation

To my great disappointment, the Council failed to reach consensus on two major issues. By only a one-vote margin, the Council recommended that houses of worship that seek to receive federal funds must form separately incorporated entities to use those funds. (This could include setting up a tax-exempt 501(c)(3) charity or other appropriate structure.) This is necessary to protect the autonomy and integrity of the religious institution as well as ensure that federal funds are not used for religious purposes.

[20] GAO Report 06-616: Highlights.
[21] *Id.* at 36.
[22] Council Report at 137.
[23] *Id.* at 135.

Before the Faith-Based Initiative, *religiously affiliated* organizations already had been among the many providers of government social services. The Faith-Based Initiative, however, permits public funds to flow directly to *houses of worship* without the establishment of separate, religiously affiliated corporations.[24]

Direct government funding of houses of worship represents a radical erosion of First Amendment principles, endangering the autonomy of religious bodies by allowing government intrusion directly into the activities of houses of worship and increasing the threat that government funds will be used for religious activities. Although some have argued that this traditional arrangement singles out religious institutions for an additional "burden," in reality, requiring funding to go to separately incorporated, religiously affiliated institutions serves to protect the integrity of the religious institutions and provide accountability for government funds. And, curiously, no evidence has ever been offered to show that any groups would decline federal aid if required simply to set up a secular arm.

I urge the Administration to side with the majority of Council members on this issue: Pervasively sectarian religious organizations must be required to form a separate entity in order to receive federal funds.

Iconography

Most troubling is that sixteen Council members asserted that "the Administration should neither require nor encourage the removal of religious symbols where services subsidized by Federal grant or contract funds are provided."[25] The Constitution forbids the government from sending religious messages to beneficiaries participating in publicly funded programs through signs, symbols or iconography.[26] But, only nine Council members supported a standard mandating that such religious messages be removed, at least where "feasible."

The reason for separating evangelism from secular services, such as serving meals and providing job training, is that rock-solid First Amendment doctrine forbids government entities from advancing religion. I can think of a no more potent promotion of any religious system, however, than having the central symbols of that faith (a Christian cross, for example, or religious statements like "Jesus said, 'I am the Way, the Truth and the Life'") on the walls of a soup kitchen or counseling center.

Many religious groups promote the idea that a single encounter with the core message of the faith can lead to spiritual conversion. Someone seeking shelter is unlikely to have the courage to

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[24] Melissa Rogers, *Traditions of Church-State Separation: Some Ways They Have Protected Religion and Advanced Religious Freedom and How They are Threatened Today* 18 J.L. & POL. 277, 317 (2008).

[25] Council Report at 131.

[26] *Berry v. Dep't of Soc. Servs.*, 447 F.3d 642, 652, 657 (9th Cir. 2006) (Policy that prohibited government social workers from displaying religious items in plain view of clients was constitutional.); *see also Cooper v. USPS*, 577 F.3d 479, 497 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 1688 (2010) (Contract unit of Postal Service housed in church-related building must remove religious material from where postal customers seek services.); *cf. Spacco v. Bridgewater Sch. Dep't*, 722 F. Supp. 834, 843 (D. Mass. 1989) (Public school could not hold classes in leased church parish center, because, even though religious symbols and messages were covered in classrooms, schoolchildren were still exposed to religious symbols in the rest of the building and grounds.).

report that this faith-saturated environment makes her or her children feel unwelcome and very uncomfortable. And, in most parts of the country, it would take so long to even locate an alternative provider that she would likely be forced to remain in that facility anyway. In reality, her real choice may be whether to face the symbols of a faith not her own or go cold and hungry.

Therefore, I hope that the Administration will reject the majority recommendation on this matter. Instead, the Administration should ensure that no government services take place in an environment permeated by religious iconography, certainly not where it is feasible for the provider to make the service available in a more neutral location. Often, this would simply be another room in the same building.

Employment Discrimination

Current Obama Administration policy allows religious organizations to take government funds and use those funds to discriminate in hiring against a qualified individual based on nothing more than his or her religious beliefs or lack thereof. This continues the last Administration's policy, which was an appalling rollback of the civil rights protections that were first put in place under the administration of President Franklin D. Roosevelt.

Title VII of the Civil Rights Act of 1964, as amended, prohibits discrimination in employment on the basis of race, national origin, color, religion, and sex.[27] Title VII grants an exemption to religious organizations, however, allowing them to adopt hiring practices that favor fellow adherents to their particular faith.[28] Before the passage of charitable choice, it had been generally accepted that this exemption applies only when the religious organization is using its own funds, because it had not been extended to government-funded positions. Accordingly, the religious organizations that for generations had partnered with the government did not engage in religion-based hiring for positions that were funded with taxpayer money.

In contrast, the Faith-Based Initiative allows religious organizations to take government funds *and* use those funds to discriminate in hiring a qualified individual based on his or her religious beliefs or lack thereof. Because significant, direct government funding of religious organizations is of relatively recent vintage, neither the Supreme Court nor any court of appeals has directly addressed whether the Title VII exemption can constitutionally be interpreted to permit a religious organization to discriminate on the basis of religion for jobs that are funded with government dollars.

Two federal district court decisions have directly addressed this issue.[29] In *Dodge v. Salvation Army*,[30] the U.S. District Court for the Southern District of Mississippi held that the title VII

[27] 42 U.S.C. § 2000e-2.
[28] 42 U.S.C. § 2000e-1(g).
[29] *Spencer v. World Vision*, --- F.3d ----, 2010 WL 3293706 (9th Cir. Aug. 23, 2010), was brought by three former administrative employees of World Vision, who were terminated on the basis of religion. The sole issue before the court was whether World Vision is a "religious corporation, association, educational institution, or society" and therefore eligible for the Title VII exemption. The case does not raise the issue of whether the World Vision would be eligible for that exemption if the plaintiffs' wages were paid in whole or in part with government funds. In fact, there is no evidence even in the record as to whether these positions were government funded. The panel, however, summarily addressed this important constitutional question. Accordingly, the plaintiffs are currently seeking *en*

exemption was unconstitutional as applied to publicly funded jobs because applying the provision in such circumstances would have a primary effect of advancing religion and would result in impermissible government entanglement with religion.[31] The plaintiff in *Dodge* worked as a victim assistance coordinator at a Salvation Army domestic violence shelter—a position that the court determined "was funded substantially, if not entirely, by federal, state and local government"—and was fired for having Wiccan beliefs.[32] The Salvation Army's defense was that it was exempt from Title VII because it was a religious organization. The court rejected that defense, however, explaining that because "the grants constituted direct financial support in the form of a substantial subsidy . . . allow[ing] the Salvation Army to discriminate on the basis of religion . . . would violate the Establishment Clause of the First Amendment."[33]

Lown v. Salvation Army,[34] reached the opposite conclusion. In *Lown*, the court held that granting the Title VII exemption to religious organizations even where the government funds the positions is "a permissible accommodation of free exercise interests."[35] Quite frankly, we believe the *Lown* decision was incorrectly decided.

Nonetheless, even *Lown* did not state that permitting such government-funded religious discrimination is *required.* And, even if the discrimination issue were simply a policy question rather than a constitutional question, we still strongly believe that such discrimination should be forbidden. How, on policy grounds, could one ever justify using taxpayer money to fund religious discrimination? Discrimination cannot be justified because employers are "more comfortable" working with fellow believers—this is not an appropriate civil rights principle, and just as it has not been accepted as an excuse for discriminating on the basis of race or gender, it should not be accepted as an excuse for federally funded religious discrimination.

We agree with the statement made by then-candidate Obama in his Zanesville speech: The federal government should never fund employment discrimination on the basis of religion. Indeed, the government should *never* subsidize discrimination. Unfortunately, the Administration has not taken any steps to restore the decades-old federal ban on employment discrimination in publicly funded programs.

Instead, the Administration has asserted that it will address any hiring discrimination issues on "a case-by-case basis." Such a test is both troubling and totally unworkable. The Administration has failed to articulate the standard it will apply to determine which instances of discrimination it would allow. Nor has it supplied a justification for why federally funded religious discrimination is ever permissible, either on constitutional or on public policy grounds. The Administration has also offered no information regarding whether any organization has requested or has received approval to discriminate in hiring. In short, the "case-by-case" test has not changed executive branch law in any way or offered any protections for applicants for

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banc review and Americans United has filed an *amicus* brief in the case, asking the court to explicitly reserve the constitutional issue for another day.

[30] No. S88-0353, 1989 WL 53857 (S.D. Miss. Jan. 9, 1989).

[31] *Id.* at *3.

[32] *Id.* at *1-3.

[33] *Id.* at *4.

[34] 393 F. Supp. 2d 223 (S.D.N.Y. 2005).

[35] *Id.* at 250-51.

federally funded jobs. To be frank, this "case-by-case" test makes no sense and there is no evidence it has been implemented.

We are gravely concerned that the continued failure to act on the employment discrimination issue will lead to even more religious organizations entrenching discrimination policies into their federally funded social service projects. For example, World Relief, which receives about two-thirds of its funding from state and federal governments, claims to have had a longstanding policy of hiring only Christians but admits that such a policy "was never put in writing or enforced until this year."[36] Now, "[n]ew employees at World Relief have to prove they are Christians. They sign a statement of Christian faith and must get a letter of recommendation from their minister before being hired."[37] What does this mean for equal employment opportunity for American workers?

These policies have devastating effects. For example, Saad Mohammad Ali is an Iraqi refugee who had volunteered for six months at World Relief in Seattle, Washington.[38] A World Relief manager suggested that he apply for a permanent position as an Arabic-speaking caseworker position in the refugee resettlement program.[39] But, a few days after he applied for the job, the same manager called to tell him that he was not eligible for the position because he is a Muslim and not a Christian.[40]

Mohammed Zeitoun, also Muslim, worked for World Relief as an employment counselor, but is now looking for a new job because he refused to affirm the Christian mission of the organization.[41]

World Vision offers other recent examples of discrimination. According to GlobalPost, World Vision is "one of the largest recipients of development grants from the U.S. Agency for International Development, the federal government's foreign aid arm."[42] Government grants "amount[] to about a quarter of the organization's total U.S. budget."[43] Nonetheless, "World Vision hire[s] only candidates who agree with World Vision's Statement of Faith and/or the Apostle's Creed."[44]

Thus, even in Mali, a predominantly Muslim country, World Vision hires non-Christians only when they cannot find a Christian for the position.[45] Bara Kassambara, a non-Christian, therefore, was only eligible for a temporary job. And, Lossi Djarra applied for a job as a driver, but a Protestant man was hired. Djarra said World Vision policy of preferring Christians makes the locals "angry" because "if you're not in their church on Sunday, you won't get the job.

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[36] Bob Smietana, "Charity Defends Christian Only Hiring," *Tennessean*, Mar. 31, 2010.
[37] *Id.*
[38] Lornet Turnbull, "World Relief Rejects Job Applicant Over His Faith," *Seattle Times*, Mar. 10, 2010.
[39] *Id.*
[40] *Id.*
[41] Manya A. Brachear, "Charity's Christian-Only Hiring Policy Draws Fire," *Chicago Tribune*, Apr. 2, 2010.
[42] Krista J. Kapralos, "Non-Christians Need Not Apply," *GlobalPost*, Jan. 11, 2010.
[43] *Id.*
[44] *Id.*
[45] *Id.*

People don't have a chance." It is particularly frustrating to locals because "positions with foreign aid agencies are often the most lucrative gigs available."[46]

Fabiano Franz, World Vision's national director for Mali, defended the policy, explaining: "We're very clear from the beginning about hiring Christians. It's not a surprise, so it's not discrimination."[47] But, having a policy of discrimination does not negate its discriminatory effects.

Of course, there are other, earlier examples of religious discrimination with government funds that were likely also spurred on by the atmosphere created by the Faith-Based Initiative's promotion of federally funded religious discrimination. Alan Yorker, for example, was denied a government-funded job because the social service agency to which he applied would not hire a Jewish psychologist, even though he was "one of the top candidates for the position."[48] He was told: "We don't hire people of your faith."[49] And, Alicia Pedreira who, despite receiving excellent job performance reviews, was fired from a government-funded job because her sexual orientation was deemed incompatible with the religious mission of the religious employer.[50]

We would hope that stories like this would prompt action from the Administration. So far, they seem to have fallen on deaf ears. The Administration needs to take action to protect the civil rights of job applicants and workers.

First, the Administration should repeal the executive orders and the myriad federal regulations that affirmatively sanction federally funded employment discrimination in nearly every federal social service program. And, as he promised in his Zanesville speech, the President should sign an executive order and implement regulations that affirmatively bar federally funded religious discrimination.

Second, the Administration should restore Executive Order 11246. This executive order, signed by President Lyndon B. Johnson in 1965, barred employment discrimination in all government contracts. The Bush Administration, however, carved out an exemption from this executive order that permits discrimination in government contracts with religious organizations. The Obama Administration should reinstate the full force of the original Johnson executive order. It was never controversial in the first place.

Finally, the Administration should order a review of the June 29, 2007, Office of Legal Counsel Memorandum that—under the guise of the Religious Freedom Restoration Act—permits religious providers to engage in religious discrimination even where the statute authorizing the funding explicitly prohibits such discrimination. The OLC Memorandum's interpretation that RFRA provides for a broad override of statutory religious nondiscrimination provisions is erroneous and threatens core civil rights and religious freedom protections. Last September, 58 leading religious, education, civil rights, labor, and health organizations wrote to Attorney

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[46] *Id.*
[47] *Id.*
[48] Adam Liptak, "A Right to Bias is Put to the Test," *New York Times*, Oct. 11, 2002.
[49] *Id.*
[50] Eyal Press, "Faith-Based Furor," *New York Times*, Apr. 1, 2001.

General Eric H. Holder, Jr., asserting that the guidance in the Memorandum "is not justified under applicable legal standards and threatens to tilt policy toward an unwarranted end that would damage civil rights and religious liberty." Indeed, Robert Tuttle, a professor at The George Washington University Law School who specializes in religious liberty issues, asserted: "I think that the OLC opinion was perhaps the most unpersuasive OLC opinion I've read. And that includes the famous John Yoo opinion, by the way . . . ."[51] The OLC Memorandum must be withdrawn, as should all federal policy guidance that relies on the opinion.

Barring federally funded religious discrimination is not a novel issue. Nor is it a requirement that would shut down federal social service programs. Indeed, as we explained earlier, before the implementation of charitable choice and the Faith-Based Initiative, it was generally accepted that religious organizations could not discriminate in hiring for federally funded positions. Indeed, back then, the government effectively partnered with religious organizations to provide social services. And, it can continue to do so.

As the President's Advisory Council explained when discussing the need to "strengthen constitutional and legal footing of partnerships": "Fidelity to constitutional principles is an objective that is as important as the goal of distributing Federal financial assistance in the most effective and efficient manner possible."[52] Taxpayers, employees, and beneficiaries of services should not be forced to choose between one or the other. Government can both partner with religious organizations and bar federally funded religious discrimination and has done so.

Conclusion

After years of battling the misguided Faith-Based Initiative from 2001 to 2008, I was hopeful when President Obama committed to reforming the Faith-Based Initiative and barring federal employment discrimination. That is why it has been so disappointing that the Administration has done nothing thus far to implement these much needed reforms. Each day that the Administration fails to act, federal funds continue to flow without constitutionally required safeguards for religious freedom, thus violating the Constitution and its core religious freedom and conscience principles. And, each day that the Administration fails to act, applicants remain subject to blatant religious discrimination in jobs that are funded by American taxpayers. The urgency of implementing these reforms, therefore, could not be more evident.

[51] Robert Tuttle, Remarks at the Brookings Institution's "Faith-Based and Neighborhood Partnerships in the Obama Era: Assessing the First Year and Looking Ahead," 140, Feb. 18, 2010 (transcript available at http://www.brookings.edu/~/media/Files/events/2010/0218_faith_based/20100218_faith_based.pdf).
[52] Council Report at 127.

Mr. INGLIS of South Carolina. Mr. Chairman, I thank the gentleman for yielding me this time.

I rise in support of the Boustany amendment. There has been a lot of talk about how it would appear these faith-based organizations are bigoted and maybe even arrogant for wanting to express their views. I think it is the opposite. The government here, absent the Boustany amendment, is being arrogant and bigoted.

It could be, if the government wants to take advantage of the location, let us say, of a Hebrew school in downtown New York, that it is the best possible route of caring for people in need in that area. Why would the government think that it is our position, our prerogative, to insist that the Hebrew school hire somebody outside their faith tradition? It is the ultimate of arrogance on the part of the Federal Government.

And to those who are concerned about the constitutional issues, may I remind my colleagues the Supreme Court actually ruled on this matter. In a 1987 case, Corporation of the Presiding Bishop v. Amos, the Court supported this kind of approach.

Ms. WOOLSEY. Mr. Chairman, I yield 15 seconds to the gentleman from Virginia (Mr. SCOTT).

Mr. SCOTT of Virginia. Mr. Chairman, I just want to make clear the Supreme Court cases made it clear that you could discriminate with your personal church money, but not with Federal money. All of the cases are consistent. In fact, if my colleagues read the cases, they point out that if you are using Federal money, you cannot discriminate.

Ms. WOOLSEY. Mr. Chairman, I yield myself such time as I may consume.

I want to read two paragraphs from a letter from Barbara Pickney, who is head of the St. Landry Parish Head Start program and is State president of the Louisiana Head Start Association.

Paragraph number 1: "I have become aware that an amendment has been offered by Representative Boustany, a Republican from Louisiana, to the Head Start bill on the House floor today that would give faith-based organizations providing Head Start services the right to discriminate with Federal funds against employees who are of different faiths. As the State President of the Louisiana Head Start Association, I strongly oppose such an amendment."

Then she goes on to say, "I am greatly concerned that the provision to remove civil rights protections for employees could have a negative impact on the children and families who participate in these programs. Tens of thousands of at-risk 3- and 4-year-old children currently in Head Start could lose their teachers, who often are the most important adults to whom they have bonded, other than their parents; not because those teachers are doing a bad job, but because they are the wrong religion."

That was Barbara Pickney, St. Landry Parish Head Start program, State president of the Louisiana Head Start Association.

Mr. Chairman, I yield 2 minutes to the gentleman from Texas (Mr. EDWARDS).

Mr. EDWARDS. Mr. Chairman, you can use whatever rhetoric you want, but at the end of the day, this amendment not only legalizes religious discrimination in America, it pays for that discrimination using American taxpayer dollars.

It is disappointing to me, and I think to the vast majority of Americans, that on the same day we are pleading with Iraqis to provide religious freedom to their citizens, the Republican leadership and this House, with this amendment, is saying it is okay to force an American citizen to choose between his or her faith and his or her job. They are saying it is okay for American citizens to have to pass someone else's private religious test to qualify for a publicly funded job.

I do not think most Americans are going to think that is okay. I think they are going to be offended by it. I think people of faith are going to be offended by the fact that some in this House think that groups have got to be able to discriminate based on religion in order to make their programs work.

The fact is, this amendment supports and allows and subsidizes racial discrimination in job hiring, and no amount of rhetoric can deny that.

I do not know how the majority can stand up and say it is okay to put up a sign, paid for by tax dollars, saying no Jews nor Catholics need apply here for a federally funded job, even though they might have a Ph.D. in education and 20 years of experience helping children get a head start in life; they can still put up that sign. I wonder what the majority is going to say and people think they are going to say the first time a Christian is denied a job by a Muslim group that has received $1 million in Federal funding to run a Head Start program and say, no Christians need apply here for a job.

Mr. Chairman, our country has more religious tolerance than any other Nation in the world and more religious freedom than any other Nation in the world because we have not allowed this kind of discrimination in America.

This is taking America down the wrong path. Defeat this amendment.

Ms. WOOLSEY. Mr. Chairman, I yield 2 minutes to the gentleman from Illinois (Mr. EMANUEL).

Mr. EMANUEL. Mr. Chairman, since 1965, Head Start has provided 22 million children, American children, with the education and health and social services to lead productive lives. It is the most successful school readiness program in the Nation. It has always received bipartisan support. I want to commend the chairman and the committee for producing a very good bill that reauthorizes Head Start so America's children get the same type of investment that we have been providing Iraqi children.

I find myself puzzled why you would take such good legislation and play politics with it when we can make progress. The rest of the country is looking at us and asking us to please put politics aside and put progress first. Do not divide Americans along religious lines. That is not the America they want; they want an American that comes together, recognizes our differences, and makes progress rather than politics.

Mr. Chairman, it is amendments like this that remind me why 29 percent of the American people think the Congress is doing a good job, but well over 75 percent of the American people think this Congress is failing to meet the obligations and the challenges that America has. You today can get a bill passed in a bipartisan vote, unanimously, with everybody understanding because we are investing in America's children, and you chose to take that progress and play politics in the most ugly way, by pinning American against American based on their religion. This does not represent America's values, it does not represent your values, and you chose to put politics over progress. It reminds me when I look at today's data why the American people hold this Congress in the lowest esteem it has in over 15 years.

Invest in America's future. Choose these children. Give them the best start they can for productive lives where they can come and be contributors to this country. No, we do not take the progress. The chairman of the committee did a good job in the committee, producing a good bill that builds on the progress of the last 40 years and continues to invest in America's children, and you chose to put an amendment on this floor, unprecedented, that chose to divide America, not unite it, to choose politics over progress, and to continue the same policies that has taken this Congress to the lowest esteem ever in the American people's history.

Mr. BOEHNER. Mr. Chairman, I yield myself 3 minutes.

Mr. Chairman, the previous speaker talked about how we brought this bill out of our committee and brought it to the House, with a unanimous vote out of the committee, 48 to nothing. One of the reasons that this language was not included in the original bill was to try to create a spirit of bipartisanship in moving the process along.

But the American people elected us to come here and make decisions on their behalf. We are having a free and open debate about this issue. No one should denigrate the majority because we want to have a debate and want to have a vote. We have had this debate many times in this House. It has passed every time on a bipartisan basis, and I expect it will pass on a bipartisan basis again today.

The issue here is a simple one. In the 1964 Civil Rights Act, and amendments to it in 1974, religious organizations were granted an exception in their hiring practices so they could hire people

of their own faith. I think most people would understand that. Over the years, religious organizations have been involved in doing all types of good works, including providing programs in their commnnities. But, for far too long, these organizations have been denied the use of Federal dollars in order to preserve their religious heritage.

Over the years, a number of programs passed by this Congress have been signed into law that have allowed religious organizations to maintain the rights given to them under the 1964 Civil Rights Act and provide services with Federal funds. As a matter of fact, Bill Clinton, Bill Clinton, during 8 years in office, signed 4 laws into law that had the same identical language as being offered to this bill today.

Mr. EMANUEL. Mr. Chairman, will the gentleman yield?

Mr. BOEHNER. I yield to the gentleman from Illinois.

Mr. EMANUEL. Mr. Chairman, as somebody who worked for President Clinton as his senior advisor, President Clinton did not support, nor did he introduce in his welfare bill, anything that you are saying, and I will say he never promulgated those rules or enforced that. Mr. Chairman, as the gentleman knows, that is not correct.

Mr. BOEHNER. Mr. Chairman, reclaiming my time, the point is, President Bill Clinton signed these laws into law, knowing that the language that we are offering today was included.

What we have been trying to do in the Work Force Investment Act, the Community Services Block Grant Act, today in the Head Start Act, is bring some consistency to the Federal rules and regulations in terms of allowing faith-based providers to offer services without having to give up their protections under the Civil Rights Act.

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Now, if you want to change the 1964 Civil Rights Act and say to religious organizations, you can have your exemption on hiring, unless you take a Federal dollar, fine. Go have that debate in the Judiciary Committee, bring it out here, and we will vote on it. But this is not the forum to deny those organizations their own rights.

Ms. WOOLSEY. Mr. Chairman, I yield 10 seconds to the gentleman from Illinois (Mr. EMANUEL).

Mr. EMANUEL. Mr. Chairman, in the original welfare reform bill by President Clinton, this provision was never in it. Second, it was unconstitutional, and it was never promulgated by President Clinton in the rulemaking. He does not support that provision. If you want to support something that President Clinton believed in, then try fiscal responsibility and start balancing the budget. This is not what he believes, and the gentleman from Ohio knows that, Mr. Chairman.

Ms. WOOLSEY. Mr. Chairman, I yield 2 minutes to the gentleman from Virginia (Mr. SCOTT).

Mr. SCOTT. I thank the gentlewoman for yielding me this time.

Mr. Chairman, again, no group is barred from participation. If this amendment is adopted or not adopted, any organization that could sponsor a program with this amendment could sponsor it without the amendment if you would agree not to discriminate. Now what we are doing, you can try to dress it up a little bit, but we are talking about a policy where someone wants to refuse to hire Catholics, Jews, and Muslims just because they are prejudiced. If that offends you, then I do not have to explain to you what is wrong with this amendment.

If it does not offend you, then I am going to have trouble explaining to you what is wrong with this amendment. The 1964 Civil Rights Act has been cited. Let us remember the vote on that amendment was not unanimous. Obviously a lot of people back then, virtually every Representative from my home State of Virginia, voted against the Civil Rights Act. But let us remember what it said in the religious exemption. It said you could discriminate if your work is connected with carrying on the church activities.

Now, obviously it is okay with church money, but a contract to administer a Head Start program is a contract for government services. It is not a gift to the church to advance religious missions. It is a contract to administer a federally funded program.

Now, since 1965, it has been illegal to discriminate in Head Start for all sponsors. It is okay to discriminate with the church money, just not with the Federal money. Let us remember also that when you talk about discrimination based on religion, you are talking about discrimination based on race, because some religious groups are, to the nearest percentage, 100 percent black; others, to the nearest percentage, 100 percent white. So your Head Start staff can start looking like your church.

This is a bad amendment. It is ugly. We should not turn the clock back on civil rights. If there is a problem in employment, where the employer does not like to hire people of different races or religion, traditionally it has been a problem of that employer. We need to support the victim, as we have for the last 40 years. This is a bad amendment, and it needs to be defeated.

Ms. WOOLSEY. Mr. Chairman, I yield myself the balance of my time.

This is an amendment that allows Federal funding to support discrimination. It is paid for by Federal tax dollars. It will strip civil rights protections by allowing religious organizations to discriminate in hiring on the basis of religion for Head Start positions, and I repeat, using Federal taxpayers' money.

Under the amendment, a religious organization could tell a potential Head Start teacher, of all of the applicants we have seen, you would be the best one to teach our kids, but we are not going to hire you, because you are not the right religion.

As I said earlier, Head Start kids are at risk as it is, without their teachers being chosen because of their religion instead of whether they are the best qualified.

Mr. Chairman, I ask the members of this body, think before you vote yes on this. Think before you set a precedent that has Federal funding paying for discrimination based on religion.

Mr. BOEHNER. Mr. Chairman, I yield myself 30 seconds.

What we are trying to do here is preserve the rights given to religious organizations under the 1964 Civil Rights Act. And for the Members who have been paying some attention to this, we know that Members on different sides of the aisle, and frankly it is on a bipartisan basis, have deeply held convictions about this. Clearly, we are not in real agreement.

But this is an issue that the House really should decide and the House should vote on. I am glad that we are having this debate once again, because the longer we have the debate, clearly, the evidence is coming down that the winning side continues to prevail.

Mr. Chairman, I yield the balance of my time to the gentleman from Nebraska (Mr. OSBORNE).

Mr. OSBORNE. Mr. Chairman, I do not know how much clearer this can be made. We keep having this circular debate on so many issues. I will just go back to the law one more time. We have mentioned over and over, title VII, Civil Rights Act, 1964, states specifically, and this is the verbiage, "This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or 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 on by such corporation, association, educational institution, or society of its activities."

There is no way we can change this. This is the verbiage. This is the language.

What we are saying here is that a faith-based organization cannot be expected to sustain their religious mission if we do not uphold this statute. It is very plain.

If a choir director or a youth director also serves as a Head Start employee, you certainly should not have to hire somebody that does not sustain the mission of the church.

Mr. GENE GREEN of Texas. Mr. Chairman, I rise today to show my opposition to the Boustany Amendment.

Head Start has been one of the most successful education programs in our Nation's history.

It is successful because it brings public, private and faith based organizations together to provide a common good.

Head Start helps disadvantaged youth get a firm foundation on which they can build a strong education.

Mr. BOUSTANY's amendment would allow faith based organizations to circumvent civil

City of West Palm Beach Weed and Seed
FY 2001-2002 Competitive Solicitation

STRATEGY SUMMARY

LAW ENFORCEMENT - The MALEU is dedicated to targeting offenders in the Weed and Seed site utilizing both proactive and reactive measures, through the use of initiating operations to target dealers/buyers or reacting to an on-going investigation to locate and apprehend a suspect.

COMMUNITY POLICING - The Community Pride Revitalization Program is placing officers in the Weed and Seed Site on bicycles providing additional visibility and increased contacts with the residents and business owners.

PREVENTION/INTERVENTION/TREATMENT – Programs and resource coordination offered by and through the Safe Haven, Community Court, Pleasant City Multi-Cultural Community Center and the Salvation Army provide the comprehensive services this neighborhood so richly deserves.

NEIGHBORHOOD RESTORATION - The unique problem-solving partnership forged between the police department and the code enforcement unit has proven to be extremely effective as a non-traditional means of addressing narcotics and other crime issues. Federal and State grant funding has provided our Agency and the City with funding to revitalize our site and provide hope for the future.

SITE SUMMARY

WEST PALM BEACH, FLORIDA

BACKGROUND

The Weed and Seed neighborhood has expanded to encompass the Northwood area of the City of West Palm Beach. This site is relatively large geographically, encompassing approximately 7 perimeter miles. The neighborhood is bordered by Banyan Boulevard to the south, 59th Street to the north, Australian Avenue to the west, and the Inter-coastal Waterway to the east.

The steering committee provides direct oversight of the strategy's goal and objectives; coordinates the activities of the program and its Seed Policy Board; identifies and assesses policy issues which impact the quality of life in the Weed and Seed area; develops strategic plans for ensuring better coordination and cooperation of social, health, recreation and other service agencies and community development agencies within the target area.

STRATEGY OBJECTIVES AND ACTIVITIES

LAW ENFORCEMENT – The MALEU will continue to target narcotic offenders in the Weed and Seed site utilizing buy/busts, reverses, traditional and problem solving methods. The team will continue to apply arrest techniques for targeting dealers/buyers, such as, buy bust, reverse stings, stake-outs, video buys, decoys and search warrants used to infiltrate crack houses, confiscate firearms and stolen property and to identify landlords who consistently rent to drug dealers. In addition to the assigned zone officers, a five member HOPE team that focuses on drug enforcement is assigned exclusively to the area. Four additional officers on bike patrol circulate the neighborhood five days per week in an overtime capacity.

COMMUNITY POLICING – The Community Policing/Problem Solving team of officers continues to provide on-going street patrols in the targeted area. Local Law Enforcement Block Grant funding has allowed our Agency the ability to fund the Community Pride Revitalization (CPR) Program within the site. The CPR Program provides bike teams to patrol the site in an overtime capacity focusing on the exchange of information between the officer and the community. The focus of the Community Bike Patrols allow our officers the ability and opportunity to create a rapport with community members, exchange ideas and concerns, identify priorities and together improve the Quality of Life within the community. This critical rapport has been proven to be invaluable since the programs inception.

PREVENTION/INTERVENTION/TREATMENT- The Safe Haven serves as the hub for prevention and intervention for the residents of our site. The Safe Haven is constantly evolving, providing additional offerings to the neighborhood and consequently utilization of the facility has tripled. Program accessibility and the effective coordination of resources is critical to the Safe Haven's effectiveness. The Safe Haven has provided ten computers for a computer lab, basketball backboards, and a van for transporting youth for the Pleasant City Multi-cultural Community Center, a facility approximately

twelve blocks north of the Safe Haven within the Weed and Seed site. The key to this strategy is effective collaboration and accessibility to residents. With this realization, the Safe Haven will expand and in essence identify the Multi-cultural Center, the Salvation Army, and the Boys and Girls Club as core Safe Haven Centers with outreach programs housed within neighborhood stakeholder facilities.

NEIGHBORHOOD RESTORATION - The Community Court is a collaborative effort by Palm Beach County, the Palm Beach County Criminal Justice Commission, the City of West Palm Beach Police Department, the Fifteenth Judicial Court of Florida, and the Northwest Community Development Corporation of West Palm Beach, and social and human resource providers. The mission of the program is to address chronic low-level offenses like prostitution, disorderly conduct, vandalism and street level drug offenses that erode the quality of life in a neighborhood and create an atmosphere where serious crime flourishes. "Victimless crimes" make the community the victim and the Community Court aims to make the offender pay back the community by performing community service within the Weed and Seed site in which it was committed. At the same time, the offender is afforded human resources to address problems, such as drug addiction, lack of employment and homelessness. Through a Citizen Advisory Board the community provides the Court input on community problems that need attention and identify needed community projects.

Code Enforcement, building condemnation, building renovation and new construction continue to play a pivotal role in revitalizing our site. Federal, State, and local funding has allowed for new residential construction, renovation and expansion of a public school within the site, and where once a vacant lot existed now a vibrant park exists. This neighborhood enhancement includes a tennis court, an expansive open multi-purpose grass field, fountain splash area, covered picnic area, and a playground.

SPECIAL INITIATIVES/NOTABLE PROGRAMS

The current Special Initiative, Truancy Interdiction Program (TIPS) is a comprehensive approach to reducing truancy in the Weed and Seed site. The interdiction teams have been diligently targeting truancy within the site. Since October 1, 2000 our T.I.P.'s Units have located 181 truants within the Weed and Seed Site. The Safe Haven has initiated or facilitated a multitude of diverse programs during this past year for the community ranging from horticulture instruction to etiquette training.

EVALUATIONS

A statistical analysis was conducted by our in-house Crime Analyst on 'Police Activity and Programming within the Weed and Seed Site'. The City of Woburn, Massachusetts recently conducted an analysis of police activity and programming within their site and our Agency utilized their format as a template for our evaluation. In the past, our Agency expended an excessive amount of funds on a private consultant to accomplish the same task our internal analyst effectively accomplished and we believe we were better served using this approach. A copy of the Evaluation is enclosed within this submission.

1. Current Linkages and Services

The Weed and Seed Program strategy in the City of West Palm Beach will continue to focus on the four basic components: Law Enforcement, Community Policing, Prevention, Early Intervention and Treatment, and Community Restoration. The Law Enforcement element has continued to impact the Weed and Seed Site through a 'zero-tolerance' approach to narcotic activity through the continued utilization of undercover operations, high-profile patrols, and vehicle inspection initiatives.

Members of the West Palm Beach Police Community Services Division, Community Policing Division will strengthen existing partnerships and forge new partnerships in pursuit of community justice. Since our Department has embraced the Problem Oriented philosophy we have made many inroads in enhancing the quality of life in the community. This has been done by combining the efforts and resources of the 19 community policing officers, local government and community members.

The short term goals of this program will be an immediate reduction in both crimes against person and property, reduced open market drug sales, increased recreational activities for at risk children in the affected area, and long term effects will be an overall lowering of crime in the affected areas, more involvement or ownership by community members in problem solving within the areas they live and work, and revitalizing the neighborhoods.

Using problem solving techniques the community members, in partnership with this agency, identified the specific concerns that are most threatening to their safety and well-being. These areas of concern then became priorities for this joint police-community partnership. Quality of life were at the forefront of their concerns.

Developing strong, self-sufficient communities is an essential step in creating an atmosphere in which serious crime will not flourish. Our Community officers have became responsible for smaller geographic areas and projects. This narrowing approach allowed trouble spots to be identified and problem-solving progress measured. Officers began to work with the public. No longer reactive the department has became pro-active as it has embraced problem solving and community partnership.

By combining efforts we can improve the quality of life in the Weed and Seed area by increasing the high profile bike patrols, community clean-ups, and other specific concerns that community members feel are most threatening to their safety and well-being.

Community Court – Tom Beck – 561.355.6126

The City has committed to financially support the Community Court through expensing funds for the recurring lease, utilities, and maintenance costs. Seed funds have been used to purchase computers, printers, UPS system, a server, two TV/VCRs, and a laptop computer. Programmatic support is derived from daily-deferred arrest referrals by the Police Departments CPR Bike Teams.

The Safe Haven has partnered with committed organizations during the past year providing a multitude of services.

Urban Youth Impact - Rev. William Hobbs - 561.844.3667

Youth After-School Tutorial and Homework Assistance Program - Serving children between the ages of 5 and 14, the seventy children who attended this program during the school year would receive a mixture of homework assistance, tutoring, and recreation during each session. A majority of the program's children increased a reading level since the beginning of the school year.

Write Note Foundation - During the current school year, Urban Youth Impact has been able to partner with other agencies and individuals to provide a broader range of services. In September 2000, Urban Youth Impact partnered with the Write Note Foundation to offer middle school students the opportunity to write and produce their own music using professional equipment.

Fine Arts Program – In October 2000, Urban Youth Impact collaborated with the Dreyfus High School of the Arts to provide a fine arts program for all the students enrolled at the Safe Haven. Over 50 high school students volunteer their time to teach classes in Visual Arts, Communications, Theatre, Dance, and Music weekly.

Kids Across America – Forty children traveled to Missouri Christian for a youth camping experience targeted toward the inner-city, designed to build hope, leadership and self-esteem through relationships with Christ, peers, and a staff of dedicated collegiate and professional athletes.

The Salvation Army – Rev. Randy Boone – 561.833.6767

Salvation Army Family Scholarships – Fifteen families will receive a one year scholarship to all activities conducted within the Center.

Boys and Girls Club – Leonard Bryant – 561.683.3392

Youth Scholarships – Seventy-five children will receive a one year membership to the Boys and Girls Club.

Volunteer Services

Drama Instruction - Provided by volunteer Robin Fink one night per week, this class produced a puppet show and several students received instruction in playing the drums.

Horticulture Sessions – The 4H club provided instruction in horticulture and expanded the existing garden.

Arts and Crafts – Volunteer Noelle Likavic leads a class one night per week allowing the children to express themselves through the use of arts and crafts.

Roosevelt Community Wellness Center – Maria Highsmith – 561.653.2032- The Wellness Center provided a variety of health related workshops to community residents out of the Safe Haven, which included anti-smoking presentations, a health fair, and regular blood pressure check-ups.

Roosevelt Food and Nutrition Program – Gwendolyn Garnett 561.822.0276 - The Safe Haven has assisted in the coordination of this needed program which serves

lunch to senior citizens each day out of our site. The Safe Haven marketed the fledgling program and helped it to thrive again. The Safe Haven utilizes children from the site to spend time with the seniors who are from the neighborhood. They read together, eat together, and talk together. It is an amazing inter-generational project.

West Palm Beach Police Athletic League – Stephanie Patterson 561.653.2812 – This has been a strong partner ship since the establishment of the Safe Haven. Over 600 children participated in the program this year at the Safe Haven site. A 'Summer Life Skills Camp' is slated for this summer (2001) which PAL will be hosting.

City of West Palm Beach Recreation Department – Laura Schupert 561.835.7025 – The recreation department has waived fees so that Safe Haven children are able to take swimming lessons in the City swimming pool. This is a strong partnership that can do fantastic things for the children in the community.

BookMobile – Claudio Serrer 561.659.8010 – The Book-Mobile comes to the Safe Haven each week.

Volunteer Income Tax Assistance – Virginia Kennedy 561.616.2064 – Working from the Safe Haven, this organization provided free tax assistance to thirty community residents.

Florida Marlins – The Marlins have donated tickets for community members to attend games through the YWCA.

The Weed and Seed Steering Committee provides direct oversight of the strategies, goals and objectives; coordinates the activities of the program and its Seed Policy Board; identifies and assesses policy issues which impact the quality of life in the Weed and Seed area; and develops strategic plans for ensuring better coordination and cooperation of social, health, recreation and other service agencies and community development agencies within the target area.

Our diverse and talented interim Seed Policy Board membership consists of:

John Clayton, WPB Neighborhood Advisory Board Chair, 561.659.7370
Leo Garcia, Palm Beach County Resident, 561.369.7804
Veronica Howard, T.L. Wingate, Inc., 561.863.9560
Travis Kelly, Office Depot, 561.588.8066
Robbie Littles, Black Student Coalition, 561.832.0954
Maxime Jean Louise, Family Internet Connection, 561.687.2343
Andy Marcus, 561.558.9407
Andrew Saul, Manhatten York, 561.367.9900
Ted White, WPTV- Channel 5, 561.653.5709

The membership of the Steering Committee is as follows:

Chair	**Emalyn Webber**, Managing Assistant, U.S. Attorney's Office
1st Vice Chair:	**Remar M. Harvin** , Director, PBC Housing & Community Development
2nd Vice Chair:	**L. Diana Cunningham**, Executive Director, PBC Criminal Justice Commission
Secretary:	**Rev. Tony Drayton**, St. James Missionary Baptist Church
Treasurer:	**Larry Herndon**, Program Operations Admin., FL Dept. of Juvenile Justice

Steering Committee Members

Ray Adams, PBC Health Care District
~~**Dale Armstrong**, Resident Agent-in-Charge, U.S. Treasury Department~~
Rev. Edgar Austin, Riviera Beach Resident & President, Citizens Crime Watch
Cecil Bennett, CEO, PBC Health Care District
Ric Bradshaw, Chief of Police, West Palm Beach Police Department
Charles Broadnax, President, Delray Beach Community Development Corporation
Michael Brown, Mayor-Elect, City of Riviera Beach
Lula Butler, Director, City of Delray Beach Community Improvement Department
John Clayton, West Palm Beach Resident
Isabella Cunningham, Riviera Beach Resident & President, Neighbors United, Inc.
Paul Damico, Chief of Felony Division, Public Defenders Office
Earl Davis, Riviera Beach Resident & President, Riviera Beach Southside Coalition
James Fitzgerald, Chief of Police, Palm Beach Gardens Police Department
Maude Ford-Lee, Chair, PBC Board of County Commissioners
Charles Gainey, Riviera Beach Resident & President, N.W. Riviera Beach CRC
John Green, Riviera Beach Resident & Coord., City of Riviera Beach Housing & Community Dev.
Carolyn Gholston, Delray Beach Resident & President, SW Delray Presidents Council
Eugene Herring, Delray Beach Resident & Admin. Assistant, PBC Commissioners Office
Annetta Jenkins, Program Director, Local Initiatives Support Corporation
Jerry Kelly, Community Development Specialist II, WPB Housing & Com. Development
Rev. Gerald Kisner, Tabernacle Baptist Church
Kenneth Morrow, Resident Agent-in-Charge, DEA
James L. Martz, Assistant State Attorney, SAO
Jase Maxwell, Jr., Riviera Beach Resident/Site Business Owner - Maxwell's Groceries
Teresa McClurg, Interim Director, WPB Housing & Community Development
Ken Montgomery, Executive Director, PBC Workforce Development Board

Darryl Olson, Juvenile Justice Manager, District IX, FL Dept. of Juvenile Justice
Richard Overman, Chief of Police, City of Delray Beach Police Department
Jerry Poreba, Chief of Police, City of Riviera Beach Police Department
Ed Rich, Director, PBC Department of Community Services
Chuck Ridley, Delray Beach Resident & Executive Director, MAD DADS of Greater Delray Beach
Laura Schuppert, Director of Recreation, City of West Palm Beach
Richard Virgadamo, Assistant Director, PBSO
Jimmy Weatherspoon, Delray Resident & So. County Urban League Coordinator
Mike Washam, Managing Supervisor, FDLE
Ed Wideman, Delray Site Business Owner & President, Delray Merchants Association

2. Implementing the Weed and Seed Strategy

LAW ENFORCEMENT

The Evaluation found that violent crime, including: homicides, forcible sex offenses, robbery and aggravated assault, are at a five year low. During the same five year period narcotic offenses are at a five year high. Both of these revealing statistics can be attributed to the efforts of our Weeding strategy. The MALEU will continue to target narcotic offenders in the Weed and Seed site utilizing buy/busts, reverses, traditional and problem solving methods. The team will continue to apply arrest techniques for targeting dealers/buyers, such as, buy bust, reverse stings, stake-outs, video buys, decoys and search warrants used to infiltrate crack houses, confiscate firearms and stolen property and to identify landlords who consistently rent to drug dealers. In addition to the assigned zone officers, a five member HOPE team that focuses on drug enforcement is assigned exclusively to the area. Four additional officers on bike patrol circulate the neighborhood five days per week in an overtime capacity.

COMMUNITY POLICING

Community policing is a philosophy and an organizational strategy that promotes a new partnership between people and their police. It is based on the premise that both the police and their community must work together to identify, prioritize, and solve contemporary problems such as crime, the fear of crime, illegal drugs, social and physical disorder, and overall neighborhood decay, with the goal of improving the overall quality of life in the area.

Our site has received discretionary Byrne Grant funding for our 'Front Porch Community Policing Enhancement'. Slated to kick-off June 1, 2001. This funding will allow our Department to apply enhanced Community Policing Services to the Weed and Seed Site, inclusive of the Front Porch area. This multi-level community mobilization initiative provides for the primary Community Bike Patrols, Crime Prevention and Target Hardening instruction, Citizen Patrols, Recreational Activities, Summer Enrichment

Camps, Substance Abuse Video Production, Information Exchange Forums, and Neighborhood Clean-Sweeps.

Community Mobilization Rally
This 'rally' will serve as the starting gate for this enhancement. The rally will bring together the neighborhood residents and business owners, all area service providers, both public and private, in concert with the multitude of varied police services in an effort to forge a common vision for the future of this neighborhood. Scholarships will be offered to forty at-risk youth to local summer camps offered in our area.

Community Bike Patrols
The focus of this initiative, Community Bike Patrols allow our officers the ability and opportunity to create a report with community members, exchange ideas and concerns, identify priorities and together improve the Quality of Life within the community.

Crime Prevention and Target Hardening Instruction
Crime prevention takes on renewed importance in community policing as the police and the community become partners in addressing problems of disorder and neglect that can breed serious crime. As links between the police and the community are strengthened over time, the partnership is better able to pinpoint and mitigate the underlying causes of crime. A Needs Assessment will additionally be conducted during the course of these Residential Surveys for social service referrals and code violations. Through experienced instruction, residential and business security surveys, and Operation ID services this goal can be realized.

Citizen Patrols
To promote a program which is comprehensive in nature, professional in appearance, and forges a lasting partnership with a diverse group of citizenry for the prevention and suppression of crime within the City of West Palm Beach. The existing program plans expansion into the Front Porch area to conduct at least 40 Citizen Patrols during the course of the year.

Recreational Activities
A 'Three-on-Three Basketball Tournament' is tentatively slated for July 2001 within the Front Porch site as an enhancement to the existing Police Athletic League to demonstrate the Department's commitment to the youth of our community.

Summer Youth Enrichment Camps
To provide 105 scholarships to at-risk youth of the Front Porch site to attend summer camp locally. These camps provide a variety of specialized services and will empower youth with the life skills, education, inspiration, and hope they need to survive and grow amidst the spectrum of negative influences they face each day.

Information Exchange Forums
These Community Meetings will be provided monthly to provide a forum for all community members to voice concerns and provide innovative problem solving methods.

Community leaders, Crime Watch members, Crime Prevention Officers, and Community Police Officers, will come together monthly for instruction, direction, to ensure all concerned understand the goal of this program and share the common vision to attain it.

Neighborhood Clean-Sweeps

Intrinsic to neighborhood pride is to ensure involvement of the community in the ownership of the problems at hand. The police officers in partnership with the community will conduct four Neighborhood Clean-Sweeps during the year to beautify the area in which they live.

Substance Abuse Video Production

Replicating the success of our nationally awarded video production in 2000 for firearms reduction under our Weed and Seed G.R.I.P. initiative, the West Palm Beach Police Department will produce this video which will be geared towards teens and focuses on Substance Abuse Reduction. The video will then be distributed to the Palm Beach County School Board and all interested municipalities and service providers.

PREVENTION/INTERVENTION/TREATMENT

As the City of West Palm Beach Weed and Seed site embarks on a renewed cycle of funding, we embrace the national EOWS priority of partnering with organizations to coordinate learning opportunities for the youth of our Weed and Seed site.

Our Weed and Seed site has more than doubled in size, providing an opportunity to enrich the lives of those economically disadvantaged residents within the expanded area. During the FY2000/2001 funding cycle it became clearly apparent that our single Safe Haven Center could not effectively provide much needed human services to the expanded area due primarily to residents inability to access it's services due to the distance they would have to travel. At the furthest reaches of the site this could amount to over 44 city blocks. This identified issue provided the catalyst to revisit and adjust our strategy. We identified that we must evolve with our site, head in a new direction, broadening our scope and thereby expanding service opportunities.

The increased service population and expanded site challenged us to 'do more with less'. The issue at hand was 'How could we provide quality human services to all site residents while ensuring the services provided at our Safe Haven were maintained'.

For the last three years $104,798 of our $125,000 award was utilized for the salaries of a safe haven coordinator, recreation specialist, and a secretary. The recurring travel and facility maintenance costs provided only $6,000 per year for programs, or five hundred dollars per month. The site has now doubled in size and population.

It was determined that we could better utilize funding and provide expanded services by dissolving the positions of recreation specialist and secretary thereby providing approximately $55,000 for programs. The safe haven coordinator will be housed within the police department providing an additional savings in facility maintenance and associated costs of $5,000.

Coordination Strategy

Leveraging existing resources and building long-term relationships is at the core of our 'Coordination Strategy'. Our safe haven coordinator will be tasked with assessing all programs offered by service providers within our site. Being an objective party with no hidden agenda, but a sincere dedication to our community, Craig Spatara will seek out service providers, identify proven programs within the site and provide support in the form of enhancements to facilitate in their effectiveness and efficiency. The 'enhancement' may be in the form of coordinating programs between service providers within a given area of the site to ensure that the schedule of offered activities are not duplicated at a given time but rather staggered thereby increasing the number of times the activity is offered and increasing participation. Enhancements can be provided through mini-grants to proven programs. Craig Spatara conducted a cursory assessment of service providers within our site and an example of a proven program which he was unaware of is the Payne Chapel African Methodist Episcopal Church. The church offers after school tutoring to elementary and middle school children and is staffed by volunteer teachers and aides. The daily attendance ranges from 90 to 130 students. Our current Safe Haven provides service to an average of 35 children per day. The church is in dire need of a computer and educational software. This is a prime opportunity to form a partnership and build a long-term relationship. By identifying surrounding service providers inclusive of the Safe Haven our safe haven coordinator can facilitate possibly outsourcing some of the children to relieve the overcrowding and thus decrease the teacher student ratio, providing a better environment for learning. Enhancements can be provided additionally in the form of assistance from our safe haven coordinator for new programs which need direction or existing programs which are seeking to form partnerships or require funding assistance.

Identified within our Weed and Seed site are three identified Safe Havens with a fourth , The Boys and Girls Club, currently under construction in the northern reaches of the site.

~ SAFE HAVEN CENTER # 1 ~
~ Weed and Seed Safe Haven Center at Roosevelt Full Service Center ~

This Center has proven to be the ideal Safe Haven for the residents of the targeted neighborhood. It is a multi-service center where a variety of youth and adult services are coordinated in a highly visible, accessible facility that is secure against crime and illegal drug activity. It is a place where youth and other residents currently access needed services, develop relationships, find opportunities to be productive and successful and enhance skills. Center staff and local residents have developed programs and services to ameliorate neighborhood problems through prevention, intervention and treatment activities. This Safe Haven center is located at the center rim of the three adjoining Weed and Seed neighborhoods and is operated by the Palm Beach County School Board in partnership with the West Palm Beach Weed and Seed Program. As its name implies, the Full Service Center provides an impressive list of services, programs and providers all of which can be accessed on the campus grounds. Principal, Dr. Shirley Payne, leads the Center with a mission of continual improvement and program evaluation in order to provide the most effective tools and practices for its students and staff.

Programming Activities

Youth After-School Tutorial and Homework Assistance Program (Ages 5-14) This program provide children with developing their educational skill through after-school tutorial assistance. The participants are tested at the beginning of the program and at the end of the school year.

Youth Book Club (Ages 5-14)
The Bookmobile comes to the Safe Haven every Wednesday to assist with this program. The children read an average of 100 books a school year.

Arts and Crafts (All Ages)
This activity provides the children with the opportunity to free express themselves through arts and crafts. This class takes place on Wednesdays from 5:00 – 6:00 p.m.

Anger Management (Ages 6-11, 12-15)
Anger Management takes place on Tuesdays from 3:00 – 3:30 p.m. The focus is on elementary to middle school youth.

Inner City Impact's Outreach Program (Ages 5-18)
This program reaches over 70 children and their families every Thursday night from 5:00 – 8:00 p.m. Recreation, spiritual enrichment, relationship building, arts and crafts and snacks make up this outreach night.

Youth Computers (Ages 5-14)
The program teaches children the basic computer skills, typing and understanding computer hardware and software. There is a reading program and games for the children to play to maintain their interest.

Drama (Ages 10-15)
This program provides approximately 20 children with training in the drama and theater performance. This program is offered in partnership with Pathway of Life. The class is offered Wednesday nights from 5:00 – 7:00 p.m.

Parenting
In partnership with the school board's Megaskills Workshop Program, a parenting course is offered to assist parents with developing coping skills and understanding challenges all parents face. This class is offered on Thursday nights at 6:00 p.m.

SAFE HAVEN CENTER # 2
~ Pleasant City Multi-Cultural Center ~

The Pleasant City Multi-Cultural Center was once the Pleasant City Elementary School for the residents of the Pleasant City neighborhood. The original building was constructed in 1914 and a second facility was added on in 1926. The building is a historic monument for the residents because it signifies their first steps to learning and building social skills. In the late 50's the City purchased the property and converted its use to a community center, however they only utilized part of the structure. In 1993 the City renovate the original school building and gave birth to the Multi-Cultural Center. The two building co-facilitate program and services for the community. The Center is open Monday through Friday 9:00 a.m. – 8:00 p.m. and on Saturday 10:00 a.m. – 6:00 p.m.

Meet the Staff: Center Director, (4) Assistant Center Directors, (6) Part-Time Recreation Specialist and (1) Maintenance Person.

Programming

The Center's programs address the needs of neighborhood residents from birth to senior citizenship and it caters to students who, without special attention and strategic programming would be ignored by the society. Program selection and implementation at the Center are guided by a "risk and protective factor" approach. Risk factors have been identified, prioritized and addressed with a comprehensive strategy that reduces risks while enhancing protective factors that lessen the impact of being exposed to these risks.

Program such as: Investing in Education, Homebuyers Credit and Budgeting Workshop, EMS Child Passenger Safety Training, GED Preparation, Cultural Arts and Crafts, Voices (A Domestic Violence Prevention Program), Poetry, Tennis, Youth Soccer, Cookie Baking Club, FOOSA – Fun Out of School Activities, Girls Flag Football, Gymnastics, Parenting Classes, Kite Making, Basketball, Gardening, Violence Intervention, Martial Arts, Fishing, Etiquette Classes, Bowling, Video and Photography Tackle Football, Consumer Credit Counseling, Job Training, Senior Meals, College Skills Bank (College Preparation), Computer Lab, Ceramics, Homework Assistance, Billiards, Body Building, Softball, Fitness and Aerobics.

SAFE HAVEN CENTER # 3

~ The Salvation Army NW Community Center ~

The Salvation Army NW Community Center serves the residents of West Palm Beach by offering recreational, educational, community development and social activities for the uplifting and improvement of the overall quality of life. The Center is open Monday through Friday 9:00 a.m. – 9:00 a.m. and Saturday 10:00 a.m. – 3:00 p.m.

Programming

The Center provides after-school tutorial programs, music, dance, computer training, and athletic programs.

Staffing

The Center has trained staff available that is comprised of the Executive Director, Program Director, Athletic Director, (2) Secretary/Clerks and (2) Recreation Assistants.

SAFE HAVEN CENTER # 4
~ The Florence De George Boys and Girls Club ~

Currently under construction with an anticipated opening date of September 2001, this safe haven is the culmination of a five year effort and an unprecedented public-private partnership between local non-profits, major foundations and local and federal funding.

NEIGHBORHOOD RESTORATION

The Community Court is a collaborative effort by Palm Beach County, the Palm Beach County Criminal Justice Commission, the City of West Palm Beach Police Department, the Fifteenth Judicial Court of Florida, and the Northwest Community Development Corporation of West Palm Beach, and social and human resource providers. The mission of the program is to address chronic low-level offenses like prostitution, disorderly conduct, vandalism and street level drug offenses that erode the quality of life in a neighborhood and create an atmosphere where serious crime flourishes. "Victimless crimes" make the community the victim and the Community Court aims to make the offender pay back the community by performing community service within the Weed and Seed site in which it was committed. At the same time, the offender is afforded human resources to address problems, such as drug addiction, lack of employment and homelessness. Through a Citizen Advisory Board the community provides the Court input on community problems that need attention and identify needed community projects. During the first eleven months after the Community Court opened only 122 residents of the Weed and Seed site asked for assistanee with social services. In the following four and one-half months over 1,600 residents have been assisted in social services including bus passes, housing assistance, SSI, food stamps, employment, and health care.

Code Enforcement, building condemnation, building renovation and new construction continue to play a pivotal role in revitalizing our site. Federal, State, and local funding has allowed for new residential construction, renovation and expansion of a public school within the site, and where once a vacant lot existed now a vibrant park exists. This neighborhood enhancement includes a tennis court, an expansive open multi-purpose grass field, fountain splash area, covered picnic area, and a playground and is at the epicenter of our 'Front Porch Kick-off'.

Activities Implementation Schedule

The activities planned for the upcoming fiscal year reflect a consistent proven approach to providing programs to the community we serve. The attached 'Activities Implementation Schedule' is reflective of the multitude and diversity of the programs offered in the upcoming year. The vast majority of programs are to be offered during the school year with the emphasis on after-school instruction. The effectiveness of these programs can not be quantified but measured by the numbers of community members who attend. Craig Spatara, the Safe Haven Coordinator, monitors each program for content and attendance , molding and revising each programs curriculum during the course of the year to ensure substance and community interest are maintained at optimum levels.

3. The Federal Role

U.S. Attorney Emalyn Webber serves as the Chair of the Palm Beach County Weed and Seed Steering Committee. In this capacity, Ms. Webber facilitates cohesiveness between federal agencies, municipal law enforcement, community resources, and neighborhood stakeholders, while ensuring consistency with the Weed and Seed Strategy. It is a unique and powerful concept that has served our Site as well as the sites throughout the County.

Federal Funding beyond that which is offered through the Weed and Seed Strategy has proven to be essential to the success of this initiative. Our Police Department has been actively seeking alternative funding sources to supplement our efforts in the Weed and Seed Site since its inception. The community has received additional services as the result of federal funding through the acquisition of three Local Law Enforcement Block Grants since 1997 totaling over $960,000. These funds have allowed our Agency to provide Bike Patrols in the Weed and Seed Site for the past three years. In the last three years our Agency has been awarded $1,950,000 for the funding twenty-six new community police officers throughout the City, which will have a proportional impact on the Site. The COPSMORE funding of $1,577,458 will allow our Agency to become technologically more efficient resulting in more time for community policing/problem solving activities.

4. Sustaining Your Weed and Seed Strategy

Currently, twenty employees are dedicated to this neighborhood with federal and state grant funding amounting to over $500,000 this year alone. State grants have been acquired to fund the City's Truancy Program, the Police Athletic League, Tobacco Enforcement Program, Front Porch Community Policing Enhancement and the Auto Theft Prevention Initiative. The Chief of Police, Ric L. Bradshaw, identified a needed enhancement within the Weed and Seed site was necessary and created the "Community Pride Revitalization" program, which placed high-profile bike officer teams acting in a Community Policing capacity within the site. The use of alternative grant funding provided by the Local Law Enforcement Block Grant has allowed our Department the ability to place bike officer teams within the Weed and Seed site eight hours per day five days per week for the past two years. This program provided a high profile sustained presence in the area coupled with the bike officer, being removed from the confines of his vehicle, to be approachable allowing residents the ability to communicate concerns and develop a rapport with the officers.

The implementation of our paperless report writing program, through the replacement of the existing CAD and RMS system and issuing laptops to each officer has been progressing this year. This $4.2 million dollar partially grant funded program will allow our officers greater efficiency in the field and subsequently more time to respond to Quality of Life issues in a problem-solving capacity.

The City is awaiting consideration for a DUI enforcement grant, a Truancy Interdiction Grant, Local Law Enforcement Block Grant and an Auto Theft Prevention Grant for FY2001/2002.

Chief Ric Bradshaw is committed to the youth of the City of West Palm Beach providing forfeiture funds to the following programs that provide services within the Weed and Seed site:

1. **BOYS & GIRLS CLUB OF PALM BEACH COUNTY, INC.** (West Palm Beach Unit) ($6,000)
   The donation of $6,000 will be utilized to enhance activities within the West Palm Beach Unit.
2. **CRIMINAL JUSTICE ACADEMY** Lake Worth High School ($2,000)
   This initiative prepares students for careers in criminal justice fields. LETF funds will assist in the acquisition of necessary classroom equipment, computers, flags, banners, color guard uniforms, and special field trips.
3. **POLICE ATHLETIC LEAGUE** ($6,000)
   This citywide athletic program will benefit from funding by supporting the PAL basketball, soccer, baseball, and softball team while infusing the principals of teamwork, leadership, and commitment to the youth of our City.
4. **CRIME PREVENTION OF WEST PALM BEACH, INC** ($3,500)
   This citywide volunteer crime prevention program will utilize the donation to fund the printing costs associated with a bi-monthly citywide newspaper. Funding will additionally be used towards the support of the National Night Out event.
5. **CITIZEN PATROL** ($20,000)
   To sustain the Citizen Observer Patrol which provides a lasting partnership with a diverse group of citizenry for the suppression of crime within the City of West Palm Beach. Funds will provide for vehicles, fuel, and the maintenance of existing equipment.
6. **PAYNE CHAPEL** ($2,500)
   To assist in supporting the after school Outreach Program for Children which provides tutoring services to 90 to 130 students per day. Proficiency in the basic skills is considered to be requisite for coping and problem solving.
7. **URBAN YOUTH IMPACT** ($2,500)
   To support the Work Skills Program for inner city youth ages 14 and above. These funds will be used to employ youth to repair and paint homes within the weed and seed site during the six week summer program.

8. **PALM BEACH MARINE INSTITUTE** ($2,500)
   The Institute which serves 120 – 140 at-risk youth each year receives referrals through the court system for first time offenders. Funds will provide for the support of acquiring a computerized vocational skills testing and pre-employment education system. The educational and vocational goals for each student would then be based on the results from the career assessment software.
9. **NEW HOPE CHARITIES** ($2,500)
   New Hope Charities, Inc. Offers literacy classes on a daily basis for groups of up to 10 students which are rotated through the library and are required to read a short story then present a written or oral report to the instructor. In addition, students are rotated through the computer lab where they receive literacy services through the use of interactive software designed to improve vocabulary and grammar. Funding will assist with acquiring educational software and associated program materials.
10. **HANLEY HAZELTON FOUNDATION** ($2,500)
    The 'Roots and Wings' program teaches parents how to influence and teach their children skills to help them overcome the serious challenge regarding the use of alcohol, nicotine, and other drugs. This funding will provide for three programs within our Weed and Seed site.
11. **THE WRITE NOTE FOUNDATION** ($2,500)
    The 'Reach and Teach' program provides the opportunity for disadvantaged youth to learn how to write, record, and produce songs and is geared towards students ages 10-14. This program is designed to help improve a participant's image of self-worth through a creative artistic outlet. Funding will assist in supporting the costs associated with providing one four-week session.
12. **NORTON MUSEUM OF ART** ($2,500)
    The Progressive After-school Art Community Education (PACE) program recently opened an outreach site in the heart of our City, at the Twin Lakes Community Center, 7th Street and Booker Avenue, providing after-school stimulating art activities for at-risk youth. The $2,500 donation will allow the Norton's Education Department to bring new and innovative educational programming to under-served children in our area.

Resources can be found in people, time, and money. Through a balanced approach of increased manpower, grant funding from multiple sources, donations to critical programs, acquiring volunteers, and community involvement this strategy will succeed.

Executive Office For Weed and Seed
Fiscal Year 2001-2002
City of West Palm Beach
Implementation Schedule

ACTIVITY DESCRIPTION	OCT 2001	NOV 2001	DEC 2001	JAN 2002	FEB 2002	MAR 2002	APR 2002	MAY 2002	JUN 2002	JUL 2002	AUG 2002	SEP 2002
Educational Classes												
Homework Assistance	X	X	X	X	X	X	X	X	X	X	X	X
Youth Book Club	X	X	X	X	X	X	X	X	X	X	X	X
Arts and Crafts	X	X	X	X	X	X	X	X	X	X	X	X
Youth Computer Lab	X	X	X	X	X	X	X	X	X	X	X	X
Adult Computer Lab	X	X	X	X	X	X	X	X	X	X	X	X
Anger Management (PAL Life Skills Camp)										X		
Youth Adventure Camp									X			
Circle F Ranch										X		
Kids Across America										X		
Salvation Army	X	X	X	X	X	X	X	X	X	X	X	X
Boys and Girls Club	X	X	X	X	X	X	X	X	X	X	X	X
Mini-grants				X	X	X	X	X	X			
PROJECT MANAGEMENT												
Financial Reimbursement Forms				X				X				X
Project Performance Reports						X						X
Annual Project Performance Report												X
Closeout Package												X

City of West Palm Beach Weed and Seed FY 2001-2002 (cont'd)

BUDGET DETAIL WORKSHEET

A. PERSONNEL

Name/Position	Salary Computation	Cost
Safe Haven Coordinator	$19.71 per/hr x 2080/hrs	$40,997
Police Officer (MALEU)	$ 38/hr O.T. x 8 officers x 3 hours/wk x 35 weeks	$31,920
Police Sergeant (MALEU)	$ 45/hr O.T. x 2 sergeants x 3hours/wk x 35 weeks	$ 9,450
	TOTAL	$82,367

B. FRINGE BENEFITS

Name/Position	Benefits Computation	Cost
Fringe benefits for the personnel listed in budget category A are calculated at 35% of the base salary. This includes: FICA taxes and Medicare (7.65%), Pension (17%), Health, Life and Disability Insurance (10.35%).	($40,997 x 35%)	$14,349
Police Officer (MALEU)	($31,920x15.5%)	$ 4,964
Police Sergeant (MALEU)	($ 9,450x15.5%)	$ 1,469
	TOTAL	$20,782

C. TRAVEL

Purpose of Travel	Item	Computation	Cost
National Workshops and Conferences (Total: $7,500) (Type and number to be determined by EOWS)			
1) 1 Person @ $900/trip x 7 trips			$6,300
	Airfare	$400/trip	
	Hotel	$100/night x 3 nights = $300	
	Per Diem	$40/day x 4 days = $160	
	Incidentals (taxi cabs, etc)	$40/trip	
	Total	$900	
2) Regional Meeting: 1 Person @ $600/trip x 2 trips			$1,200
	Mileage (or airfare not to exceed)	400 miles x $.20/mi x 2 ways = $160	
	Hotel	$106.67/night x 3 nights = $320	
	Per Diem	$40/day x 3 days = $120	
	Total	$600	
		TOTAL	$ 7,500

City of West Palm Beach Weed and Seed FY 2001-2002 (cont'd)

D. EQUIPMENT

Item	Computation	Cost
	TOTAL	$ 0

E. SUPPLIES

Supply Items	Computation	Cost
	TOTAL	$ 0

F. CONSTRUCTION

Purpose	Description of Work	Cost
TOTAL		$ 0

G. CONSULTANTS/CONTRACTS

Contracts

Item	Service to be Procured	Cost
Vickers House (Program Assistant)	$7.21/hour x 20 hours/wk x 52 weeks	$ 7,500
Urban Youth Impact Tutorial Program		
Part-time Parent Liaison	$10/hour x 10 hours/wk x 52 weeks	5,200
Site Coordinator	Offset full-time salary of $25,000	10,000
Student Supplies	Pencils, paper, crayons, markers, glue, paint	1,000
Snacks	Snacks for children	800
PAL Summer Life Skills Camp	25 children @ $80 per	2,000
Pathway of Life		
Youth Adventure Camp	20 children @ $200 per	4,000
Circle F Ranch	20 children @ $200 per	4,000
Kids Across America	50 children @ $175 per	8,750
Salvation Army	20 family year memberships @ $200 per	4,000
Boys and Girls Club	100 children @ $10 per	1,000
Mini-Grants	Undetermined number	13,904
TOTAL		$62,154

City of West Palm Beach Weed and Seed FY 2001-2002 (cont'd)

H. OTHER COSTS

Description	Computation	Cost operations.
1) Cellular telephone air time for six cellular telephones for MALEU narcotics		$ 1,000
2) Rental vehicles for MALEU buy/bust narcotics operations.		$ 1,197
TOTAL		$ 2,197

I. INDIRECT COSTS

Description	Computation	Cost
TOTAL		$ 0

BUDGET CATEGORY		
A.	Personnel	$ 82,367
B.	Fringe Benefits	$ 20,782
C.	Travel	$ 7,500
D.	Equipment	$ 0
E.	Supplies	$ 0
F.	Construction	$ 0
G.	Consultants/Contracts	$ 62,154
H.	Other	$ 2,197
I.	Indirect Costs	$ 0
Total Direct Costs		$175,000
TOTAL PROJECT COSTS		$175,000

City of West Palm Beach Weed and Seed FY 2001-2002 (cont'd)

Budget Summary- When you have completed the budget worksheet, transfer the totals for each category to the space below. Compute the total direct costs and the total project costs. Indicate the amount of Federal requested and the amount of non-federal funds that will support the project.

Budget Category	*EOWS Core*	*Safe Haven*	*Law Enforcement*
Personnel	-0-	$40,997	$41,370
Fringe	-0-	$14,349	$ 6,433
Travel	$ 7,500	-0-	-0-
Equipment	-0-	-0-	-0-
Supplies	-0-	-0-	-0-
Construction	-0-	-0-	-0-
Contractual	-0-	$62,154	-0-
Other	-0-	-0-	$ 2,197
Total Direct	$7,500	$117,500	$50,000

City of West Palm Beach Weed and Seed FY 2002-2003 (cont'd)

BUDGET DETAIL WORKSHEET

A. PERSONNEL

Name/Position	Salary Computation	Cost
Safe Haven Coordinator	$19.71 per/hr x 2080/hrs	$40,997
Police Officer (MALEU)	$ 40/hr O.T. x 8 officers x 3 hours/wk x 35 weeks	$33,600
Police Sergeant (MALEU)	$ 46/hr O.T. x 2 sergeants x 3hours/wk x 35 weeks	$ 9,660
Police Officer (Weekend Teen)	$ 40/hr O.T. x 2 officers x 8 hours/wk x 23 weeks	$14,720
	TOTAL	$98,977

B. FRINGE BENEFITS

Name/Position	Benefits Computation	Cost
Fringe benefits for the personnel listed in budget category A are calculated at 35% of the base salary. This includes: FICA taxes and Medicare (7.65%), Pension (7.5%), Health, Life and Disability Insurance (10.35%).	($40,997 x 35%)	$14,349
Police Officer (MALEU)	($33,600x15.5%)	$ 5,208
Police Sergeant (MALEU)	($ 9,660x15.5%)	$ 1,498
Police Officer (Weekend Teen)	($14,720x15.5%)	$ 2,282
	TOTAL	$23,337

C. TRAVEL

Purpose of Travel	Item	Computation	Cost
National Workshops and Conferences (Total: $7,500) (Type and number to be determined by EOWS)			
1) 1 Person @ $900/trip x 7 trips			$ 6,300
	Airfare	$400/trip	
	Hotel	$100/night x 3 nights = $300	
	Per Diem	$40/day x 4 days = $160	
	Incidentals (taxi cabs, etc)	$40/trip	
	Total	$900	
2) Regional Meeting: 1 Person @ $600/trip x 2 trips			$ 1,200
	Mileage (or airfare not to exceed)	400 miles x $.20/mi x 2 ways = $160	
	Hotel	$106.67/night x 3 nights = $320	
	Per Diem	$40/day x 3 days = $120	
	Total	$600	
		TOTAL	$ 7,500

Exhibit 2R: SHP Project Information

Project Information

1. **Basic Identification**

Miami Dade County
Riverside House - 19 Beds
DUNS #: [redacted]

a. Grantee Name: Miami Dade County
b. Project Name: Riverside House 19 Beds SHP
c. Sponsor Name: Riverside Christian Ministries, Inc. DBA Riverside House
d. Address: 968 NW 2nd Street, Miami, FL 33128
e. Telephone: 305-326-9799 x 103
f. Fax Number: 305-326-9003
g. Contact Person: Catherine Vigilant
h. Project Congressional District: 5
i. Project 6-digit Geographic Code: 121968
j. Project Number of Grant Being Renewed: FL14B400042 PIN: FL [redacted] 1400 3
k. Component/Type: (please check one) TH☒ PH☐ SSO☐ SH-Th☐ SH-Ph☐ HMIS☐ IH☐
l. Priority Number on Exhibit 1: 37

2. **Number of Beds/Number of Participants**

Chart 1: Beds

Beds	Current Level
Number of Bedrooms*	4
Number of beds*	19

*Do not complete information on the number of bedrooms and beds for Supportive Services Only (SSO) or Dedicated HMIS projects. In those instances, enter "N/A" in the appropriate cells.

Chart 2: Participants

Participants	Current Level (if applicable)	No. Projected to be served over the grant term
Number of families with children	n/a	n/a
Of persons in families with children		
a. number of disabled		
b. number of other adults		
c. number of children		
Of single individuals not in families		
a. number of disabled individuals	19	45
a.1. number of disabled individuals who are chronically homeless	10	31
b. number of other individuals		

Exhibit 2R: SHP Project Information - Continued

Miami Dade County
Riverside House – 19 Beds
DUNS #[redacted]

Number of Participants/Number of Beds - Instructions

Chart 1 is for recording the number of beds/bedrooms in the project. Do not complete Chart 1 if the project is for supportive services only (SSO) or dedicated HMIS projects.

Chart 2 is for recording the number of participants to be served. Information for each project should be entered in this section except for dedicated HMIS projects.

1. In the first column, please enter the requested information for all items at a point in time (a given night).
2. In second column, enter the number of persons to be served over the grant term.

Note: If your project is funded you will be responsible for achieving the numbers submitted.

3. **Performance**

   a. Are there any significant changes in the project since the last funding approval:
   ☐ Yes ☒ No
   If "yes", briefly describe the changes. (Attach additional pages as needed)

   b. If one or more extensions have been provided for your current grant, please indicate:
   ☐ Yes ☒ No
   If yes, please indicate the number of extensions approved: _____
   The extension period (e.g., two months, one year): For each extension please indicate the extension period, providing dates and number of weeks or months.
   - Extension 1: _____ weeks, or _____months
   - Extension 2: _____ weeks, or _____ months

   List additional extensions as necessary.
   For each extension, identify the reason for the extension.

If not operating at full capacity, please explain.

4. **Additional Key Information**

   a. Check the *Predominately Serve* box if your project primarily targets the given subpopulation, i.e., 70 or more of the persons you serve **or** the *Serve* box if less than 70%.

Subpopulation	Serve Less than 70%	Predominantly Serve (70% or more)
Chronically Homeless		√
Severely Mentally Ill	n/a	
Chronic Substance Abuse		√
Veterans	√	
Persons with HIV/AIDS	√	
Victims of Domestic Violence	√	
Women with Children	n/a	
Youth (Under 18 years of age)	n/a	

Exhibit 2R: SHP Project Information - Continued

b. Project is in a rural area:
☐ Yes
☒ No

c. Is the sponsor and/or applicant of the project a religious organization, or a religiously affiliated or motivated organization? (Note: This characterization of religious is broader than the standards used for defining a religious organization as "primarily religious" for purposes of applying HUD's church/state limitations. For example, while the YMCA is often not considered "primarily religious" under applicable church/state rules, it would likely be classified as a religiously motivated entity.)

Sponsor: ☐ Yes ☐ No Applicant: ☒ Yes ☐ No

d. Is the Logic Model attached? Please see the General Section for instructions.
☒ Yes
☐ No

Project Information Instructions

Items 1, 2 and 3 are self-explanatory. Renewal applicants for a dedicated HMIS project answer items 1, 2c, and 3.

Item 4. – Additional Key Information

a. Check the subpopulations your project will assist. (Check the *Predominantly Serve* box if your project primarily targets the given subpopulation, i.e., 70 percent or more of the persons you propose to serve, or the *Serve box* if less than 70 percent.) Please identify all that apply. Responses will also be used to measure compliance with the requirement that no less than 10% of the funds awarded are for projects predominantly serving individuals experiencing chronic homelessness. New this year, existing permanent housing projects may only replace those exiting the project with homeless persons who come from the street, emergency shelter or transitional housing, not "Other" populations.

Project Number FL14B40042
Support Services Chart
RIVERSIDE HOUSE 19-BED SHP

Exhibit 2R

Miami Dade County
Riverside House – 19 Beds
DUNS #[redacted]

Supportive Service Expense	Year 1	Year 2	Year 3	Total
	(a)	(c)	(e)	(d)
1. Service Activity: Certified Director of Substance Abuse, salary $24,000 + benefits & taxes 30% =$7,200 Quantity: 0.6 FTE	31,200			31,200
2. Service Activity: Substance Abuse Counselor, salary $30,000 + benefits & taxes 30%=$9,000 Quantity: 1.0 FTE	39,000			39,000
3. Service Activity: Counselor/Case Manager, salary $28,000+ benefits & taxes 30%=$8,400 Quantity: 1.0 FTE	36,400			36,400
4. Service Activity: Senior SAP Resident Monitor, salary $21,000+ benefits & taxes 30%=$6,300 Quantity: 1.0 FTE	27,300			27,300
5. Service Activity: SAP Resident Monitors (24-hour staffing), salaries $16,975 each + benefits & taxes 30%=$15,278.00 Quantity: 3.0 FTE's	66,203			66,203
6. Service Activity: Classes/Groups led by Executive Director & Chaplain, salary $9,6000+ benefits & taxes 30% =$2,880.00 4hrs/week each person Quantity: 0.1 FTE each (0.2 FTE total)	12,480			12,480
7. Service Activity: Substance Abuse Counselor, salary $21,620+ benefits & taxes 30%=$6,486 Quantity: 0.7 FTE	28,106			28,106
8. Service Activity: Physical Exams Quantity: 45 /yr @ $ 90 each=$4,050.00;	4,050			4,050
9. Service Activity: Medical Director Quantity: 0.1 FTE Medical Director @ $3,00/yr	3,000			3,000
10. Service Activity: Drug Testing for 19 clients, 4 tests/mth Quantity: Drug Testing 635 tests/yr @ $5.50/test = $3,762.00	3,493			3,493
11. Service Activity: Medications Quantity: 20 medications, such as Tylenol, somuch flu medications, 40@ $4.00 each 80.00	80			80
12. Service Activity: Transportation/Bus trips to client outings Quantity: 19 clients X 1 round trips/mth X $2.50/round trip	800			800
13. Service Activity: Client English as a second language classes Quantity: 25 hrs for 19 clients	6,000			6,000

Project Number FL14B40042
Support Services Chart
RIVERSIDE HOUSE 19-BED SHP

Exhibit 2R

Miami Dade County
Riverside House – 19 Beds
DUNS #: 004148292

Supportive Service Expense	Year 1	Year 2	Year 3	Total
14. Service Activity: Family therapist to provide therapy for clients and family as part of their treatment	9,000			9,000
15. Service Activity: Computer lab & teacher teacher - 2 hrs per week for 19 clients Quantity: 19 clients	5,000			5,000
16. Total Supportive Services Budget	272,112			272,112
17. SHP REQUEST*	217,690			217,690
18. Selectee's Match [redacted]	[redacted]			[redacted]

Project Number FL14B40042
Operating Costs Chart
RIVERSIDE HOUSE 19-BED SHP

Exhibit 2R

Miami Dade County
Riverside House – 19 Beds
DUNS #: 004148292

Operating Costs	Year 1	Year 2	Year 3	Total
	(a)	(b)	(c)	(d)
1. 0.30 FTE Maintenance Coord. salary $9,000+ benefits & taxes 30% = $2,700	11,700			11,700
2. Service Activity: 2 Cooks, salary $11,232+benefits and taxes 30%=$3,370 Quantity: 0.9 FTE's	14,602			14,602
3. Servite Activity: Food Service Manager, salary $9,936 + benefits and taxes 30%=$2,981 Quantity: 0.3 FTE	12,917			12,917
4. Service Activity: Food, paper supplies, $5,000/month x 12 x 30% Quantity: 19 clients	19,800			19,800
5. Maintenance/Repair: for 5 client rooms/bathrooms, plus pro-rated common areas (kitchen, dining rooms, tv rooms, groups rooms , monitoring station, offices, halls, patios, and laundry rooms, trash pickup): Supplies = $5,500	5,500			5,500
6. Service Activity: Laundry equipment (leased) Quantity: 2 washers, 2 dryers @ $145.00/mth X 12 mths = $1,740.	1,740			1,740
7. Service Activity: Client cleaning supplies Quantiy: Cleaning supplies for daily cleaning = $2,500.00	2,500			2,500
8.Utilities: Water = $5,50.00/yr,for 5 rooms + pro-rated common areas/offices	5,500			5,500
9.Utilities:Electricity $ 11,271	11,271			11,271
10.Utilities:Gas $800.00/yr	800			800
11.Utilities:Phone Service incl l/d = $4,500	4,500			4,500
12. Equipment (lease/buy): 6 phones $1,800.00/yr;	1,800			1,800
13. Computers, maintenance and network incl wiring $4,000	4,000			4,000
14. copier/printer -$1,700/yr	1,700			1,700
15. Office Supplies of $100/mth @ 12 mths = $1200	1,200			1,200
16. Insurance: Liability for 19clients and 6 staff = $6,000, Directors and Officers	6,000			6,000
17. Total Operating Budget	105,530			105,530
18. SHP REQUEST**	79,147			79,147
19. Selectee's Match ***	[redacted]			[redacted]
(Line 17 minus line 18)				

** The SHP request for Years 1, 2, and 3 cannot be more than 75% of the total operating budget for those years.

Exhibit 2R: SHP- Project Budget

Project Budget
Please fill out your proposed project budget and term of grant for the activities in which you are requesting funds, including the cash match resources and the total project budget.

Grant Term: (please check one) 1 ☒ 2 ☐ 3 ☐

Proposed Activities	SHP Request	Applicant Cash	Total Budget (Col. 1 + Col. 2)
1. Real Property Leasing	0	0	
2. Supportive Services	$217,690	[redacted]	$272,112
3. Operations	$78,147	[redacted]	$105,530
4. HMIS	n/a *		
5. SHP Request (subtotal lines 1 through 4)	$296,837		
6. Administrative Costs (up to 5% of line 5)	$14,842		
7. Total SHP Request (total lines 5 and 6)	$311,679		

* By law, SHP funds can be no more than 80% of the total supportive services and HMIS budget.
** By law, SHP can pay no more than 75% of the total operations budget.
*** Applicants may request up to 5% of each project award for administrative costs, such as accounting for the use of the grant funds, preparing HUD reports, obtaining audits, and other costs associated with administering the grant. ***State and local government applicants*** and project sponsors ***must*** work together to determine the plan for distributing administrative funds between applicant and project sponsor (if different).

NOTE: The total SHP Request on line 7 cannot exceed the dollar amount on the Priority Chart in Exhibit 1 for the project.

Logic Model

U.S. Department of Housing
and Urban Development
Office of Departmental Grants Management and Oversight

OMB Approval No. 2535-0
(exp. 12/31/2

Program Name: Riverside House 19 Beds SHP

Component Name: SuperNOFA

Strategic Goals	Policy Priorities	Problem, Need, Situation	Service or Activity	Benchmarks		Outcomes		Measurement Reporting Tools	Evalu Proc
				Output Goal	Output Result	Achievement Outcome Goals	End Results		
1		2	3	4	5	6	7	8	9
Policy		Planning		Intervention		Impact		Accountability	
2, 3	6, 8 Miami-Dade County Riverside House – 19 Beds DUNS #: 004148297	The rising number of homeless males with Substance Abuse issues.	Provide a 180 day residential treatment program for 19 males. Services include: • Transitional Housing • Group Counseling • Case Management • Individual Assessments • Education to include GED, computer classes and • English as a Second Language • Employability Skills • Medical services • Home making skills • Assist in the attainment of	Short Term • Recruit and enroll 19 homeless males with substance abuse issues • Provide transitional housing to 19 homeless males • Provide 12 group counseling sessions and at least 4 individual sessions within 30 days		• 19 homeless males (100%) will be recruited into the Substance Abuse program and placed in transitional housing • At least 60% will complete treatment during the 90 days prior to discharge		a.Screening/Initial Assessments b. Daily Log c. HMIS d. Case Management Records e.Daily SHP Reports	

Program
ec: Riverside House 19 Beds SHP

Component Name: SuperNOFA

Strategic Goals	Policy Priorities	Problem, Need, Situation	Service or Activity	Benchmarks		Outcomes		Measurement Reporting Tools	
				Output Goal	Output Result	Achievement Outcome Goals	End Results		
	1	2	3	4	5	6	7	8	
Policy		Planning		Intervention		Impact		Accountability	
			affordable housing	Intermediate Term • Provide vocational training which includes: • Computer training • English as a second language • GED classes • Home making skills for at least 40% of the population within 90 days in program		• At least 40% will be enrolled in educational (GED, Computers, English, etc.) vocational or job training and placement programs as appropriate • At least 65% will obtain permanent (benefits or employment) within six months		a. Assessments b. Class participation Log c. MIS d. Sign in/out logs e. income verification g. Follow-up interview f. Referral log g. Bed availability report	

Miami Dade County
Riverside House – 19 Beds
DUNS #: 004149292

Program
Name: Riverside House 19 Beds SHP

Component
Name: SuperNOFA

Strategic Goals	Policy Principles	Problem, Need, Situation	Service or Activity	Benchmarks		Outcomes		Measurement Reporting Tools	Evaluation Process
				Output Goal	Output Result	Outcome Goals	Final Results		
1		2	3	4	5	6	7	8	9
Policy		Planning	Intervention			Impact		Accountability	
	Miami Dade County Riverside House – 19 Beds DUNS # 004148292		Long Term • 65% will seek employment with ultimate goal of finding affordable housing after 90 days • Graduate after 180 days • 40% will continue to attend AA, NA meetings • 40% will find affordable housing			• At least 65% of participants will sustain employment after 90 days • At least 65% will be discharged into permanent housing • At least 65% will graduate from program within 180 days • At least 40% will be attending AA/NA meeting for 90 days post discharge • The average length of stay for all residential participants will be five month		a. Income verification b. Sign In/out logs c. Case Management records d. Pre-post Surveys e. Assessments g. Participation class logs	

form HUD 96010 (2/2003)

Pastoral Care

Riverside House is committed to being a place of refuge, providing spiritual and social guidance to individuals who are imprisoned in mind or spirit. Riverside Christian Ministries works with more than 45 churches to provide the resources and programs needed to empower our clients.

A practical expression of our mission is our Pastoral Care services, which include:

RESIDENTIAL MINISTRY

Offers our residents an opportunity to live in an atmosphere conducive to change, while equipping them to re-enter the community as productive, responsible citizens.

- Personal Evangelism
- Weekly Chapel Services
- Pastoral Counseling
- Bible Study/Discipleship

COMMUNITY OUTREACH

Partners with faith-based organizations, providing education and support to combat community deterioration, juvenile delinquency and crime.

- Church Relations
- Resource Development
- Correction Institution Relations

AFTERCARE/OUTPATIENT

Ministers to residents who have completed the program and to others in the community.

- Program Services
- Support Groups

Why is Pastoral Care the best opportunity to make the most of a precious second chance?

Quite simply, the government can not take care of all of the material needs or any of the spiritual needs of ex-offenders. Many of our clients show up with nothing more than the clothes on their backs. To find employment they need training, clothes, grooming supplies and faith.

We give them a welcome box and a guiding hand. The welcome box includes practical elements like a transit map, essential toiletries, a writing tablet and pen, and of course, a Bible. We also assess their needs and let them know what to expect. We provide clothes, food, guidance and teach them how to get a job.

But even supplying all of the essentials for physical survival is not enough. Our clients are introduced to a God who will forgive them of their wrongs, love them unconditionally, and transform their daily lives.

We contribute to their spiritual needs. We deliver pastoral care services on a voluntary basis and with respect.

We are non-denominational: modeling and teaching the lifestyle of Jesus. The Gospel is delivered simply, remembering that most of our clients are not ♦church people.♦

By offering messages of God♦s love, forgiveness and accountability, we offer a well-rounded program that is much more successful than the services provided by a halfway program without pastoral care. Through this proven program, we are able to turn those in desperate need into contributing members of society. During a typical year:

- More than 325 Riverside House clients will join the work force
- They pay 25% of their gross income or more than $300,000 in program fees to help offset program costs
- They contribute more than $65,000 in income taxes

But most important of all, Riverside House clients become responsible members of society who believe in a personal relationship with God, the power of prayer, and the respect of people and property.

Home | Who We Are | What We Do | How You Can Help | Why You Should Care | Testimonials | Links | Contact Us

Riverside House, 1010 Rev. ZZQY., Miami, FL 33150
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CSC Facility: Phone: (305) 341-0426 Fax: (305) 545-0389
CAP Facility: Phone: (305) 943-8280 Fax: (305) 528-7994

Substance Abuse Program

VolunteerMatch

Riverside House operates two programs in conjunction with the Miami-Dade County Homeless Trust, Supportive Housing and Primary Care Programs. These programs totaling 31 beds serve male homeless clients in the Miami-Dade County and provide a number of services. Services included here at Riverside House include, residential services, counseling, substance abuse treatment, vocational training, family re-unification and life skills classes.

PROFESSIONAL SERVICES

- Client orientation
- Individual assessment of history
- Individual program or treatment plan, including length of stay, client input, goal setting, and direction
- Biweekly counseling and program review
- Group counseling
- Group treatment sessions
- Job interview coaching and employment skills training available
- Rent collection from clients when applicable
- Recreational activities
- Voluntary pastoral care services
- Release planning and preparation
- Aftercare for graduates
- Outpatient assessment and counseling for clients.

CLIENT ELIGIBILITY

Clients, male only, must be at least 18 years of age and without any mental health diagnosis in order to meet the program-specific criteria. Clients come on a voluntary basis and must submit to a health screening before entering the program. They may be referred to our programs by one of the following:

- HAC-Homeless Assistance Centers
- Miami-Dade Homeless Trust
- Area Treatment Centers

Riverside House 10 Steps to Recovery

1. Stop looking for something or someone to fix you, and take responsibility for fixing your own life.
2. Find out what spiritual means and do it all the time, everywhere, with everyone you meet.
3. Find out what your character defects really are and spend the rest of your life letting go of them.
4. Don't feel when you should be thinking, and don't think too much when you should be feeling something.
5. Make the really hard life choices and then follow through on each.
6. Find out what being honest means and do it all the time, everywhere, with everyone you meet.
7. Find out what humble means and do it all the time, everywhere, with everyone you meet.
8. Learn to say, "I'm sorry", and pay all your financial and emotional debts, not just the easy ones.
9. Never stay in a relationship unless it's your choice; relationships are always optional.
10. Nobody said you have to like going to meetings; just go, and do what they tell you to do, and make it better.




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CSC Facility: Phone: (305) 545-0926 Fax: (305) 545-5389
SAF Facility: Phone: (305) 545-8292 Fax: (305) 326-7884

Why is Pastoral Care the best opportunity to make the most of a precious second chance?

Quite simply, the government can not take care of all of the material needs or any of the spiritual needs of ex-offenders. Many of our clients show up with nothing more than the clothes on their backs. To find employment they need training, clothes, grooming supplies and faith.

We give them a welcome box and a guiding hand. The welcome box includes practical elements like a transit map, essential toiletries, a writing tablet and pen, and of course, a Bible. We also assess their needs and let them know what to expect. We provide clothes, food, guidance and teach them how to get a job.

But even supplying all of the essentials for physical survival is not enough. Our clients are introduced to a God who will forgive them of their wrongs, love them unconditionally, and transform their daily lives. We contribute to their spiritual needs. We deliver pastoral care services on a voluntary basis and with respect.

We are non-denominational, modeling and teaching the lifestyle of Jesus. The Gospel is delivered simply, remembering that most of our clients are not "church people."

By offering messages of God's love, forgiveness and accountability, we offer a well-rounded program that is much more successful than the services provided by a halfway program without pastoral care. Through this proven program, we are able to turn those in desperate need into contributing members of society. During a typical year:

- More than 325 Riverside House clients will join the work force
- They pay 25% of their gross income or more than $360,000 in program fees to help offset program costs
- They contribute more than $85,000 in income taxes

But most important of all, Riverside House clients become responsible members of society who believe in a personal relationship with God, the power of prayer, and the respect of people and property.

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CDC Facility: Phone: (305) 545-0850 Fax: (305) 545-3989
SAP Facility: Phone: (305) 545-8052 Fax: (305) 326-7994

Testimonials

Riverside House is committed to being a place of refuge, providing spiritual and social guidance to individuals who are imprisoned in mind or spirit. Our prayer is that Riverside House clients become responsible members of society who believe in a personal relationship with God, the power of prayer, and the respect of people and property. We believe God has accomplished some impressive works through us. But don't take our word for it. Here is what some of our graduates as well as members of the community have to say about us:

"You did a fine job educating us about the plight of many who are shackled by substance abuse and who are preparing to reenter society after time served in a federal prison system. I was personally moved by a couple of the testimonies as shared by some of Riverside's clients. They are truly trophies of grace and a testimony to the wonderful work you are doing in the community."
~ Lance Womack, South Florida teacher

GRADUATES OF RIVERSIDE HOUSE PROGRAMS:

Without God I can't do anything. I give thanks to God for this ministry. I called out to God and he answered me. I was a very angry rebellious individual and He changed me, thanks to this program. My life now is peaceful. I solve problems in a different way. God has given me the privilege to start a painting business with my brother Jorge, who also graduated from the program. He is also walking with the Lord and together we share the miracles God has done in our lives
~ The Brothers, Jorge and Miguel

The sad thing is, I didn't need to get into this trouble. I earned my AA and BS degrees and still was able to make stupid choices. If only I would have turned around and seen God was there all along. Norge He is my #1.
~ Allen

I was 25 years old and I was facing a combined 35-year sentence. I know people don't think guys like me deserve a second chance, but I accepted Jesus in 1995 and it's now 2001. The power of His forgiving grace is forever.
~ Ignacio

I remember the guys talking about becoming new in Jesus. That same night at Riverside I went and sat on the toilet and told God I'm flushing the old Norge, please Lord, forgive me and make me new. I'm now serving Him instead of time.
~ Norge

"Before I came to Christ I walked around in a drug induced state, believing in nothing, not even in myself. I accepted Jesus Christ as my Lord and Savior and my whole life changed, I began to have hope that led me to Riverside House to get help for my addiction. They helped me to grow spiritually by getting me in closer contact with God, by reading and listening to the word of God."
~ John

"Receiving Christ in my life has empowered me to be honest and open to a new way of life. I don't have to repeat my past and I am a new creation in Christ with the power through the Holy Spirit to overcome this awful addiction. I thank Jesus for his sacrifice and his teachings. I know he loves me today. Amen"
~ Max

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The Washington Post
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The Washington Post

September 15, 2002 Sunday
Final Edition

GOP Using Faith Initiative to Woo Voters; Office's Officials Have Appeared With Republican Candidates in Tight Races

BYLINE: Thomas B. Edsall and Alan Cooperman, Washington Post Staff Writers

SECTION: A SECTION; Pg. A05

LENGTH: 1085 words

Republicans are using the prospect of federal grants from the Bush administration's "faith-based initiative" to boost support for GOP candidates, especially among black voters in states and districts with tight congressional races this fall.

Top government officials overseeing the program, designed to funnel federal social service grants to religious groups, have appeared at Republican-sponsored events and with GOP candidates in at least six states. The events often target black audiences, such as a recent South Carolina seminar to which about 1,600 black ministers were invited. The events' hosts explained how the federal program will distribute about $ 25 million in grants to community groups affiliated with churches and other private-sector institutions.

The South Carolina event, on July 19, was sponsored by the state Republican Party. Those who attended received follow-up letters, on GOP stationery, explaining how to apply for grant money. Ron Thomas, the party's political director, called the event a "phenomenal success" that helped "put a human face on the party again."

Bush has repeatedly said the faith-based initiative is not political. On Feb. 1, when he announced that Jim Towey would replace John J. DiIulio as head of the program, the president said Towey "understands there are things more important than political parties. And one of those things more important than political parties is to help heal the nation's soul."

White House spokeswoman Ann Womack said in an interview that Towey will talk to anyone about the initiative, regardless of political affiliation. "The bottom line is that Jim travels all over the country to talk about the president's faith-based initiative," she said. She cited a Manhattan appearance attended by Democratic Reps. Charles B. Rangel and Anthony D. Weiner, although she could not cite an example of joint appearances with Democrats facing tough election fights.

Some lawmakers who opposed the president's faith-based initiative say they feared that it could be used for political purposes.

"Madison and Jefferson understood the lesson of human history -- that when you start combining the power of politics and the power of religion, you end up with politicians using religion as means to their own ends," Rep. Chet Edwards (D-Tex.) said.

Another critic of the initiative, Barry Lynn of Americans United for Separation of Church and State, said, "The Bush administration has been fishing for African American voters, and faith-based funding looks like the answer to their prayers." Possible grants, he said, "are being dangled to select church pastors in the African American community as a kind of lure, with the expectation that those churches will get out and support Republican candidates."

In Kentucky, Rep. Anne M. Northup (R) -- facing a tough reelection campaign -- invited Towey to explain the grant program's potential when she toured a heavily black section of her district near Louisville. The Aug. 29 visit focused on the church-based Shiloh Community Renewal Center. Northup, a member of the House Appropriations Committee, recently won approval for a $ 400,000 grant to the center.

The grant was part of the regular appropriations process and not from the new "compassion fund," but Towey described the center as "a model of what a faith-based organization can be."

Northup, who won $ 5 million in earmarked grant money primarily for projects in black neighborhoods, said in an interview, "There is a long tradition in the minority community of just voting almost universally Democratic." She recalled losing black precincts by vote margins as high as 525 to 25. "I don't think you change a 30- or 40-year pattern of voting in a short period of time, but I do criticize the Republican Party for not fighting for those votes."

In South Carolina, where the GOP is fighting to keep the Senate seat being vacated by Strom Thurmond, the state party sponsored a "seminar on Faith-Based and Community Initiatives" primarily for black ministers in the Columbia area. Jeremy White, director of outreach for the White House Faith-Based Initiative, gave the keynote speech.

Ten days later, Thomas, the state GOP political director, sent each attendee a packet with detailed information on "all the points of contact for faith-based offices . . . and information on the Compassion Fund." Thomas provided material about a company called Nehemiah Communications "that can help you and your organization set up your nonprofit status or help with grant writing."

In an interview, Thomas said the seminar was "not necessarily a political event." He said it drew about 300 of the 1,600 mostly black ministers who were invited, and it "got huge press coverage, press and TV. It was a great, great success."

Towey, meanwhile, has appeared this summer with other Republican candidates in close elections, including Reps. Shelley Moore Capito (W.Va.), Rob Simmons (Conn.) and John M. Shimkus (Ill.), as well as Sen. Tim Hutchinson (R-Ark.).

In July, Towey joined Hutchinson to tour Dorcas House, a shelter for abused women and children in Little Rock. They met with officials of more than 20 religious charities who, according to the Associated Press, voiced concerns "about accountability and expressing their respective faiths while receiving government funds." Towey told the gathering, "The government shouldn't ask 'Does your organization believe in God or not?' . . . It should ask 'Does your organization work?' "

In early August, Towey joined Shimkus at the Community Hope Center in Cottage Hills, Ill., where the two met with 60 religious leaders from the area to discuss the program. Towey praised such programs as Catholic Charities and the Salvation Army, and told the gathering, according to press accounts: "These groups have

typically been stiff-armed by the government. . . . The only questions ought to be: 'Are you changing people's lives?' and 'Will you follow the federal rules?' "

In mid-August, the Charleston, W.Va., Gazette reported that Towey joined Capito to present a $ 25,000 check to the Kanawha Institute for Social Research and Action Inc., a church-based nonprofit program offering computer training classes at the Ferguson Baptist Church in West Dunbar.

On Aug. 20, Towey helped Simmons pass out meatloaf dinners at St. Paul Episcopal Church's soup kitchen in Willimantic, Conn.

Simmons said the faith-based program is not "a system that replaces government. It's designed to be a system that embraces government."

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April 26, 2001

Republicans Hold Forum With Blacks In Clergy

By ELIZABETH BECKER

In a bid to woo African-American clergy members and possibly their parishioners -- to their party, the Republican leaders in Congress held a conference today to promote religious-based charities and invited an audience of largely black religious leaders.

In his keynote address, delivered in the marble banquet hall of the Library of Congress, Representative J. C. Watts Jr., Republican from Oklahoma, who is black, said that he had invited people who were normally forgotten.

"This is an historic time," Mr. Watts said. "For some reason, in this grand experience known as America, we never invited all of you here before."

To underline the importance they attached to the gathering of more than 400 lay people and ministers, many from small evangelical Christian churches, the Republican leadership came out in full force. Senator Trent Lott of Mississippi, the majority leader; Speaker J. Dennis Hastert of Illinois; and Representative Tom DeLay of Texas, the majority whip, all gave speeches today. Only one Democrat -- Representative Danny K. Davis of Illinois -- was on the podium.

"The Republicans said that the Democrats had traditionally done a good job reaching out to the African-American community and this was their effort to do a better job," said a senior Congressional aide involved in some of the conference planning.

The conference's heavy Republican tilt was an about-face from the bipartisan approach that Mr. Bush has said would mark his initiative to give all religious groups the same opportunity to receive federal financing for their social service projects as secular organizations.

For Democrats who have supported Mr. Bush's initiative but were left out of the event, the conference was a disappointment. Representative Tony P. Hall, an Ohio Democrat and the co-sponsor with Mr. Watts of the key legislation for religious-based charities, said he received an invitation at the last minute but declined the chance to be a "token Democrat."

"I would hope in the future they would not do these purely partisan events like this when we have to have both sides," Mr. Hall said in an interview.

The attention lavished on the clergy members seemed to pay off. Preachers like Willie Brooks, pastor of the small Bethesda Tabernacle Apostolic Church in San Diego, said the conference sent shivers down his spine as well as having led to a change in his political affiliation.

"I've never seen government taking such a concern for our community like they're doing now," Mr. Brooks said. "They're giving an ear to our community through the pastors. I was a Democrat. Now I'm undecided."

The Republican organizers said they did not have a list of the people who attended the gathering. But Bishop Harold Calvin Ray of Miami, who was master of ceremonies at the luncheon, said that he and Mr. Watts had originally planned the gathering exclusively for African-American clergy members.

"We've been dialoguing for one year with other African-American clergy about a summit," said Bishop Ray, who also heads a board advising Congressional Republicans on the issue. "I didn't think Representative Watts was getting the recognition he deserved in the African-American community for what he was doing."

When President Bush created his White House Office for Faith-Based and Community Issues, Mr. Watts and Bishop Ray expanded their gathering to include Republican members of Congress and the ministers and directors of social services invited by the lawmakers.

Very few Jewish leaders were on that list. Dr. Jeffrey S. Lichtman, director of the National Jewish Council for the Disabled in New York, said he attended despite the fact that many rabbis oppose the initiative.

"This gets to the concern in much of the Jewish community that this will cross that line dividing church and state," Dr. Lichtman said.

More than 850 members of the clergy signed a petition this week saying they opposed the president's initiative because they wanted "to keep government out of the churches, temples, synagogues and mosques."

Supported by the Baptist Joint Committee, the American Jewish Committee and the United Church of Christ, the petition said that the provisions of the legislation "would entangle religion and government in an unprecedented and perilous way."

But for many of the ministers at the conference, the goal of the initiative is such an entanglement. They said they felt that they have been left out of the mainstream for too long.

"The wall that separates church and state is crumbling -- the fall is imminent," said Bishop Carlton Pearson of Tulsa, Okla., leader of the Azusa Interdenominational Fellowship. "We should be getting funding; we've been doing the work."

Other members of the clergy already have figured out how much money they would want from the program. James Gordon, of the Southtown Apostolic Church of Mount Vernon, Ill., will ask for a three-year grant of at least $60,000 to help his 80-member rural congregation continue their social services.

With a budget of only $200 million, most ministers acknowledged, however, that the government could not finance all of their projects.

Correction: April 28, 2001, Saturday A picture caption on Thursday about a forum on President Bush's program for religiously sponsored charities misidentified a clergyman who attended. He is the Rev. Marcus Harvey of Pittsburgh, not Bishop Harold Calvin Ray of Miami.

Take It on Faith

Doug Mills/ The New York Times

The White House National Conference on Faith-Based and Community Initiatives, March 9, 2006

By NOAH FELDMAN
Published: December 16, 2007

John J. DiIulio Jr., the onetime head of the White House Office of Faith-Based and Community Initiatives, really loves faith-based charities. He must, since he promises the post-tax royalties from "Godly Republic: A Centrist Blueprint for America's Faith-Based Future" to no fewer than a dozen of them (no mention of any advance fee).

GODLY REPUBLIC
A Centrist Blueprint for America's Faith-Based Future.
By John J. DiIulio Jr.
309 pp. University of California Press. $24.95.

Related
First Chapter: 'Godly Republic' (December 16, 2007)

Exactly why DiIulio feels this way is a little less clear. He tells us repeatedly — and with the refreshing candor that is his trademark — that empirical evidence has not convincingly shown social programs run by religious institutions to be any more successful at getting people off drugs or into jobs than their secular counterparts. Religion, DiIulio emphasizes, is a good thing, offering lots of social and even health benefits. But the strongest policy argument he advances for religion-based social programs is that religious organizations do an especially good job of motivating volunteers.

It may be true that faith-based charities perform no better or worse than secular do-gooders, but it doesn't necessarily follow that the federal government should be paying for them. DiIulio, however, has devoted the last decade or so of his unusually high-profile academic and policy career to advocating such financing. He does not base his claims on his personal religious faith; his position is that religious charities should be on a level playing field with nonreligious organizations when it comes to gaining access to government money. Anything less than equality amounts to discrimination.

Why? DiIulio points out that the First Amendment to the United States Constitution grants religion special protection. But it also singles religion out for a special disability — the prohibition on being established. This ban limits the ways that government may support religious activities and institutions. So backing George W. Bush's faith-based initiative depends on making two arguments: first, that the Constitution can be interpreted to permit such support; and second, that the support is actually desirable.

According to DiIulio, Bush's faith-based initiative failed because the White House lost the first argument. Some academics and politicians and many in the news media, he says, mistakenly impugned the constitutionality of its program. This probably explains why so many pages of his book are devoted to interpreting the history and legal doctrine surrounding the establishment clause, and so many more to the particular circumstances that surround various faith-based initiatives, from mentoring programs like Anachi in his beloved Philadelphia (motto: "People of faith, mentoring children of promise") to Charles W. Colson's Prison Fellowship Ministries.

The result is not a narrative but a series of chapters organized around the refutation of misperceptions that DiIulio labels myths. Derived from a lecture given at Berkeley, "Godly Republic" is long on studies by DiIulio's former graduate students at the University of Pennsylvania and short on systematic argument. DiIulio's talent for phrase-making — in the 1990s he coined the label "superpredator," used by some to justify life sentences for repeat offenders — is on display throughout. DiIulio has some lively complaints about the politics-as-usual practices he encountered in the White House, but those looking for another Bush insider tell-all will be sorely disappointed. DiIulio is sorry he ever called Karl Rove and his team "Mayberry Machiavellis." And it is with fondness that he recalls the president telling him, "Big John, let's make this work."

Since DiIulio believes the failure of the faith-based program turned on the mistaken perception of its unconstitutionality, the content of his constitutional argument needs to be taken seriously. DiIulio describes the current state of legal doctrine accurately: in brief, the government may finance charity efforts undertaken by religious organizations provided the money is granted on the same terms as that offered to secular groups. The so-called "charitable choice" laws signed by President Clinton stipulated that no funds could be used for proselytizing, worship or religious instruction; that the organizations were subject to strict requirements of equal treatment of volunteers and employees alike; and that they were obliged to help all comers without regard to religion. These demands are consistent with the terms on which the federal and state governments had, since the 19th century, supported groups like Catholic Charities.

Where DiIulio goes astray is in his characterization of the beliefs of the founding fathers. He misleadingly calls the framers "Bible believing," an anachronistic term implying a literal faith in unerring Scripture that the 18th-century mind did not contemplate. He labels Thomas Jefferson "faith friendly," citing Jefferson's rewriting of the Gospels, without acknowledging that its title, "The Life and Morals of Jesus of Nazareth," effectively denied Jesus' divinity, resurrection and essential religious character.

Most unforgivably, DiIulio persistently misrepresents James Madison's view that a multiplicity of sects, not a bill of rights, would protect religious liberty. In DiIulio's telling, Madison "preached" that multiplicity could be used to support the financing of faith-based charities. But Madison's core political activity in the years before the drafting of the Constitution was opposing a bill in the Virginia Legislature that would have given aid to multiple religious sects on perfectly nonpreferential terms. DiIulio's misuse of Madison's legacy would be troubling even if it were not accompanied by the shockingly ignorant statement that Justice David Souter, the closest exponent of the Madisonian vision on today's Supreme Court, "has not really read his Madison."

DiIulio also disappoints when applying the law to his favored charities. He protests a recent court decision striking down a Prison Fellowship Ministries program, saying that no one is coerced to join it and no proselytizing occurs. But of course coercion is not the

test of establishment of religion: paying for a church service would not cease to be an illegitimate use of government funds even if the worship was noncoercive and involved no outreach. DiIulio insists that few faith-based programs are "faith-saturated," in the sense that they rely totally on religion to achieve their goals. But total saturation is not necessary to make a program religious in content.

Opponents of faith-based aid are not alarmists; nor do they object if DiIulio wants to fund such charities out of his own pocket. They are simply worried — with Madison — that the use of tax dollars to support inherently religious activities subverts the principle of keeping religion separate from government.

Noah Feldman is a professor at Harvard Law School and a senior adjunct fellow at the Council on Foreign Relations.

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REQUEST FOR REVIEW AND WITHDRAWAL OF
JUNE 29, 2007 OFFICE OF LEGAL COUNSEL MEMORANDUM RE: RFRA

September 17, 2009

The Honorable Eric H. Holder, Jr.
Attorney General of the United States
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Dear Mr. Attorney General:

The undersigned religious, education, civil rights, labor, and health organizations are committed to protecting religious liberty, and working to do so at all levels of the government. We write today to request that you direct the Office of Legal Counsel ("OLC") to review and withdraw its June 29, 2007 Memorandum ("OLC Memo").[1] The OLC Memo's interpretation that the Religious Freedom Restoration Act of 1993[2] ("RFRA") provides for a blanket override of statutory nondiscrimination provisions is erroneous and threatens core civil rights and religious freedom protections.

Some of us were leaders in the Coalition for the Free Exercise of Religion, which led the effort to persuade Congress to enact remedial legislation after the United States Supreme Court sharply curtailed Free Exercise Clause protections in *Employment Div. v. Smith* in 1990.[3] This effort culminated in 1993, when then-President William J. Clinton signed RFRA into law.[4] In essence, RFRA was intended to provide robust protection of free exercise rights, restoring a standard of strict scrutiny to federal laws that substantially burden religion.[5]

Many of us also are members of the Coalition Against Religious Discrimination (CARD), which formed in the mid-1990s specifically to oppose insertion of the legislative proposal commonly known as "charitable choice" into authorizing legislation for federal social service programs. Upon taking office, the Bush Administration sought to impose "charitable choice" on nearly every federal social service program. Stymied in its legislative efforts to do so,[6] the Administration instead issued Executive Orders and federal regulations to allow religious

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[1] Memorandum for the General Counsel, Office of Justice Programs, from John P. Elwood, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act* (June 29, 2007).
[2] 42 U.S.C. § 2000bb *et seq.*(2000).
[3] 494 U.S. 872 (1990).
[4] The Coalition for the Free Exercise of Religion, chaired by the Baptist Joint Committee for Religious Liberty, also led the effort to enact the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000bb-2(4) (2000).
[5] Although RFRA, as enacted, reached both federal and state law, the Court held in *City of Boerne v. Flores*, 521 U.S. 507 (1997), that application of RFRA to state and local laws was unconstitutional. The *Boerne* decision, however, did not render RFRA *per se* unconstitutional and subsequent cases demonstrate that, as applied to the federal government, RFRA remains good law. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal et al.*, 546 U.S. 418, 424 (2006).
[6] In 2001, the Bush Administration strongly promoted legislation (H.R. 7) which would have expanded "charitable choice" to nearly all federal social service programs. The measure failed in Congress, in large part, because of the civil rights and religious liberty concerns CARD raised.

organizations to participate directly in federal grant programs without the traditional safeguards that protect civil rights and religious liberty.

Not all statutory provisions barring religious discrimination in the workplace could be obviated by Executive Order,[7] and the Bush Administration's attempts to repeal them in Congress were repeatedly rejected. Failing in its attempts to repeal these laws in Congress, the Administration then developed and promoted the far-fetched assertion, memorialized in the OLC Memo, that RFRA provides religious organizations a blanket exemption to these binding anti-discrimination laws.

The OLC Memo wrongly asserts that RFRA is "reasonably construed" to require that a federal agency categorically exempt a religious organization from an explicit federal nondiscrimination provision tied to a grant program. Although the OLC Memo's conclusion is focused on one Justice Department program, its overly-broad and questionable interpretation of RFRA has been cited by other Federal agencies and extended to other programs and grants. The guidance in the OLC Memo is not justified under applicable legal standards and threatens to tilt policy toward an unwarranted end that would damage civil rights and religious liberty.

When President Barack Obama issued Executive Order 13498, amending former President George W. Bush's Executive Order 13199 (Establishment of White House Office of Faith-Based and Community Initiatives), he underlined the importance of ensuring that partnerships between government and faith-based institutions can be created and maintained effectively while "preserving our fundamental constitutional commitments." The OLC Memo, however, stands as one of the most notable examples of the Bush Administration's attempt to impose a constitutionally questionable and unwise policy—RFRA should not be interpreted or employed as a tool for broadly overriding statutory protections against religious discrimination or to create a broad free exercise right to receive government grants without complying with applicable regulations that protect taxpayers.

We accordingly request that the Obama Administration publicly announce its intention to review the OLC Memo, and that at the end of that review, withdraw the OLC Memo and expressly disavow its erroneous interpretation of RFRA, the most significant free exercise protection of the post-*Smith* era.

Thank you in advance for your consideration of our views.

Respectfully,

African American Ministers in Action (AAMIA)
American-Arab Anti-Discrimination Committee
American Association of University Women
Asian American Justice Center (AAJC)
American Civil Liberties Union
American Federation of State, County and Municipal Employees, AFL-CIO
American Humanist Association
American Jewish Committee

[7] Many programs – including Head Start, AmeriCorps, and those created by the Workforce Investment Act – contain specific statutory provisions barring religious discrimination that cannot be superseded by Executive Order.

Americans for Religious Liberty
Americans United for Separation of Church and State
Anti-Defamation League
Baptist Joint Committee for Religious Liberty
Bazelon Center for Mental Health Law
B'nai B'rith International
Center for Inquiry
Central Conference of American Rabbis
Disciples Justice Action Network
Equal Partners in Faith
Friends Committee on National Legislation
Interfaith Alliance
Hadassah, the Women's Zionist Organization of America
Hindu American Foundation
Human Rights Campaign
Japanese American Citizens League
Jewish Council for Public Affairs
Lambda Legal
Leadership Conference on Civil Rights
Legal Momentum
NAACP
NA'AMAT USA
National Center for Lesbian Rights
National Community Action Foundation
National Council of Jewish Women
National Council of La Raza
National Gay and Lesbian Task Force
National Education Association
National Employment Lawyers Association
National Ministries, American Baptist Churches USA
National Organization for Women
National Partnership for Women and Families
National Women's Law Center
OMB Watch
People For the American Way
The Rabbinical Assembly
Rainbow PUSH Coalition
Religious Coalition for Reproductive Choice
Secular Coalition for America
Sexuality Information and Education Council of the U.S. (SIECUS)
Sikh American Legal Defense and Education Fund (SALDEF)
Sikh Council on Religion and Education
Texas Faith Network
Texas Freedom Network
Union for Reform Judaism
Unitarian Universalist Association of Congregations
United Church of Christ Justice and Witness Ministries
United Methodist Church, General Board of Church and Society
Women of Reform Judaism
Women's Law Project

cc: The Honorable Gregory B. Craig, White House Counsel

1 of 1 DOCUMENT

The Tennessean (Nashville, Tennessee)

March 31, 2010 Wednesday
Correction Appended
ONLINE Edition

Charity defends Christian-only hiring

BYLINE: By, Bob Smietana

SECTION: NEWS

LENGTH: 994 words

THE TENNESSEAN

When Omar Alkalouti was hired to work with refugees at the Nashville office of World Relief in 2007, nobody asked him about Jesus.

Alkalouti knew World Relief was a Christian charity. As a Muslim, he never felt out of place. And he was surprised at how diverse World Relief's office was.

"When I was there it was Muslims and Buddhists and everything," said Alkalouti, now a freelance photographer in Nashville. "It was never 'Join up with Jesus.' I wouldn't have wanted to be a part of that."

Today, that has changed. New employees at World Relief have to prove they are Christians. They sign a statement of Christian faith and must get a letter of recommendation from their minister before being hired. At most workplaces, that would be illegal.

But religious nonprofits, even those that get government grants, get special exemptions. They can hire and fire employees based on their religion or sexual orientation - something other employers can't do.

Civil rights groups like the ALCU, and some religious groups like the United Methodist Church, want to see those exemptions outlawed. They want religious nonprofits to play by the same rules as other businesses or stop getting federal funding.

But charities like World Relief say that would violate the First Amendment by giving government too much say in how religious nonprofits operate.

Exemptions extended

The exemptions for religious charities began with Title VII of the Civil Rights Act. That law allows such organizations to hire only members of their own faith when their programs are funded by private donations.

Under President George W. Bush, those exemptions were extended to religious

groups that receive government grants.

That's unfair, says Ron Winkler, general secretary of the United Methodist Church's General Board of Church and Society.

All citizens - from Muslims to Methodists - pay taxes, he said. So everyone should be eligible to work at charities funded by the government.

Winkler's group is part of the Coalition Against Religious Discrimination, which seeks to overturn the Bush-era rules.

"Our position is that if a charity receives government funds, they should play by the same rules as everyone else," Winkler said.

The Rev. Brad Morris, executive director of World Relief's Nashville office, disagrees.

"If you go to work for IMB or another corporation, they want people who will support their mission," he said. "It helps if we are all on the same page."

Nationwide, World Relief receives about two-thirds of its $50 million budget from state and federal governments. In Nashville, those funds pay for the refugee resettlement program.

But the charity doesn't use those funds to proselytize, nor does it require that people they help have any particular religious beliefs.

"In our programs, we don't discriminate against anyone," Morris said. "We serve everyone the government sends to us. And that's what matters."

Some World Relief workers didn't agree with the policy. Morris also has been running the Chicago office after the director and other workers there quit in protest.

Jan Kary, a senior vice president at World Relief's national office, said hiring rules ensure that the charity remains true to its Christian mission. The policy on hiring only Christians has been in place since the 1940s but was never put in writing or enforced until this year.

No non-Christian employees will be fired - that includes the two non-Christian workers on the 24-person staff in Nashville.

If the exemptions are eliminated, Kary said, the charity would stop taking government money.

"We are not going to change our mission for money," she said.

Disappointed in Obama

Winkler and others who disagree with the exemptions had hoped President Barack Obama would support the cause. In 2008, as a candidate, Obama promised to overturn the Bush rules.

"First, if you get a federal grant, you can't use that grant money to proselytize to the people you help and you can't discriminate against them or against the people you hire on the basis of their religion," Obama said at a campaign stop in Ohio. "Second, federal dollars that go directly to churches,

temples and mosques can only be used on secular programs."

But change was slow to come after Obama got into office, said Weldon Gaddy, president of the Washington, D.C.-based Interfaith Alliance. Gaddy served on a task force that recommended changes in the White House faith-based initiative.

He pushed for changes in the hiring rules but said the task force was divided on the issue. He believes the exemptions are unconstitutional. And he doesn't believe the White House is taking the issue seriously.

"There's no sense of urgency," Gaddy said. "That is simply not acceptable in reconciling the faith-based office and the Constitution."

Solution isn't simple

Resolving the debate over the exemptions won't be easy, said Shaun Casey, professor of Christian ethics at Wesley Theological Seminary in D.C.

"To get a resolution, everyone is going to have to give up something," said Casey, who served as an Obama campaign adviser on religious issues.

"And neither side has been wiling to do that. The only solution would be to do something that would offend everyone."

At least one faith-based organization in Nashville doesn't see the hiring exemptions as necessary.

The Nashville Area Command of the Salvation Army asks employees to support their mission. But they hire Christians and non-Christians alike.

What matters most is finding the most qualified person for the job, said Maj. Rob Vincent.

"Our mission statement is to spread the gospel of Jesus Christ and to meet human needs in his name," Vincent said. "Hiring the most qualified person helps us fulfill that mission."

Contact Bob Smietana at 615-259-8228 or bsmietana@tennessean.com

CLARIFICATION

Omar Alkalouti was identified in a story on Page 1A on Wednesday as being Muslim. He was raised in that faith but now claims no religious affiliation. THIS CLARIFICATION RAN ON APRIL 1, 2010, ON PAGE 2A.

LOAD-DATE: April 2, 2010

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The Seattle Times

Wednesday, March 10, 2010 - Page updated at 11:02 AM

World Relief rejects job applicant over his faith

By Lornet Turnbull
Seattle Times staff reporter

Saad Mohammad Ali had volunteered for six months at World Relief, helping the agency resettle arriving Iraqi refuges, when a manager suggested he apply for an Arabic-speaking caseworker job.

The 42-year-old SeaTac resident had been an interpreter for the U.S. government in Iraq before coming to the U.S. two years ago â€" himself as a refugee.

KEN LAMBERT / THE SEATTLE TIMES
Saad Mohammad Ali applied for a job as a caseworker at World Relief but was told he didn't qualify because he's not Christian.

With a degree in statistics, strong English skills and basic knowledge of American culture, Mohammad Ali, who now works as a baggage handler at Seattle-Tacoma International Airport, could help his arriving countrymen temper their typically high expectations of life in America.

But a few days after he applied for the position last December, the Muslim and father of three got an unexpected call from the same manager at World Relief. She was sorry, she told him, but the agency couldn't offer him the job because he is not Christian.

The response may have surprised Mohammad Ali and others who hear his story, but the practice is not new: World Relief is well within its right to reject him for employment.

Recognizing the need of faith-based organizations to maintain an atmosphere of shared values and principles, the Civil Rights Act of 1964 permits them to hire based on religion. Such groups, largely philanthropic, range from soup kitchens and drug-counseling services to refugee-resettlement agencies.

Among these are organizations like World Relief, which provides aid to some of the world's most vulnerable, and operates in the U.S., helping resettle refugees from all cultural and religious backgrounds.

Grounded in evangelical faith, the Baltimore-based organization receives up to 70 percent of its funding from government sources, with the rest from private donors, including churches seeking assurances that the religious values of those carrying out the agency's work are similar to their own.

Staff members at the agency also say the work they do can be stressful and so they pray during meetings to help ease that stress â€" a practice they believe might make non-Christians uncomfortable.

While there's little debate that faith-based organizations should be allowed to hire based on faith, some civil-liberty groups argue that public funds should not be used to subsidize those that do.

"There is saying in these circles: With shekels should come shackles," said Charles Haynes, a senior scholar with the First Amendment Center in Arlington, Va.

And while other refugee-resettlement agencies across the Puget Sound region could also hire based on faith, most say they choose not to.

Placing religious limitations on who can and cannot work at Jewish Family Services, for example, would "make it more difficult to find culturally appropriate staff to serve the refugees you are resettling," said Shane Rock, the agency's director of refugee service.

And Jan Stephens, with Lutheran Community Services, said he doesn't ask the religion of job candidates.

To Mohammad Ali, it seems unusual that he could serve as a volunteer and later as a paid contractor for World Relief but can't be employed.

His frustration is not with local workers who advocated for him and even sought an exception on his behalf from the agency's headquarters, he said, but with a policy he finds in conflict with everything he's learned about this country.

"I've heard over and over again that in the U.S. discrimination in any form is not accepted," he said.

"So it was a disappointment."

Started in 1940s

World Relief was started in the 1940s by evangelical leaders to clothe and feed victims of World War II. In later years it expanded to serve needy people around the globe and now has one of the largest humanitarian operations in Haiti.

In the U.S., it is one of a dozen or so resettlement agencies that have agreements with the State Department to resettle tens of thousands of refugees the country welcomes each year. Those agreements prohibit proselytizing.

Stephan Bauman, its senior vice president of programs, said the organization's Christian-only hiring has been practice but not formal policy for many years.

"Some people started to say we were hiring as a faith-based organization without a clear policy," he said.

So in recent months, the agency formalized its policy, which he said "allows us to preserve our core identity and value. It has nothing to do with the people we serve or work with."It also began requiring employees to sign a statement of faith, affirming the organization's mission, vision and values, which, among other things, include using the life of Jesus Christ as an example for doing good.

Volunteers, interns and contractors, like Mohammad Ali, are required to acknowledge an understanding of these principles, Bauman said, though they are not required to sign a statement.

Service valued

Julianna McWilliams, the agency's Seattle spokeswoman, said the local staff values Mohammad Ali's services.

"This is not something we've confronted in the past because the people seeking employment here have always been Christian," she said, adding that five of the agency's seven Seattle managers are former refugees.

She said prayer is common at staff meetings. "At times we feel a lot of hopelessness so we spend a lot of time in prayer," she said. "So and so can't get a job, we can't find them one and we ask God to lift things up in prayer."

McWilliams said while faith is a key part of the group's mission, workers at the World Relief offices in Seattle are careful not to evangelize.

"If someone is coming in as a Muslim from Iraq or Somalia, we never talk about religion," she said.

Among metropolitan areas nationwide, the Seattle region is among the top 10 in the country in the number of refugees it resettles. In recent years, the number arriving from Iraq has steadily grown.

Many come with high expectations â€" in part because they have cooperated with the U.S. government in Iraq and also because they may be better educated than other refugees.

When World Relief wouldn't hire him, Mohammad Ali, who ran a business in Iraq, quit volunteering for the organization but returned days later, knowing he was well suited to help his countrymen adjust to the realities of life as a refugee.

"It's about knowing the culture and what to expect â€" the good and the bad," he said.

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The Chicago Tribune

Charity's Christians-only hiring policy draws fire

World Relief's rule is legal, but it has caused complaints and resignations by staffers who say it's discrimination.

By Manya A. Brachear

April 2, 2010

Reporting from Chicago

A prominent refugee resettlement organization has enacted a policy that requires new employees to be Christian, triggering staff complaints and departures by those who see it as discrimination.

World Relief, a global evangelical Christian charity that receives federal funds to resettle refugees, said the policy simply establishes a routine that has been in place for years.

"We felt we needed to put a formal policy in place that reflects a 65-year history of hiring according to our faith," said Stephan Bauman, senior vice president of programs for the Baltimore-based agency. "The policy is really just to galvanize our organization."

But staffers don't necessarily see it that way.

"As a Christian, I feel it is my duty to advocate for the most vulnerable," said former legal aide Trisha Teofilo, who left because of the policy. "I believe Jesus would not promote a policy of discrimination."

Under the Civil Rights Act of 1964, the policy is legal. But opponents, including current and former employees, say it is hypocritical for an agency to discriminate when its mission is settling refugees -- many of whom have fled religious intolerance in their home countries.

"It's legal, but it's ridiculously wrong and un-Christian," said Delia Seeburg, the director of immigrant legal services in World Relief's Chicago office.

She plans to leave for a new job in April.

Although current employees don't have to be Christian, they risk termination if they don't affirm the organization's Christian mission statement "to follow Jesus by living holy, humble, and honest lives."

Mohammed Zeitoun, a Muslim employment counselor, is searching for a new job because he refused to affirm the Christian mission.

"To ask us to change who we are, it's not right, not in the country of the United States of America -- the land of the free," said Zeitoun, who was born and raised in Jordan.

mbrachear@tribune.com

FOREIGN DESK

NON-CHRISTIANS NEED NOT APPLY

Krista J. Kapralos | January 11, 2010 Global Post

World Vision is one of the largest recipients of U.S. government overseas development grants. In theory, it gives preferential treatment to Christians. Obama vowed to change that. So why have I be?

For decades, World Vision has fought poverty and famine in countries such as Sudan, visited by anti-hunger crusading former Congressman Tony Hall in 1998. Critics fault the organization for giving preferential treatment to Christians when staffing its $250 million in programs funded by U.S. taxpayers. (Photo by Corinne Dufka / Reuters)

Editor's note: this article was supported by a grant from the International Center for Journalists.

Bamako, Mali — For a year and a half, Bara Kassambara kept his mouth shut.

Every day, all of his coworkers paused for prayer time. There were frequent Bible studies, and constant talk about Jesus. Kassambara attended the required events, but otherwise quietly focused on his work: bringing clean water to rural Mali.

"I think many people at World Vision just believed that I was a Christian," said Kassambara, a Muslim in a predominantly Islamic country.

Fluent in English and with years of development work on his resume, World Vision hired Kassambara to work on the West Africa Water Initiative — a project to provide safe drinking water stave off water-borne diseases that run rampant in the region.

It was a rare hire for World Vision, Kassambara said; he only got the job because it was a temporary position. When World Vision stepped down as lead agency on the project in late 2008, Kassambara took a similar job with another organization.

"The goal of World Vision is clearly written: To promote Christianity worldwide," Kassambara said. "I knew this was going on. I knew the rules of the game. If their goal is to promote Christianity, why should they hire a Muslim?"

World Vision, based outside of Seattle, is one of the largest recipients of development grants from the U.S. Agency for International Development, the federal government's foreign aid arm. The organization received $281 million in U.S. grants in 2008, up from $220 million in 2007 and $261 million in 2006, according to World Vision documents. Those grants, amounting to about a quarter of the organization's total U.S. budget, came in the form of both cash and food.

World Vision International employs about 40,000 people globally.

Charity Navigator, which ranks charities based on efficiency, lists World Vision as a "super-sized charity," with $1.1 billion in expenses in 2008, and gave it four stars – the best possible ranking. Throughout Mali, Christians and Muslims alike praise World Vision for bringing food and clean water to hungry people — the organization "extends assistance to all people, regardless of their religious beliefs," according to its website. Malians credit the organization with staving off starvation and helping rural villages develop agriculture. If the group ever leaves Mali, people there say they would be devastated.

World Vision officials say the organization does not proselytize, just that they decline to separate their work from their faith. "We do want to be witnesses to Jesus Christ by life, word, deed and sign," says Torrey Olsen, World Vision's Senior Director for Christian Engagement. That wouldn't be possible, he says, unless the organization's workers were Christians.

Under U.S. law, World Vision points to civil rights protections that allow religious organizations to hire employees based on their faith. This is an uncontroversial protection of religious freedom, given that churches obviously need Christian staff to carry out their missions, just as synagogues need Jews and Mosques Muslims.

But such religious institutions are typically funded by their followers. The controversial question is whether it's a violation of the First Amendment to exclude on the basis of religion when U.S. taxpayers are footing the bill, a practice that became increasingly common during the Clinton and George W. Bush administrations.

As a candidate, President Obama promised to end such discrimination. So far, he has not.

And so for now in Mali, World Vision's hiring practices mean that for many of the best qualified candidates, most jobs are off-limits.

Kassambara said he didn't deny being a Muslim when asked, but kept quiet about his faith because a job with a stable, well-funded employer like World Vision is a rarity in this landlocked nation, one of the world's poorest. There are few decent jobs here, and the government struggles to keep its most educated citizens from moving abroad.

World Vision only hires non-Christians if a qualified Christian can't be found. According to its website, "World Vision U.S. has the right to, and does, hire only candidates who agree with World Vision's Statement of Faith and/or the Apostle's Creed," referring to an oft-quoted Christian doctrinal statement.

Fabiano Franz, World Vision's national director for Mali, says that jobs held by non-Christians are considered temporary. "There's no encouragement for a career here if you're not a Christian," he says.

Franz argues that separation of church and state is an American concept that doesn't translate well to many other cultures. In Mali, and in other countries throughout the world, he says, faith is integrated into daily life. An attempt to separate faith and practice in Mali, he says, would be foreign and confusing to those receiving aid. "If you're a committed Christian, you shouldn't have this separation between your faith and your work," he says.

"We're very clear from the beginning about hiring Christians," Franz says. "It's not a surprise, so it's not discrimination."

So is it Constitutional?

Despite U.S. civil rights laws that protect against discrimination where tax dollars are at use, World Vision officials cite an exemption for religious organizations in the 1964 Civil Rights Act in defense of their longstanding policy.

Critics argue that the exemption doesn't apply to World Vision and other groups that accept federal dollars. They say their position is supported by the First Amendment, which forbids the government from favoring (or disfavoring) a particular faith, or from favoring (or disfavoring) religion in general over secularity. This, critics argue, should constrain tax revenue from flowing to groups that hire based on religion.

Safeguards against such awards, however, have been eroded in recent decades, beginning with a Clinton-era provision known as "Charitable Choice." This allowed religious groups to apply for social service grants, but barred overtly-religious agencies from receiving funds. Several Bush-era policies pushed the envelope further, in ways that critics say undermine foundational American anti-discrimination laws.

In 2001, President George W. Bush removed restrictions preventing religious groups from receiving federal funds, and his administration was sympathetic to federal grantees that discriminated by faith. In 2007, the Justice Department's Office of Legal Counsel issued a memo on a $1.5 million awarded to World Vision. The memo stated that, even though the 1974 federal statute under which the money was being granted specifically prohibited discrimination on the basis of religion, World Vision would be *permitted* to discriminate, as a result of the 1993 Religious Freedom Restoration Act.

Critics say that World Vision leads faith-based agencies in an effort to "engage in government-funded religious discrimination," according to Aaron Schuham of Americans United for the Separation of Church and State. "It has seized upon every available legal argument to undermine civil rights protections."

Schuham's organization and other opponents of the Bush-era policies on the issue are hopeful that President Barack Obama will tighten the reins on World Vision and other religious groups. In a July 1, 2008 speech on faith in America delivered in Zanesville, Ohio, candidate Obama said "if you get a federal grant, you can't use that grant money to proselytize to the people you help and you can't discriminate against them – or against the people you hire – on the basis of their religion."

So far, Obama has not tried to change any policies governing faith-based agencies. On the contrary, critics such as the ACLU and Americans United worry that he embraced them in February, when he appointed Richard Stearns, president of World Vision's U.S. operations, to his advisory council for the Office of Faith-Based and Neighborhood Partnerships.

"There is a force for good greater than government. It is an expression of faith," Obama said then.

A number of evangelical organizations have advocated for religious discrimination, but World Vision is widely considered to be the main force behind the effort.

In a September letter, more than 50 groups pressed Attorney General Eric Holder to withdraw the memo. The petitioners included a Baptists, Methodists, and a handful of prominent Jewish organizations — including the Rabbinical Assembly and the Jewish

Council for Public Affairs — as well as civil rights groups such as Americans United for the Separation of Church and State and the American Civil Liberties Union.

"When a religious organization uses their own funds, they have the right to discriminate on the basis of religion," Schuham says. "But that shouldn't apply to government-funded positions."

After multiple requests, the White House did not offer a comment on the issue.

World Vision's hiring policy is nothing new. Officials at the organization said they've received federal funds for decades, all while giving Christians preference when filling positions. For many years, these hiring practices were illegal, says Christopher Anders of the American Civil Liberties Union, but they went largely unnoticed until the Bush administration publically supported them.

"They were ignoring federal restrictions (against discriminatory hiring), and sometimes the federal agencies giving them money weren't doing anything to put restrictions on them," Anders said. "Once Bush took office, the issue got a lot more attention,"

A matter of survival

Foreign leaders in the poorest corners of the world are unlikely to argue with World Vision's policies, even if it means that locals are denied jobs, said William Miles, a Northeastern University professor and expert on West Africa.

"The notion of the separation of church and state doesn't transfer well to Africa," Miles said. "Even for those countries that call themselves secular, they don't practice secularism in the way that we understand it. They don't try to reduce the influence of any particular religion, and any source of development aid is welcomed, even if it has a religious provenance."

In Mali, where positions with foreign aid agencies are often the most lucrative gigs available, a regular paycheck from World Vision is considered by many to be the gold standard.

Ali Kodio, 27, lives in Koro, a dusty rural town on Mali's eastern edge, where World Vision has a large field office. Kodio strolls down sandy streets on the lookout for foreigners, whom he directs to a friend's small guesthouse in exchange for cold beer and a shaded place to sit in the heat of the day.

Koro has a growing Christian community, Kodio said, mostly because of World Vision's influence.

"My sister's husband is a Muslim, and he is a driver for World Vision, and when my sister got sick, World Vision took her to the hospital and paid her bill," Kodio said.

The whole family is grateful that the man works for World Vision, but no one expects that he'll ever be promoted, Kodio said. "Everyone knows that World Vision is a Protestant organization, and that they want people to become Protestants," he said.

It's not enough to believe in Christ, said Lossi Djarra, 46, who lives with his wife and their seven children in the central Malian city of Bla, where World Vision has a strong presence. Djarra said he applied for a job as a security guard with World Vision, but a Protestant man was hired.

"It makes people angry," Djarra says. "If you're not in their church on Sunday, you won't get the job. People don't have a chance." Even for projects that have no religious component, World Vision carefully screens job applicants.

The organization's religious discrimination slowed work on the West Africa Water Initiative, said Nicole Cece, who works on the project for Cornell University's Institute for Food, Agriculture and Development. Cece shares office space at World Vision's Mali headquarters.

When World Vision, then the lead agency on the project in a group of non-profits, set out to hire someone to help her and others work on the project, the effort stalled, Cece said.

"There was a question of Christian commitment," Cece said.

Kassambara said he only knew of one or two other Muslims who work for World Vision in Mali. For many Muslims, he said, even sitting at a desk in a World Vision office would present challenges.

"A lot of Muslims believe they should not even touch a Bible, or discuss the Bible," he said. "In order to work at World Vision, you must be willing to be surrounded by Christianity."

Editor's note: This article has been updated to clarify several points. The subhead was changed from "[World Vision] only hires Christians" to "In hiring, [World Vision] gives preferential treatment to Christians." In the nineteenth paragraph we clarified the description of how the First Amendment applies to religion. In the twenty-first paragraph, we corrected the text to indicate that the Office of Legal Counsel's memo applied specifically to a World Vision grant.

Westlaw Delivery Summary Report for SCHUHAM,DAN

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A Right to Bias Is Put to the Test

ADAM LIPTAK

Lawsuit recently filed in Georgia may help settle legal question of whether religious institutions that are ordinarily free to discriminate in employment on basis of religion lose that freedom by accepting government money; suit was brought against United Methodist Children's Home by Aimee R Bellmore, who was fired because she is lesbian, and Alan M Yorker, who was denied employment because he is Jewish; photo (M)

A lawsuit filed in Georgia recently may help answer this open legal question: Do religious institutions that are ordinarily free to discriminate in hiring on the basis of religion lose that freedom by accepting government money?

"This is an unresolved issue," said Douglas Laycock, a law professor at the University of Texas who is an expert in the law of religious liberty.

"Congress is bitterly divided over it," Professor Laycock added, referring to the uncertain fate of legislation to spend more government money on secular services provided by religious institutions. A crucial element of the debate over the legislation is whether receiving such money should limit an institution's ability to discriminate.

The Georgia lawsuit was brought by Alan M. Yorker, who was turned down for a job at a foster home in Decatur because he is Jewish.

"I remember thinking that this would be the perfect job," Mr. Yorker said, recalling an advertisement in The Atlanta Journal-Constitution last year: the United Methodist Children's Home was seeking a psychological therapist.

Mr. Yorker, 53, sent his resume, which set out credentials that included degrees from Columbia and Georgia State, teaching at Emory, government service and decades of practice in adolescent and family therapy.

But the interview did not go well. The application he filled out that day called for his religion, church and four references, "including one minister." He wrote that he was Jewish, and listed his synagogue and his rabbi of 24 years.

Sherri Rawsthorn, a supervisor at the home, later conceded in court papers that Mr. Yorker had been "one of the top candidates for the position." On learning he was Jewish, though, she ended the interview. "We don't hire people of your faith," Mr. Yorker said she told him.

The home, which is an affiliate of the United Methodist Church and receives about 40 percent of its financing from the government, says it was entitled to reject Mr. Yorker. In court papers, it said it "declined to continue the application and interview process with Yorker because he is not a Christian."

Mr. Yorker sued, and the court will decide who is right. The answer will turn on whether government money alters the uneasy accommodation between religious liberty and civil rights.

"This is the perfect test case," Professor Laycock said.

Mr. Yorker said the answer in cases like his should be simple. "I resent that my money is being spent to discriminate," he said. "My money should be used for things that are not abridging my civil rights."

One of the home's lawyers, Gregory S. Baylor, director of the Center for Law and Religious Freedom at the Christian Legal Society, said it was important to allow religious organizations to prefer people of their own faith and to require conduct consistent with that faith. Government financing alters nothing, he said.

"Whether it's right or wrong is not affected by whether there is funding from the government or not," Mr. Baylor said. "The only question should be, Is it wrong?"

Mr. Yorker is joined in his lawsuit by another therapist, Aimee R. Bellmore, who was fired when the home learned that she is a lesbian. Her claim adds a twist to the debate.

In papers submitted to the Equal Employment Opportunity Commission, the home said Ms. Bellmore had been fired because "her religious beliefs were not in conformity with those required" and because she did not subscribe to the home's religious doctrines, including one that does not "condone the practice of homosexuality."

Discrimination on the basis of sexual orientation is not forbidden under federal or Georgia law, and Ms. Bellmore could have been fired from the local hardware store or coffee shop for being a lesbian. But she says the home's discrimination is different; in a kind of legal jujitsu, she is suing for religious discrimination.

Her lawyer, Susan L. Sommer of the Lambda Legal Defense and Education Fund, which also represents Mr. Yorker, said the home's policies amounted to religious discrimination in their effect on gays.

The civil rights laws, Ms. Sommer said, "protect against religious discrimination that takes the form of requiring an employee to lead the kind of life and subscribe to the kind of beliefs that assert there is only one true and virtuous path."

Courts have made only a handful of decisions in this area, and they are inconsistent.

In 1989, a federal court in Mississippi held that the Salvation Army could not fire Jamie Kellam Dodge, who worked in one of its shelters. The Salvation Army, which refers to itself as a Christian spiritual ministry, fired Ms. Dodge, the court said, because "she was a member of the Wiccan religion and was involved at work with the reproduction and dissemination of Satanic manuals." The court ruled that the exemption allowing religious discrimination was lost when government money was involved.

Other courts have suggested that government financing does not create a prohibition on discrimination, or that a prohibition is created only where the government directly finances a particular job. In any event, legal experts caution that little should

be read into a few scattered decisions.

Richard T. Foltin, legislative director of the American Jewish Committee, said the case in Decatur highlighted the dangers inherent in government financing of religious institutions that provide secular services.

"All the bright lines that should have been observed were crossed," Mr. Foltin said. "Organizations that are pervasively religious ought not to be receiving government funds." If such organizations do accept government money, he said, they should remember an old maxim: "With the king's shilling comes the king."

Photo: Aimee R. Bellmore outside a Methodist children's home in Georgia where she was fired because she is a lesbian. She and another therapist, denied employment at the home because he is Jewish, are suing. (Erik S. Lesser for The New York Times)

---- INDEX REFERENCES ---

NEWS SUBJECT: (Religion (1RE60); HR & Labor Management (1HR87); Workplace Discrimination & Equal Opportunity (1WO73); Legal (1LE33); Social Issues (1SO05); Legislation (1LE97); Business Management (1BU42); Judaism (1JU93); Government (1GO80); Employment (1EM26); Recruitment & Hiring (1RE84); Employment Law (1EM67); Economic Indicators (1EC19); Economics & Trade (1EC26))

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Faith-Based Furor

BYLINE: By Eyal Press; Eyal Press is a contributing editor at Lingua Franca. He last wrote for the magazine about a Congolese refugee's first year in New York.

SECTION: Section 6; Column 1; Magazine Desk; Pg. 62

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The first time Alicia Pedreira heard from co-workers that they had spotted her picture in a photo exhibit at the state fair in Louisville, Ky., she was baffled. "I thought: Photograph? What photograph?" Pedreira said recently of the strange sequence of events that began in August 1998 and would soon upend her life. "I had no idea what they were talking about."

At the time, Pedreira was working as a therapist at the Kentucky Baptist Homes for Children, a religious organization that contracts with the state to provide a range of services for at-risk youth. Pedreira liked her job, and she had a sterling reputation among her peers. But she wasn't the chattiest person in the office. On the advice of the man who had hired her, she generally kept her personal life to herself -- until, that is, her photograph unexpectedly popped up at the Kentucky State Fair. Taken by an amateur photographer during a 1997 AIDS walk and entered, without her knowledge, in the state-fair art competition, the image depicts Pedreira, who is 37, in the company of a woman with short-cropped brown hair whose arms dangle suggestively around Pedreira's waist. The two women look distinctly like a couple, an impression that Pedreira's tank top -- which bears a map of the Aegean Sea with an arrow pointing to the "Isle of Lesbos" -- all but announces.

"The minute I heard what I was wearing," said Pedreira, "I thought immediately, I've lost my job." She was right. On Oct. 23, 1998, a few weeks after word of the photograph circulated through the office, Pedreira was fired. A termination letter explained that Pedreira's "homosexual lifestyle is contrary to Kentucky Baptist Homes for Children core values."

Pedreira was devastated; several of her colleagues were so angry that they resigned in protest. Friends urged her to fight back. Last April, Pedreira and the American Civil Liberties Union filed a federal lawsuit in United States District Court in Louisville, accusing the Kentucky Baptist Homes for Children, which receives more than three-quarters of its money from the government and is the state's largest provider of services for troubled youth, of engaging in religious-based discrimination.

Now, as Congress prepares to consider President Bush's agenda to allow an array of government-financed social programs to be administrated by religious groups,

her case is being monitored by proponents and opponents alike of so-called faith-based initiatives. Pedreira's lawsuit may well become the most important gay rights case since Boy Scouts of America v. Dale -- although the issues it raises are in fact much broader.

Religious organizations have long been exempted from the provision in Title VII of the 1964 Civil Rights Act that forbids religious discrimination by employers, on the grounds that they would otherwise be forced to act against their beliefs when hiring personnel. But starting in 1996, Congress began passing "Charitable Choice" legislation allowing religious organizations to discriminate while accepting public funds for welfare-to-work and, more recently, drug-treatment programs. And although criticism is mounting, supporters of faith-based initiatives are attaching similar provisions to a host of additional social programs, from crime prevention to hunger relief to housing grants. Recently on "Face the Nation," Stephen Goldsmith, a White House adviser, explained that such organizations will indeed be allowed to discriminate in their hiring practices, but only "on the basis of religion."

What Goldsmith did not say is that religion can often bleed into other categories, like gender, sexual orientation and race. "If you can discriminate on religious grounds, it doesn't take much imagination to discriminate in other ways," said Congressman Bobby Scott, a Democrat from Virginia. Indeed, several courts have ruled that the Title VII exemption would allow Christian schools to fire female teachers who give birth out of wedlock. Others have determined that religious institutions can refuse to hire applicants whose views on abortion differ from theirs. Nor is it clear what courts would say if an organization's religious tenets mandate differential treatment on the basis of race. In theory, an organization like Bob Jones University could receive public funds to hire employees while forbidding them to engage in interracial dating.

Alarmed by the implications, a coalition of civil rights and religious organizations -- including the Union of American Hebrew Congregations, the N.A.A.C.P., the Interfaith Alliance and Catholics for a Free Choice -- recently sent a letter to President Bush urging him to oppose "government funded" discrimination in any form. "It would be unconscionable," the letter states, "that a want ad for government-supported social services could read, for example, 'Catholics and Jews Need Not Apply."' But the Bush administration -- which in February established a White House Office of Faith-Based and Community Initiatives -- is unlikely to change course.

Pedreira lost her job, her lawsuit claims, not on the basis of her performance but because Baptist Homes determined that she violated the demand (spelled out explicitly in its employment forms) that employees "exhibit values in their professional conduct and personal lifestyles that are consistent with the Christian mission and purpose of the institution."

When the case comes to trial, probably near the end of the year, Pedreria's legal team plans to raise some pointed questions. If hiring discrimination is illegal with government jobs, why not with jobs paid for by the government? Does the public financing of faith-based programs violate the Constitution, whose Establishment Clause requires government neutrality toward religion? Although Pedreira's case deals with state rather than federal financing -- and therefore does not overtly threaten Charitable Choice -- her lawyers say it will set a precedent for eventually overturning the law. "Charitable Choice authorizes religious-based employment discrimination in government-funded programs," said

Michael Adams, Pedreira's attorney. "This case, if we prevail, will say, 'You can't do that, it's unconstitutional."'

Alicia Pedreira lives in a one-story white clapboard house on a quiet residential street in Germantown, a working-class neighborhood in Louisville. The matchbox houses on Pedreira's block look more or less the same. Hers, however, is the only one with a gay-pride flag fluttering above the entrance.

Dressed casually in jeans, running shoes and a wool sweater, Pedreira greeted me at the door one day in February. She has short black hair and a muscular physique; she was once a competitive bodybuilder. We went to sit on the leather couch in her living room, beneath several oil paintings of landscapes adorning the walls. Pedreira painted them herself, she explained, telling me it was her passion for art that initially sparked her interest in becoming a therapist -- and led her to the doors of the Kentucky Baptist Homes for Children.

"I had been working various jobs but never found anything I really liked," she explained in a soft voice that bore the trace of a New York accent, which is where Pedreira, the daughter of Puerto Rican immigrants, lived as a child. In 1997, roughly a decade after she moved to Louisville to live near her older sister, Pedreira completed a degree in expressive therapy, a Jungian approach that aims to help patients explore their emotions through artistic creation. After working for several months with mentally ill patients at a local hospital, she was approached about an opening at a place called Spring Meadows, one of the Louisville branches of the Baptist Homes.

Pedreira was initially skeptical. "I wasn't sure if I wanted to work for Baptists," she recalled. "I mean, the year before they had boycotted Disney for offering benefits to gays and lesbians." Still, the idea of working with teenagers intrigued her, the salary was good and her interviews with Jack Cox, Baptist Homes's clinical director, went well. Pedreira recalls that Cox asked her what she would do if one of the children she was treating were gay. Pedreira said she would try to help the patient work through his or her emotions; she revealed nothing about her personal identity. At the start of the next interview, however, she informed Cox that she was a lesbian.

"I said, Look, if this is a problem, don't hire me, because I don't want to work here six months and then get fired," she recalled. "It was prophetic."

According to Pedreira, Cox (who declined to be interviewed for this article) assured her she would be fine, provided she kept the matter to herself. It was, in essence, a "don't ask, don't tell" policy, and Pedreira followed it faithfully, disclosing her sexual orientation only to a few fellow clinicians.

At the same time, she did not overhaul her daily life to avoid the risk of being outed. While working there, Pedreira regularly appeared in public with her girlfriend at the time, Nance Goodman, the woman standing next to her in the state-fair photograph. And she remained active in the gay political scene in Louisville, helping to organize marches (as she still does). She simply trusted Cox's promise that as long as she did not discuss her sexuality in her therapeutic work, her job would not be in jeopardy.

When she was told of her dismissal, Pedreira felt obligated to provide an explanation to the teenage boys she had been counseling. "We had a group session," she said, shaking her head at the memory, "and they were angry. It takes a long time for these kids to get comfortable with a therapist, and here I

was, one more person being yanked out of their lives." She paused and then said: "I remember one of the kids said: 'Wait a minute, you're gay and we're boys! So what's the problem?' We all laughed to keep from crying."

According to Pedreira, Jack Cox, who had praised her "exceptional skills" as a therapist in his performance evaluations, broke into tears when telling her the news. A few weeks afterward, Cox himself left the organization.

The Kentucky baptist homes for children refused to answer specific questions about Pedreira's dismissal, but in published statements the agency has made its line of defense clear. Pedreira was fired, the agency has said in an official statement, not on the basis of religious discrimination, but because "homosexual behavior is not in the best interest of anyone, especially sexually abused and confused children and youth."

From a legal perspective, focusing on Pedreira's sexual orientation is smart. There is no federal statute barring discrimination against gay men and lesbians, nor does the state of Kentucky have such a law.

Michael Adams, Pedreira's attorney, acknowledged this in an interview. But he pointed out that officials at Baptist Homes have made contradictory statements about the reasons for Pedreira's firing. On Sept. 23, 1998, the parent of a child whom Pedreira had treated wrote a letter to Baptist Homes pleading for her to be retained. "I just can't understand why someone as intelligent and as good with problem children as Alicia is could be fired because she is different from many of us," the letter states. In response, Bill Smithwick, the president of Baptist Homes, explained the agency's reasoning as follows: "To employ a person who is openly homosexual, living in an adulterous situation, is a chronic abuser of alcohol or drugs, etc., does not represent the Judeo-Christian values which are intrinsic to our mission."

Pedreira's legal team sees this letter and other statements by Baptist Homes employees as clear evidence of religious-based discrimination. "We argue that you cannot take government money and impose those religious beliefs on employees," said Adams, "whether the victim is a homosexual -- as in this case -- or not."

Whose argument will prevail in court remains to be seen. Pedreira's case comes, of course, on the heels of the Supreme Court's 5-4 decision in Boy Scouts of America v. Dale, which determined that the Boy Scouts can ban homosexuals because it conforms to the group's "expressive message." But unlike the Boy Scouts, which receives little money from Washington, Baptist Homes relies on the government for the vast majority of its budget.

At the very least, the policy of Baptist Homes runs counter to the trend in publicly financed employment positions: all federal employees, for example, are now protected from discrimination on the basis of sexual orientation. Allowing government-financed groups to disregard this standard has begun to raise concerns in Congress. "We can't adopt a system here that allows religious groups to meet a lower standard of civil rights protection than nonreligious groups," Senator Joseph Lieberman recently said in a statement.

But this is not the only concern. Because courts have interpreted the Title VII exemption to include all the "tenets and teachings" of a faith, the door could be open to a seemingly wide range of government-financed discrimination practices. Consider what would happen if a state decided to contract out

services to the Nation of Islam. Catholics, Jews or any other group that runs afoul of the Nation of Islam's teachings might find themselves excluded. This is not a hypothetical example. Back in 1995, Bob Dole and other Republicans denounced the Department of Housing and Urban Development after discovering that federal funds were used to hire a security firm linked to the Nation of Islam. Despite reports that the firm was effective, HUD promptly revoked the contract. Yet in 1996, many of these same politicians helped pass the first Charitable Choice legislation.

Baptist Homes does not hide the fact that its religious tenets prohibit more than just homosexuality. "We've made it clear as to the values we're looking for in the staff we hire," said Smithwick. In general, he explained, leadership positions at the agency must be filled by Baptists. "It's not just a single issue that brought this whole thing to a head. There are other issues."

One of those other issues, according to Dawn Oaks, who worked at Baptist Homes for two years, is couples who live together out of wedlock. "When I started working there, I had a male roommate," Oaks said. "Then we started dating. Now, I was raised a Baptist, so I knew this would not be accepted." Oaks worried constantly about being discovered. A co-worker in the same situation, she says, installed a separate phone line in her home for protection. What if one of the women had gotten pregnant? Court precedent suggests that they could have lost their jobs.

Oaks was the first of several colleagues who resigned after Pedreira's firing. "It was hard, because I really think the agency provides good treatment," she said. "But a lot of the kids there are dealing with problems like birth control and sex and sexual identity. What kind of message did this send? I felt I could not stay." It's a feeling others shared. To show support for Pedreira, the University of Louisville and Spalding University stopped assigning students to field placements at Baptist Homes.

None of this has moved the agency to alter its employment policies or any other aspect of its approach. "Our mission is to provide care and hope for hurting families through Christ-centered ministries," Smithwick has said. "I want this mission to permeate our agency like the very blood through our bodies. I want to provide Christian support to every child, staff member and foster parent." If forced to change, Smithwick told me, Baptist Homes would rather stop contracting with the government.

This nearly happened. Last June, the agency declined to renew its state contract after Viola Miller, head of Kentucky's Cabinet for Families and Children, warned that it was "very possible" the group's employment policies would lead state officials to stop sending children there. The dispute was resolved only after Gov. Paul Patton -- who is reportedly planning to run for Senate one day -- intervened and persuaded Baptist Homes to renew. "As a person raised in the traditions of the Southern Baptist Church," Patton explained in a subsequent letter to a Baptist newspaper, "I fully understand the sincere and deeply held beliefs of the church."

Pedreira's case is not the first of its kind. In 1987, a Mississippi woman named Jamie Kellam Dodge sued a Salvation Army domestic-violence shelter after she was fired for her association with the Wiccan religion (a sect that practices modern witchcraft). Because Dodge's salary was partly financed through a government grant, a federal judge ruled against the Salvation Army. Citing the

Establishment Clause of the Constitution, the court determined that government financing of jobs filled in accordance with religious values "clearly has the effect of advancing religion and is unconstitutional." Dodge received $1.25 million in damages.

In 1995, when Charitable Choice was first being debated in Congress, the Mississippi case caught the eye of John Ashcroft, then a senator from Missouri and the legislation's chief advocate. Although the Salvation Army case was not precedent-setting, committee transcripts record Ashcroft expressing fear that it would "send a chill" through religious communities and insisting on adding an amendment guaranteeing religious groups "the ability, frankly, to be discriminating" when contracting with the government.

Proponents of Charitable Choice view the law's hiring provisions as essential. Carl Esbeck, a conservative legal scholar, has written that religious organizations "can hardly be expected to sustain their religious vision without the ability to employ individuals who share the tenets of the faith." In a recent article in The New Republic, Jeffrey Rosen echoed this view, noting that, after all, many secular organizations that receive government funds, like Planned Parenthood, also hire on the basis of their values.

Pedreira's allies counter that the same argument could be used to justify lifting the restraints on any form of discrimination. Excluding someone on the basis of religion is barred under federal law because, like race and sex, this category of discrimination has proven so persistent and deleterious. Doing so with public funds is not only deeply offensive to many Americans, the argument goes, it also highlights a contradiction in the logic behind Charitable Choice. While proponents argue that faith-based organizations deserve "equal treatment" when it comes to disbursing public funds, their demand for a Title VII exemption for religious groups -- an exemption whose limits will be difficult to define -- amounts, opponents say, to a form of preferential treatment.

"In no other government program do we allow such discrimination," said Congressman Scott. "I think it's turning the clock back to say that in a government-funded program, we can practice bigotry." A better alternative, argues Julie Segal, an adjunct government professor at American University who has written widely on the subject, would be to restrict public financing to religiously affiliated groups that agree not to discriminate, thus enabling them to provide social services without violating basic principles of fairness.One night during my visit to Louisville, Pedreira drove me over to Spring Meadows. It was her first time back.

"Hey, that was my building," she said as we approached the facility, a series of large, red-brick cottages situated atop a vast expanse of green lawn. We slowed to a halt, and Pedreira, who is normally voluble, fell silent. "What gets me," she finally said, "is that it had nothing to do with my work. I did good work. And I cared about those boys."

Though her case is still in the early stages, Pedreira seemed unfazed by the prospect of a protracted legal battle. "My goal is not the lawsuit; it's education," she said. "I want people to know this can happen." In Louisville, where local media coverage has been steady, she has already achieved this objective. "People walk up to me all the time," she said, "and tell me I did the right thing."

Pedreira even got the chance to confront Governor Patton, who appeared one day

when she was volunteering for a Democratic Congressional candidate. "He shook my hand and said, 'Hi, I'm Governor Patton,"' she recalled. "I said, 'Hi, I'm Alicia Pedreira.' He kept walking, so I squeezed his hand again and said, 'I'm the woman who got fired from Kentucky Baptist Homes for Children.' He said, 'Oh, that was a terrible situation for everybody,' but he never looked me in the eye, which made me think he knew what happened was wrong."

For all the gratifying moments, however, Pedreira has also suffered plenty of lows. "I've had people throw trash in my yard," she said. "I've been called a pedophile." And she is still dealing with the aftershocks of a traumatic experience. "I was depressed, and I didn't work for months," she confessed. "I felt lost." Since losing her job, Pedreira has not felt inclined to pursue work as a therapist; at present, she's working as a repair technician for Bell South. "Before, I had hoped to climb the ladder, maybe even direct my own program one day," she said. "But I haven't felt ready to go back to that."

Pedreira told me that she has fallen out of touch with the children she once counseled. But there are certain things she keeps around to remind herself of what happened. Back at the house, I asked her about the infamous photograph that caused her troubles. She left the room for a moment, then returned with a manila envelope. "Here it is," she said, laying the black-and-white still on the table. "I'd still have my job if not for that photo," she said. Then she smiled. "It is a lovely photograph. One day, I'm going to have it framed."

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GRAPHIC: Photos: Alicia Pedreira was told by the Kentucky Baptist Homes for Children that her homosexuality made her unfit to work there as a therapist. (Maude Schuyler Clay); The photograph of Pedreira and Nance Goodman that cost Pedreira her job. (Jeff Offutt)

PUBLICATION-TYPE: Newspaper

Mr. NADLER. I thank you, Reverend Lynn.

We have two votes on the floor. We have 4 minutes and 28 seconds remaining but that is congressional time; we will have a little more time than that.

So there is about 5 minutes remaining on this vote, 5 minutes on the next vote, and then I ask the Members of the Committee to return as soon as possible after that second vote. And meanwhile, I will declare the hearing in recess.

[Recess.]

Mr. NADLER. The hearing will reconvene and I apologize to everyone for that delay. Hopefully it won't occur again, but it might.

I will begin the questions by recognizing myself for 5 minutes.

First, for Professor Rogers, you testified that the Supreme Court has never interpreted the free exercise clause to prevent the government from placing nondiscrimination conditions on grants to or contracts with religious organizations, including the requirement that providers abide by longstanding commitments to equal opportunity in federally-funded jobs. Professor Laycock and the Office of Legal Counsel contend that the Religious Freedom Restoration Act, RFRA, compels a different result.

Congress was very clear that the purpose of RFRA was to restore the pre-Smith application of—that is—I don't think I have to explain to this audience what Smith was—the pre-Smith application of strict scrutiny to free exercise claims. If, under the pre-Smith application of strict scrutiny restored by RFRA, the government could place a nondiscrimination condition on grants how is it possible that RFRA compels a different result?

And let me add that many of us have urged the Obama administration to review the OLC opinion on this. When they do so, do you see any grounds for them to uphold that opinion or should it be revised or withdrawn?

Ms. ROGERS. Yes, Chairman Nadler. Thank you for that question.

I believe that the opinion—the World Vision opinion—that the Department of Justice——

Mr. NADLER. Would you speak closer to your mike?

Ms. ROGERS. Sure—that the Department of Justice offered should be reconsidered, and in my view it should be withdrawn because in my view it incorrectly interprets the burden prong of the Religious Freedom Restoration Act, finding that the requirement that a nondiscrimination provision in the RFRA—in the actual grant cannot flow, or cannot be placed on the recipient because of RFRA. The opinion says that that is a substantial burden, and I just think they got that wrong.

Mr. NADLER. You think that is not a substantial burden?

Ms. ROGERS. I think it is not a substantial burden. It is a government grant that applies to—the nondiscrimination clause applies to positions that would be within the government program, but it doesn't apply to positions that would be outside the government program and privately funded, so there is certainly a lot of latitude there. And it is something that an organization could take the grant or not take the grant. They are under no duress to take the grant and if they don't agree——

Mr. NADLER. And the necessity not to take the grant would not be a substantial burden?

Ms. ROGERS. Not taking the grant would not be a substantial burden, yes. I agree with that.

So my view is that that opinion incorrectly interpreted the burden analysis, and so I do hope that the Department of Justice will reconsider that opinion and withdraw that particular opinion.

Mr. NADLER. And the first part of my question, which was the—that under pre-Smith application of strict scrutiny restored by RFRA it was always assumed at that time that the government

could place nondiscrimination conditions on grants. How can RFRA compel a different result?

Ms. ROGERS. I don't believe that RFRA does compel a different result, and Chairman Nadler, you were a leading Member and very active in the RFRA debate, and I think what was true of that coalition that passed RFRA, which was so broad, is that there were different opinions about matters like these that we had to say, I think, that these matters would be unaffected by RFRA.

Mr. NADLER. I agree. I should say the legislative intent has sometimes—I once lost a lawsuit in the New York State courts on the legislative intent of a statute that I was one of the principal authors of, so you never know.

Professor Laycock, you testified that protecting the right of program beneficiaries by the guarantee of a secular alternative to religious providers is fundamental to these programs. I think that is a direct quote from your testimony.

Does that requirement have constitutional dimensions? That is, is it required by the free exercise or establishment clause, in your opinion?

Mr. LAYCOCK. There is not a Supreme Court case directly on point, but yes, I think the requirement of a secular alternative is of constitutional dimension. The government cannot force recipients into a religious alternative as the only alternative available.

Mr. NADLER. So you think it is of constitutional—so your answer is yes?

Mr. LAYCOCK. My answer is yes.

Mr. NADLER. And what are or should be the consequences if we cannot ensure alternatives in that case?

Mr. LAYCOCK. Well, I mean, the premise of that question is ensuring the secular alternative is difficult. It takes some money and it takes some planning. And if you have a beneficiary request a secular alternative and doesn't get it you have got a constitutional violation.

Well, then what is the remedy for that violation? I don't think it is to shut down the entire program. I think you have to have a remedy focused on that individual—on that individual——

Mr. NADLER. Well, what would be the remedy? Not to shut down the entire program—is there a different remedy?

I mean, we are in a situation where obviously funding is tight; it is going to be tighter in the next few years or decades. So what would be the remedy if it is unconstitutional not to have a secular alternative?

Mr. LAYCOCK. The remedy is for the court to order the agency to fund a secular alternative, and if that turns out to be flatly impossible on the ground then I don't know where we are. But the remedy is to create the secular alternative.

Mr. NADLER. Which, yes, okay. So, in other words——

Mr. LAYCOCK. And I would think, sir, in an individual case it is always going to be possible. What is difficult is to do it in a structural manner so that we can be confident it is always going to be there for any beneficiary in the——

Mr. NADLER. All right. Now, in effect you are saying that one solution is to—to concerns about religious discrimination in federally-funded jobs is simply to fund a diverse range of employers. Some

will discriminate based on religion, some will not, so there is an alternative available.

Setting aside other possible objections, how do we square this with the consensus position taken, I believe, by everyone in the witness table today, by the Bush administration, by the Advisory Council, and by the new Executive order, that the government absolutely should not consider religious affiliation or lack of affiliation when making grants and distributing funds? Doesn't this solution actually require consideration of affiliation and beliefs in order to make sure they have some with and some without?

Mr. LAYCOCK. No, I don't believe it does. I think connection runs the other way, that when the government says, "You have to secularize your hiring in order to be eligible," that is very similar to saying, "We only consider secular providers." And I think the logic of these programs is, you know, award the grants without regard to religion and on the basis of the merit of the programs. The distribution of the grants won't be perfectly even but it will be——

Mr. NADLER. But how do you—what I don't understand is how do you figure out that some of the groups that you are going to be funding are not going to discriminate so that you have alternatives, knowing that some will, if you don't ask and if it is impermissible to ask?

Mr. LAYCOCK. The premise of the program is you award the grants on the basis of merit, and you assume that in the real world that will result in some kind of a distribution, that it is not going to be the same group getting the grant every time. And if it is then we want to check whether the funding agency is really awarding on the basis of merit or whether——

Mr. NADLER. Some group may really be meritorious—others.

Mr. LAYCOCK. Pardon?

Mr. NADLER. It is always possible that some group really is so meritorious that it gets all the grants.

Mr. LAYCOCK. It is possible. It is possible. But I think our experience has been that generally you get a distribution.

Mr. NADLER. Well, let me ask you one last question. Would the unavailability of nondiscriminating employers or the lack of jobs at those employers change the results? And do prospective employers have to relocate or take lower-paying jobs and would this violate the principle of alternative employers?

Should I repeat that?

Mr. LAYCOCK. Well, I think we have moved from the principle of alternative providers for beneficiaries to alternative employers for job seekers, and——

Mr. NADLER. I thought we were talking about that.

Mr. LAYCOCK. Well, let's review the bidding and make sure we haven't missed any—— [Laughter.]

I said I think it is a matter of constitutional principle that the beneficiaries of this program, the recipients of the services, have a secular alternative——

Mr. NADLER. Yes, okay.

Mr. LAYCOCK [continuing]. Available so that they are not forced into a religious provider against their will.

With respect to employment——

Mr. NADLER. It is a different question.

Mr. LAYCOCK.—I don't think they are guaranteed a federally-funded secular employer of their choice. I think as a practical matter if we award the grants and the contracts on the basis of merit there will be a diversity of federally-funded private sector employers out there. But I don't think that job seekers get guarantees in the way that the beneficiaries——

Mr. NADLER. Thank you. My time is long expired.

I now recognize the Chairman of the full Committee. Oh, Chairman defers. I will recognize the gentleman from Virginia, Mr. Scott.

Mr. SCOTT. Thank you, Mr. Chairman.

You know, one of the things that is confusing me on this secular alternative is what is going on in the program that requires an alternative?

Reverend Lynn?

Rev. LYNN. I think that is an excellent point. One of the things that I disagree about in regard to the Executive order yesterday was the determination that religious icons and symbols do not need to be removed from the wall. On the other hand—on a wall where a federally-funded service is being provided.

I just find it unusual that you cannot, under the regulations—presumably if they will be promulgated after the Executive order—that you cannot use these government funds to proselytize or to evangelize but it is perfectly acceptable to have them occur, whether that is a counseling session or a hunger program, in a place that contains the very symbols, icons, and statements of the faith. I mean, what could be more of an evangelistic opportunity than to put up a quote from the Christian Bible suggesting that Jesus is the only way to salvation, and to have that appear on the walls of a federally-subsidized program of any kind?

I think that is a fundamental problem. If you have a person who does not want to have a religious provider then it seems to me that you must guarantee, and there has to——

Mr. SCOTT. If the provider happens to be of a certain religion and the beneficiary just doesn't like that religion and it is a secular program can he say, "Well, I don't like that provider's religion. I don't want somebody of that faith counseling me on my drug problem. I want somebody of another faith"? Is that a legitimate complaint?

Rev. LYNN. I think it is a legitimate complaint, and I think it is even more legitimate——

Mr. SCOTT. I mean, this doesn't have anything to do with faith-based; I just don't like the man's religion.

Rev. LYNN. Well, but I think that the——

Mr. SCOTT. Secular program, right?

Rev. LYNN. Yes, but the beneficiary may well understand, particularly if he or she is in a room——

Mr. SCOTT. Well, you are talking about is it—I mean, if it is a secular program and it is run as a secular program and you just don't happen to like—you just found out the guy's religion is one you don't agree with, "I want someone of another religion." I mean, there used to be a time when hospitals, you know, "I don't want a doctor of that race."

You know, what I mean, is this—if it is a secular program run appropriately—Professor Laycock, if you have got a secular pro-

gram run appropriately without the proselytizing what is the complaint?

Mr. LAYCOCK. Well, if you wholly secularize the religious providers then I think——

Mr. SCOTT. No, the program, not the provider. I mean, people have—people will come in with their religion. You have a program that is a secular program if you are suggesting that things are going on that are actually proselytizing then you have got another problem. Not just the alternative, you have got another problem.

Mr. LAYCOCK. As I understood the idea for these programs back in the beginning—and there has been some substantial evolution since 1996—but as I understood the point back in 1996 the program had to provide the secular service that the government was willing to pay for and had to provide it——

Mr. SCOTT. Well, let me tell you, back in 1976 the bill—the original bill—allowed the program to require, as a condition to participation, that you take Communion and come to Wednesday night prayer sessions.

Mr. LAYCOCK. But you got that fixed before it was enacted.

Mr. SCOTT. Okay, well yes. That is right. And we think we got it fixed so that there is no proselytization.

Mr. LAYCOCK. But what it said was, "Government funds cannot be used to pay for proselytization."

Mr. SCOTT. Okay.

Mr. LAYCOCK. And one form of implementation that would have been consistent with that 1996 legislation would have been to say, "The secular part of the program is paid for with government money; religious add-ons to the program were paid on with—paid for with private money, but they don't have to be cleanly separated."

Mr. SCOTT. Well, yes they do—well, when we passed legislation out of this Committee it did have to be cleanly separated so that you could participate in the government-funded programs without any proselytizing added on, because as a matter of fact, the concern was the original bill said "paid for with government money," which opened the opportunity for the youth choir director to come in and—volunteer to come in and lead the group in praise and prayer. We made sure that that was not possible. The program had to be secular.

Mr. LAYCOCK. I understand that. In the intervening years we have added the separation requirement that any religious add-ons have to be separate in time or separate in space. That may well have been a mistake, but that is what we have done.

Mr. NADLER. Excuse me. That add-on may have been a mistake or the original may have been a mistake?

Mr. LAYCOCK. The requirement of separation may have been a mistake, but that is the direction we have gone in. And that does reduce the need for the secular alternative. I don't think it eliminates.

If we can still have religious art on the walls—and I don't think we should take it down—then the beneficiaries have a reasonable religious objection to that. They can still be invited to the separate program that is going to occur later in the day and they may not

want to deal with that, but you are right. The more we secularize the program the less——

Mr. SCOTT. So your assumption is that—your assumption is that there is still some proselytization going on in some of these programs for which you need an alternative.

Mr. LAYCOCK. Well, there may be some proselytization going on——

Mr. SCOTT. Let me get on another question because—let me get on another question.

Reverend Lynn, you mentioned Dr. Yorker, the psychologist who couldn't get a job at a program because of his religion. It is my understanding that the faith-based office is treating discrimination cases on what they call a case-by-case basis, whatever that means.

Can you explain how a—there is only one drug counseling program in the area; it is run by a faith-based organization that is discriminating. How does Dr. Yorker get a job as a drug counselor anywhere in the county? Or does his religion essentially eliminate any possibility of employment in a drug program?

Rev. LYNN. I think the answer is that he is unlikely to find any job in that county——

Mr. SCOTT. Because of his religion?

Rev. LYNN [continuing]. Because of his religion. And this could be a county-wide phenomenon or in entire states one could imagine a condition where he could not find a reasonable job if those would-be employers, including the religiously-based ones, are allowed to discriminate on the basis of religion.

As far as the case-by-case review, we have repeatedly asked the Administration, the Justice Department, to explain what this case-by-case review is. But a case-by-case review that results in permitting discrimination in some cases but not others—if that is happening we have no standards, there are no written documents, there are no rules about how this is being applied. I don't think you can have a case-by-case evaluation if some cases lead to saying no on the basis of religion to that job seeker.

Mr. SCOTT. And, Mr. Chairman, if I can just get one thing on the record from Ms. Rogers—Professor Rogers, prior to 2001 or late 2001 the Bush Executive order, which changed the Johnson Executive order, that constituted a change. Is it true that before then if you get a Federal contract you could not discriminate based on religion?

Ms. ROGERS. Yes. That was the 1965 Lyndon B. Johnson Executive order that related to contracts and was amended by the Bush 2002 Executive order.

Mr. SCOTT. After 2002, if a faith-based organization is running a program, what legal prohibition is there against discriminating openly and notoriously on the basis of a person's religion?

Ms. ROGERS. Well, for that you would have to look at the program at issue because there are different statutes. For example, a charitable choice statute would allow that——

Mr. SCOTT. If there is no specific prohibition against discrimination in the program——

Ms. ROGERS. No overarching prohibition against discrimination? In some programs there are conditions that are like the one that is at issue in the World Vision case where the Justice Department

issued a memo. There was a nondiscrimination provision that related to employment in that particular program. But other programs contain charitable choice provisions that would allow the discrimination and so we have——

Mr. SCOTT. Or they are silent.

Ms. ROGERS. Or they are silent, yes.

Mr. SCOTT. And in that case a program can have a practice of discriminating against persons in employment solely based on religion?

Ms. ROGERS. Yes. In those cases where it is, you know—there is a charitable choice statute, for example, they could.

Mr. SCOTT. Or if there is no specific prohibition?

Ms. ROGERS. Well, I suppose that you would have to take a look at regulations and see what is there, but it is conceivable that that might be the case.

Mr. SCOTT. And so a person applying for a job paid for with Federal money can be told, "We don't hire people of your faith," just like Mr. Yorker was told. That would be legal in those programs?

Ms. ROGERS. If it was a religious group and they had the clearance—the charitable choice-type language—then they would be able to make those decisions on the basis of religion with regard to federally-funded jobs.

Mr. SCOTT. Thank you, Mr. Chairman.

Mr. NADLER. Thank you.

I now yield 5 minutes to the gentleman from Arizona.

Mr. FRANKS. Well, thank you, Mr. Chairman.

And thank you all for being here.

Mr. Chairman, I think one of the challenges we have in a situation like this is that there are organizations out there that seem genuinely committed to trying to erase any sort of religious expression from American life, and I am not going to try to make that case here this morning but I believe it is part of the issue. I wrote a bill here about 15 years ago that passed in the Arizona legislature that simply allowed people—private individuals on a voluntary basis—to contribute to a scholarship fund for children to go to a school of their parents' choice. And that is private dollars that never touched the public coffers whatsoever.

And the rub came in when some of those parents chose a religious school for their child. And of course, the ACLU, and Mr. Lynn, and others sued us in the Federal courts for the last 15 years—last 12 years. And oral arguments were heard in the U.S. Supreme Court here about 2, 2½ weeks ago.

And I think the Supreme Court will uphold the Arizona provision because otherwise they would be saying that every dollar in everyone's pocket is public money. That is exactly what the ACLU is arguing, that that is public money simply because it is subject to a tax credit.

I am wondering how long it will be before the ACLU argues that money given to a church, because there is special tax treatment involved there, that it is deductible, that that money is also public money and that the church, if you are a Jewish synagogue, that you have to hire a Baptist to be your counselor for young marrieds. I mean, it just—the possibilities are endless.

And as we all know by now, that yesterday President Obama issues a new Executive order dealing with the White House office of faith-based and neighborhood partnerships, but it was silent as to the degree to which religious entities could continue to enjoy the freedom of association through hiring. Now, the order's lack of clarity has breathed a new life into what was once an otherwise long-settled question of whether grant recipients can hire and fire based on religious association.

For 50 years our courts have said yes, but our current Administration officials have said that those questions will be answered on an ad hoc basis. I don't know how a religious entity can possibly know what is permissible and what is not permissible under the Administration's ad hoc approach.

I mean, ad hoc is sort of synonymous with "making it up as you go," and I think this violates the basic notions of due process. I mean, King George was famous for his ad hoc approach to almost everything.

So I guess, Mr. Laycock, my first question here, before I get too exercised, is, is the Administration's ad hoc policy a clear victory for those, if there are such groups, that would seek to deny religious entities the right to associate with or employ only those who share their religious beliefs? I mean, do you think that is a victory for those groups that want to remove that liberty to religious groups?

Mr. LAYCOCK. No. I think it is postponing the issue. And none of the three witnesses like case-by-case or ad hoc, all right? Professor Rogers and Reverend Lynn would say you can never hire on the basis of religion if you have a Federal grant, and I would say you can.

There is some room for case-by-case. There may be some jobs where, you know, where this is a determining issue, where it doesn't really look like a burden, but I think most of the three of us believe—all three of us believe that in most cases there is a clear rule one way or the other, and the Administration's case-by-case approach seems to be a way of not having to make that hard choice.

Mr. FRANKS. Yes. Well, obviously I couldn't agree with you more, and it frightens me to death that there is a consensus on this point, but I am grateful.

I guess my last thought, Mr. Chairman, is that this is a pretty important area that we are dealing with, and it is my judgment that the ability to have a private donor intervene in the protocol here is the best approach—in other words, allowing individuals to give to these things and then get an even more powerful tax advantage than just deduction because this takes these burdens off of government and puts them in a situation where private individuals can vet these groups much better than government seems to.

And I think that it kind of builds a firewall here that would probably make both sides a lot happier. Now, it depends on how the Supreme Court comes down on this case from Arizona, but I think that might be some—I don't know, you know, I don't know if I dare think that the ACLU would be happy with that since they are suing us in Federal court right now on it, but I think that we have to do something like this because otherwise we are going to

say that, you know, anything that—within the shadow of the American flag can't be religious, and I think that that would undermine everything that the country—at least the ideals that catalyzed it in the first place.

My last thought, then, Mr. Laycock. Don't you think that if this ad hoc approach happens that there are going to be a lot of litigation and arguments over it because of the lack of clarity, and how will the cost of litigation be borne, and would those principles be—would some forebear on those principles until it was decided in court, and wouldn't this be a pretty serious chill on the basic freedom of association for religious entities that couldn't find the financial ability to fight the Obama administration to protect their rights?

Mr. LAYCOCK. Well, the litigation would most commonly come in the form of an employee suing a religious agency for not hiring them or not promoting them and if the employee wins the agency has to pay the employee's attorneys fees. There has been remarkably little of that litigation.

Folks who don't get hired tend to go on to the next job and not to file lawsuits so that most employment discrimination litigation is about promotions and discharges or pay rather than about hiring. So, so far the litigation burden has not been bad.

Mr. FRANKS. Well, Mr. Chairman, I think that is great but I think that the ad hoc rule of the Administration is an open invitation for everybody just to sue because it is Friday. And so with that, I will yield back.

Mr. NADLER. I thank the gentleman.

I now recognize the gentleman from North Carolina.

Mr. WATT. Thank you, Mr. Chairman.

I think Mr. Franks and I have found some common ground here—maybe not in the consequences of what this rule will lead to. Our concern is that it will lead people to—groups to discriminate and take their chances because, as has been indicated, seldom do even—do people file lawsuits.

They, in most cases, don't even know they have been discriminated against. They don't find out. It is not articulated as clearly as the case the Reverend Lynn described.

So I am with you on that. I think all three witnesses seem to be with you on that. It seems to be delaying a very difficult choice for the Administration, and I want to come back to that.

But first of all, I want to welcome Professor Rogers. Not that I don't welcome the other two gentlemen also, but Professor Rogers is from Wake Forest University Divinity School, and at least a part of Wake Forest University is in my congressional district—not all of it. I am not sure where the divinity school is located so I am not sure whether you are in my district or not in my district, but since all politics is local, I want to make sure I welcome either my constituent or my near-constituent.

Ms. ROGERS. Well, thank you. I can solve this because I actually live in Falls Church, Virginia, but teach classes that meet in Washington and in North Carolina.

Mr. WATT. So she is not my constituent. I take back my——

[Laughter.]

Ms. ROGERS. I appreciate your welcome nonetheless and will bring it back to my——

Mr. WATT [continuing]. Take back my special welcome and welcome all three of you on an equal footing in that case.

But I do appreciate you extending your wisdom to Wake Forest, and I am sure the folks at Wake Forest University appreciate it.

Let me come back to this issue, because Professor Laycock actually said the Administration seems to be avoiding a difficult decision. It went out of its way, apparently, to take this issue of employment out of the jurisdiction of the commission that was set up.

Professor Rogers, you are on that commission. Am I missing something here? I mean, what is up with the Administration delaying a difficult decision? I mean, either you can discriminate or you can't discriminate, and I don't know that allowing it to happen on a case-by-case basis or evaluating it on a case-by-case basis—I am with Mr. Franks on that.

What was the rationale for taking that part of this from the commission's portfolio?

Ms. ROGERS. Well, there wasn't a lot of discussion about it, but—from the Administration to us—but they were aware, of course, of, you know, a lot of the law in this area and felt that it was important for them to make this——

Mr. WATT. Okay. Well, now, this Administration has been in power now for 2 years. Is there any indication of when they will make this decision? You know, I am——

Ms. ROGERS. I have no information on that.

Mr. WATT. Okay.

Ms. ROGERS. No more than you do. I will say that people on the council—there were some of us who really wanted to address this issue within the context of the council; there were other council members who didn't want to, and some in between. So there were different feelings about that, but the Administration decided it would handle it through this separate process, and I don't have more——

Mr. WATT. What is the separate process?

Ms. ROGERS. I have no information.

Mr. WATT. Does anybody on this panel know what the separate process is?

Reverend Lynn?

Rev. LYNN. We, along with 57 other groups, have written to the attorney general that followed up on this question of when this policy will be discussed, when this Office of Legal Opinion memorandum will be reviewed, and I hope repealed, and we have had no luck whatsoever in moving them forward toward an answer, much less a change in the policy. And it is deeply disappointing.

Mr. WATT. Okay. Well——

Ms. ROGERS. Representative Watt, I was just going to say that, if I may, that issue is very important in my mind, and obviously in yours as well. I do believe, though, that the Executive order and the recommendations that the council did make on a range of other issues are very important——

Mr. WATT. Oh, yes. I am not diminishing the value of the commission's work. I am just——

Ms. ROGERS. I didn't think you were, but I just wanted to raise those again because that was quite a bit of work and kept us very busy and was something that we feel very strongly about, these other issues. Now, the council itself—the membership of the council—would divide on the employment issue——

Mr. WATT. Now, am I clear, Professor Laycock, that you are in a different position on how that issue ought to be resolved from the other two members of this panel?

Mr. LAYCOCK. Yes, sir.

Mr. WATT. You believe that, using government money, a religious institution should be able to discriminate based on religion.

Mr. LAYCOCK. Yes. Yes, I believe we should not use the government money to force the religious organization to change its——

Mr. WATT. So if the objective of an afterschool program is to get kids to perform better and there are two applicants, one of whom is clearly superior to—in achieving that objective—a teacher, long experienced in achieving that objective—the other one has no experience but happens to be a member of the particular faith, you think it is fine for that employer to select the person based on that person's faith?

Mr. LAYCOCK. Well, in that example it probably isn't. Recall the——

Mr. WATT. Well, you know, either—we got a black or white rule here. That is what all of us have been advocating for a rule——

Mr. LAYCOCK. More than one rule.

Mr. WATT [continuing]. And I agree we need a rule. You can't have it both ways. You can either discriminate or you can't discriminate.

Mr. LAYCOCK. You can discriminate, but the——

Mr. WATT. You said you believe that they ought to be able to discriminate.

Mr. LAYCOCK. The organization also has to win the grant on the merits. It has to be the best at delivering the services. And if it is hiring unqualified people it is not likely to win many grants.

So the realistic comparison we are talking about for groups——

Mr. WATT. So you would take a——

Mr. LAYCOCK [continuing]. A few relatively qualified people, one of whom also supports the mission and——

Mr. WATT. Let's change the equation, make sure that it is clear. This person has no qualifications but happens to be a Baptist or—and this is a Baptist program—Baptist-run program. You think the—using Federal dollars we ought to support allowing them to use Federal dollars for that purpose?

Mr. LAYCOCK. Yes, but only so long as they are the best at providing the service. And your hypothetical doesn't exist in the real world. They are not going to be the best——

Mr. WATT. That is not a trick question. I am just——

Mr. LAYCOCK. I understand.

Mr. WATT [continuing]. Just trying to be clear on—either one of the other two witnesses agree with that?

Rev. LYNN. I certainly don't agree with that——

Mr. WATT. Okay. I think I got that from your testimony.

What about you, Ms. Rogers? You equivocated a little bit more than Reverend Lynn did. What about you, Professor Rogers?

Ms. ROGERS. Yes, I disagree. I believe that when it is involving private money—the religious organization's own money given by tithes and gifts of the people that subscribe to that faith—then there should be full freedom to make religion—religious calls on who is hired. Of course, Baptist churches should be able to hire Baptist preachers, as I said at the outset. But the money—direct government aid—changes the calculus.

Mr. WATT. Okay. All right.

Again, I am not—you know, I am just trying to make sure we get the record——

Ms. ROGERS. Right. And I would say that also that positions—an organization—a religious organization could receive a government grant and I think it should not be able to make religious calls on the positions that are subsidized by that grant money, but it is positions that are outside, that are privately funded, then they should be able to make religious calls on those positions even though they are still getting a government grant. I just wanted to——

Mr. WATT. I don't know how you are going to do that, but—I mean, money is fungible, and unless you set up two separate organizations I don't think you can do that. But, you know, again, this is not intended to create an overarching debate. I am just trying to get this specific principle and where these three witnesses come out on this.

And so my time has long since expired so I will——

Mr. LAYCOCK. If I might add, sir, very briefly, it is also fairly common to have employees who are paid 50 percent on the grant and 50 percent with other funds.

Mr. WATT. So you would allow them to discriminate 50 percent of the time, or——

Mr. LAYCOCK. I would allow them to hire people who support their mission and preserve their religious identity.

Mr. WATT. You sound as wishy-washy as the Administration on this.

Mr. LAYCOCK. I would allow them to hire. You call that discrimination, I call that—that is what religious organizations do.

Mr. WATT. Yes. Well, I agree. They do, and I actually sanction them doing it with their own money. I just can't sanction them doing it with taxpayer money, so that is the divide. I mean, we are not—we are all adults here.

I yield back.

Mr. NADLER. Thank you.

I just observed that with what Professor Laycock just said, then you have not the 50-50 situations but the round situation, for instance, where 950 employees were paid 95 percent with Federal money and 5 percent with non-federal money, which perhaps presents a different aspect of the case.

That concludes our——

Mr. CONYERS. I don't think so.

Mr. NADLER. I am sorry, I didn't—the Chairman of the full Committee.

Mr. CONYERS. Thank you very much.

I wanted to ask Chairman Bobby Scott if he had an observation that he wanted to weigh in on before I began.

Mr. SCOTT. Do we have a definition—is there somewhere where there is a definition of what faith-based means? I mean, you kind of know it when you see it if it is a church, but if you just have a bunch of people who declare themselves to be religious are they exempt from civil rights laws under this theory?

Rev. LYNN. In general, if one declares oneself to be a church, for example, you are presumed to be a charitable 501(c)(3) organization, and many churches never strictly apply for that; they are——

Mr. SCOTT. Well, I mean, for the purpose of this law, if a bunch of us get together, happen to be the same religion, can we declare ourselves a religious organization and therefore exempt because we just feel so strongly—we just don't want to hire people of that religion?

Rev. LYNN. I think that is perfectly permissible under the rules that are still in effect from the last Administration, unchanged by this one.

Mr. SCOTT. Okay. The other question is, can you tell—just for the record, what is the law—present law on direct contracting with religious organizations and how it differs in this context with a voucher situation?

Can the Federal Government contract with a church to provide services, and has that always been the case or has there been an evolving standard? And does the fact that it is a voucher where the beneficiary is actually making the choice make a difference in the proselytization that is going on in what would essentially be a federally-funded, or at least partially federally-funded, program?

Ms. ROGERS. Congressman Scott, that was one issue that we asked in the Executive order. We asked the Administration to opine on because we couldn't agree, in the Advisory Council, about that. Some in the Advisory Council would cite the school voucher decision—the Zelman decision from 2002 that upheld the fact that there can be some programs that include religious schools in them where people can use the voucher at the religious school——

Mr. SCOTT. But the choice is the parents'; it is not the state's.

Ms. ROGERS. Right. That that breaks the circuit in the Supreme Court's view between the connection between church and state and thus makes it permissible in their view. Some believe that that decision applies and makes it so that you could take a social service voucher to a drug rehabilitation program and allow—that program could include, you know, part of the way you get off drugs is to accept our ideas about Jesus Christ and what he can mean for your life——

Mr. SCOTT. And that is with a voucher. But can you have a direct funding of a religious organization directly——

Ms. ROGERS. With that type of content you could not. Now, let me say that some of us would disagree with that reading, or at least question the indirect application in the social service voucher context, that there might be some differences between the school voucher context and the social service voucher context.

When it comes to direct aid what we have said—what the Administration has said in the Executive order and what we said in our recommendations was that programs that are funded by direct aid cannot have religious content. That is, they cannot include worship, prayer, religious instruction, any of that——

Mr. SCOTT. Or anything that would provoke someone from wanting an alternative service?

Ms. ROGERS. Well, your question earlier, I think, that it is clear in the Executive order that that program that is funded by direct aid has to be free of explicit religious content, but a beneficiary might feel that if they don't want to enter a church for some religious reason, or perhaps for a non—you know, they just object to having to go to a church, or to go into a room, or go into a building that has religious symbols and the like, so we wanted to make sure that we provided that notice of that right for that kind of person, even if there isn't religious content in the direct—the program that is funded by direct aid, that they would have a secular alternative if they want one.

Mr. CONYERS. Thank you. I am so sorry that my colleague from Arizona isn't with us, Trent Franks, but he will, of course, hear about this. But his claim that for 50 years the courts have said religious organizations can discriminate in employment based on religious stands a little bit closer scrutiny.

As a matter of fact, the only way that could possibly apply is to privately-funded religious activities. But that does not apply when you are talking about taxpayer-funded activity.

Do you agree, Reverend Lynn?

Rev. LYNN. I certainly do. I have no idea what cases you could cite over a 50-year period that reached the conclusion that Congressman Franks has reached. And in fact, there is very little hard, black-letter law on this matter, very few cases. There is certainly not 50 years in the direction that Mr. Franks has discussed. It simply is not there.

Mr. CONYERS. And I wanted to welcome you. I noticed my colleague, Mr. Watt, welcomed Professor Rogers. I would like to welcome you, only the law school you went to isn't anywhere remotely near my congressional district, but I do it anyway.

Rev. LYNN. Well, I appreciate that. I have spoken at law schools in your district.

Mr. CONYERS. That is pretty close.

Do you agree with this discussion, Ms. Rogers?

Ms. ROGERS. Yes. I don't know what his citation to a 50-year precedent is—I am sorry he is not here to answer that question. I don't know what he was referring to.

I think we do have this long tradition that many of you have referenced starting, I think, with FDR in the 1940's about equal opportunities in government-funded—in federally-funded employment, and that is a precedent that has been longstanding that I am quite familiar with. So I don't understand the reference that he made.

Mr. CONYERS. And, Professor Laycock, may I be bold enough to solicit your agreement in this discussion?

Mr. LAYCOCK. Sure. I assume he must have been referring to the 702 exemption in Title 7, but as all three witnesses have said, you know, the whole point of dispute is whether that applies when the position is government funded in whole or in part, and that certainly is not settled. There are very few cases, they go both ways.

We will just figure the Executive order, which has now been amended—even when the Executive order said no discrimination

on the basis of religion there would have been a question about the priority of the statute and of the Executive order, and which was more specific as applied to this issue. So I think it is unsettled. But he must have been thinking about the exemption in Title 7.

Mr. CONYERS. Let's give him the benefit of the doubt. I will see him later on today, or not later than Monday, anyway, and we will continue this discussion.

Now I come to one of your positions, Professor Laycock, that I would like to put under the microscope for a little more scrutiny.

And again, I will start with Reverend Attorney Lynn and ask, isn't there some restriction that privately-funded religious activities be separated from government-funded secular services? Is there some policy that makes that a pretty standard practice or, as Professor Laycock asserts, it doesn't matter whether it is government funded or not?

Rev. LYNN. I think it makes all the difference in the world. And in fact, in the Civil Rights Act, as amended in 1972, if you look at the record in this body and in the Senate there is discussion about how organizations ought to be able to hire and they consistently refer to private dollars.

Senator Ervin, who was cited in Professor Rogers' testimony, said that. He said that all the time, including on the floor. No one seriously was proposing in 1972 that with Federal dollars comes an exemption from the otherwise applicable civil rights principles of the country. It simply is not there.

Mr. CONYERS. Professor Rogers, can you weigh in on this before——

Ms. ROGERS. Yes.

Mr. CONYERS.—I turn to——

Ms. ROGERS. There is an article that I wrote, and in preparation for writing it I looked back at the 1972 history and found that the prime cosponsors—and this includes Sam Ervin—when he was making the case for the broadening of the 702 exemption he would cite institutions which he emphasized were supported solely by private money to make the case for that broadening of the exemption that happened in 1972, and also Senator Allen made similar types of statements citing that as part of his case for broadening the exemption.

So if you are interested in that, there is more about that in the article that I wrote a few years ago.

Mr. CONYERS. Mr. Chairman, can I have enough time to have Professor Laycock respond?

Mr. NADLER. Without objection.

Mr. CONYERS. Professor Laycock, you have been outvoted but that doesn't mean anything around here. What say you?

Mr. LAYCOCK. If I understood your question you initially asked about the requirement that the—any religious part of a program that is privately funded be separated in time and space from any secular part, and that is required by the Executive order; it is required by regulations that were in place before yesterday; and it seems to be settled about these programs. I suggest in my written testimony it may not be constitutionally required, but it is certainly required by regulation.

You know, the current state of the law is—on the hiring issue, I think, is simply up in the air. Whatever people said in the legislative history, you have got a clear exemption of the statutory text of Title 7. The Bush people amended the 60-year Executive order—the new Executive order from the Obama people doesn't address it. The cases go both ways. So the hiring issue I don't think there is any clear law in place.

Mr. CONYERS. Well, we have made far more progress than I had expected. I am happy to hear you agree that funding—private money and government money should be generally be separated in time and location.

Ms. ROGERS. Yes, and one of the interesting things, Chairman Conyers, is that people who disagree about the employment issue on the council were able to come together, and all of us agreed that as to religious activities that were privately funded those should be cleanly and carefully separated from a program funded by direct government aid. So even those who have differences over the employment issue on the council were able to come together on that point.

And that is a very important point, because as we were discussing earlier, some earlier statutes did not make this as clear as it should be. So I am very pleased that the council recommendation that does, I hope, drive the point home was made a part of the Executive order and that there is a very high degree of consensus on those issues at the present time.

Mr. CONYERS. Well, that is encouraging.

Do you feel any better about that, Professor Laycock?

Mr. LAYCOCK. I think that is a done deal. If the executive and Congress have come to agreement on that——

Mr. CONYERS. And you.

Mr. LAYCOCK. I am not sure we needed to go that way, but we have gone that way.

Mr. CONYERS. All right. Reluctance doesn't change—it is like the way we vote sometimes here. You hold your nose and vote that way. It is reluctant; it is not with enthusiasm. So you remind me of the way some of our colleagues, including myself, have to vote sometimes.

Ms. ROGERS. Chairman Conyers, another point I would make about that. As a religious person I am pleased that that requirement is there because I don't want government meddling in religion. I don't want it to tell a religious organization what they can and can't say about religion, about matters of faith.

So if the religious activities are privately funded and cleanly separated from the government program, then the religious organization is in charge of that, and as long as all the other things are observed, then that keeps the government out of meddling in the religious sphere. And I definitely, as a religious person myself, do not want the government meddling in the religious sphere.

Mr. CONYERS. Thank you, Chairman Nadler.

Mr. NADLER. Thank you.

The gentleman from Georgia?

Mr. JOHNSON. Thank you, Mr. Chairman.

Do the panelists agree or disagree that a person—a citizen in the United States—has a right to be free from religion?

Ms. ROGERS. They have——

Mr. JOHNSON. Is there a right to be free from religion?

Mr. LAYCOCK. Absolutely.

Ms. ROGERS. I would put it differently. I would put it they have a right to be free from government establishments of religion, and so they should be free not to have the government pressure them in any way on religious matters, but they are not free from just encountering religion in the public square, where religion plays such a robust role. And I think that is appropriate.

We don't want the government playing that role; we want it to ensure that it does not pressure people along religious lines. That is an inappropriate role for government.

Rev. LYNN. I would just take one step further and suggest, Congressman Johnson, that one thing that people who do not choose to be religious also have a right to expect is that their tax dollars will not be subsidizing the religion of other people—any of them or all of them. I think that is a core principle as well.

Mr. NADLER. Excuse me. We are going to have to—there is an immediate vote in the Democratic caucus, so we are going to have to recess the hearing, not for too long I hope.

This hearing——

Mr. LAYCOCK. Mr. Chairman, I apologize but I have a flight and I am going to have to leave at this recess.

Mr. JOHNSON [continuing]. To explain why the government shouldn't put up crosses——

Mr. NADLER. Then let me thank you for your attendance here——

Mr. JOHNSON. Well, if I might, Mr. Chairman, we were just getting ready to get into some good——

Mr. NADLER. Well——

Mr. JOHNSON. But only thing I want to say is I know that the witnesses have been here this morning, and I appreciate you being here. I look forward to hosting you again to answer some of the questions that I have. But I will yield and let the hearing be brought——

Mr. NADLER. I appreciate the gentleman's actions. Let me say that——

Mr. LAYCOCK. Sir, I would be happy to answer in writing if you had a question you wanted to ask and didn't get a chance.

Mr. JOHNSON. Thank you.

Mr. NADLER. Thank you.

We will conclude the, but before we conclude I just wanted to claim a point of personal privilege. This may be the Subcommittee's last meeting of this Congress. It has been an honor to have been able to serve as the Chair. Our jurisdiction gives us the responsibility of protecting the fundamental rights of this country.

I want to thank the Members of this Subcommittee, especially our distinguished Ranking Member, the gentleman from Wisconsin, for their hard work and for the dedication they have always brought to this task. I want to thank the Committee staff, the Subcommittee staff. Most people never know just how hard they work behind the scenes, how dedicated they are, how talented each of them is.

I wanted to thank our counsels, Heather Sawyer, Keenan Keller, Kanya Bennett on the Democratic side; Paul Taylor on the Republic side; Matthew Morgan, our clerk, without whom the Subcommittee could not function; and our chief of staff, David Lachmann. Many more people have also contributed to our work over the years—too many to mention, but we all—I and my colleagues genuinely appreciate their service.

And the usual boilerplate language: All Members will have 5 legislative days to submit to the Chair additional question. We ask that—witnesses to respond as promptly as they can.

Without objection, all Members will have 5 legislative days to submit any additional materials for inclusion in the record. Again, I thank everyone. I thank our witnesses; I thank the staff; I thank the Members.

With that, this hearing is adjourned.

[Whereupon, at 12:54 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE ROBERT C. "BOBBY" SCOTT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA, AND MEMBER, SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

Opening Statement of Congressman Robert C. "Bobby" Scott

Hearing on
Faith-Based Initiatives: Recommendations of the President's Advisory Council on Faith-Based and Community Partnerships and Other Current Issues

Subcommittee on the Constitution, Civil Rights, and Civil Liberties
Committee on the Judiciary

November 18, 2010

I would like to begin by thanking the Chairman for convening this important hearing as well as our witnesses for being here today. I would also like to commend the members of the Advisory Council on Faith-Based and Neighborhood Partnerships and the members of the Council's Taskforces for their work. Their recommendations find common ground on which to lay a foundation for strengthening the constitutional and legal partnerships between government and nongovernment social service providers, as well as provide clarity and transparency in the provision of these services, all while respecting our nation's commitment to religious freedom.

Unfortunately, our work is far from done. The most egregious aspect of the so-called "Faith-Based Initiative" – the right of religious social service providers to discriminate in employment decisions with government and therefore taxpayer funds – remains unresolved.

One of the founding principles of our great nation was the freedom to worship or not worship as one chooses. Faith plays a central role in the lives of many Americans, and our communities benefit from the countless acts of justice

and mercy that faith inspires people to commit. Faith-based organizations are often on the front lines of meeting challenges like homelessness, youth violence, and other social problems. At the same time, the history of our nation and its First Amendment protections do not and should not allow public funds to be used to proselytize or discriminate.

In the 60s, several Civil Rights Acts were enacted in order to end the sorry history of bigotry in this Nation. Since that time, it has been illegal to discriminate in employment against protected classes, and make job decisions based on race or religion, which are protected classes. I mention protected classes in response to the Planned Parenthood example that is frequently used. Position on abortion is not a protected class. There is a difference between Planned Parenthood hiring people based on their position on a social issue, as opposed to a policy of "We don't hire Blacks or we don't hire Jews". Race and religion are protected classes and that is what is protected by our civil rights laws. One exception exists for religious organizations, but it is limited to the context of the religious organization using its own money.

However, long before that, this country recognized the disgusting practice of discriminating in employment while using federal funds. Almost 70 years ago, in 1941, President Franklin Delano Roosevelt issued an Executive Order prohibiting discrimination by all defense contractors. In other words, the U.S. government said that even if you can build better and cheaper rifles, we won't buy them from you if you discriminate in employment. And in 1965, President Lyndon B. Johnson expanded that policy in an Executive Order banning discrimination by ***all*** government contractors. No discrimination with federal funds has been the U.S. government's policy for decades now, at least until President Bush's so-called "faith based initiative."

Under traditional laws, many religious organizations have been sponsoring federally-funded social service programs for over a century. Until recent history, they were funded like all other private organizations are funded: they had to use the funds for the purpose for which they were appropriated; they were prohibited from using taxpayer money to advance their religious beliefs; and they were subject to laws that prohibit discrimination in employment. Let's be clear: religious organizations could still discriminate in positions paid for with their own money, just not those paid for with federal funds. Many religiously affiliated organizations, such as Catholic Charities, Lutheran Services of America and Jewish Social Services, have been receiving hundreds of millions of dollars in federal funding for decades.

Incredibly, the idea of Charitable Choice and President Bush's so called "Faith-Based Initiative" came about because some people insist on discriminating in employment and therefore have been barred from federal contracts. They now believe that the prohibition against discrimination with federal funds constituted a "barrier" that needed to be removed. Unfortunately, the Faith-Based Initiative specifically removed that so-called barrier and as a result, religious sponsors of federally funded programs are now allowed to discriminate in employment with federal dollars on the basis of religion. That means that a person applying for a job, paid for with federal funds, can be ineligible for consideration for that job solely based on religion.

And if this bigotry based on religion is tolerated, racial and sexual discrimination disguised as religious discrimination certainly follows.

It doesn't take a rocket scientist to figure out that if you get a pass on religion, it will be impossible to enforce non-discrimination based on race. Dr. King once said that the eleven o'clock hour on Sunday was the most segregated hour in America. That is unfortunately still true today. If the white Baptist church

gets the contract to deliver substance abuse treatment, what chance will a minority have in applying for the position of substance abuse counselor. I can hear it now: "you have to be a member of *our* church" or better yet "we were *spiritually* moved to hire the less qualified white person over the more qualified black." The fact is that many religious groups are racially homogenous.

Religious discrimination is also a proxy for discrimination based on sex. A Catholic organization could claim religious grounds when it refuses to hire a single mother, either due to divorce or premarital sex. And how will the organization know? Are we going to change privacy laws and allow potential employers to inquire into religious affiliation, marital and family status, etc? Or do people get hired, and then fired when the information gets out?

It is shocking that we would even be having a debate about whether basic civil rights practices should apply to programs run with federal dollars. When funds raised from all taxpayers are involved, it has been – and should continue to be – illegal for any sponsors of government funded programs to reject applicants for jobs paid for with taxpayer dollars solely because of their religion, or because of acts or practices contrary to the organizations' religious beliefs. There is just no justification for sponsors of government funded programs to tell job applicants "we don't hire your kind."

The so-called "faith-based initiative" represented a profound change in policy. Since 1965, if an employer had a problem hiring the best qualified applicant because of discrimination based on race or religion, that employer had a problem, because the weight of the federal government was behind the victim of discrimination. But the faith-based initiative shifted the weight of the federal government from supporting the victim to supporting the employer's so-called "right" to discriminate. That is a profound change in civil rights protection. And if we don't enforce discrimination laws in federal contracts, with secular programs,

where is our moral authority to tell private employers, who may be devoutly religious, what they can do with their private money? A policy of religious discrimination in employment is wrong in the private sector; it is certainly wrong with federal funds.

During his presidential campaign, then-Senator Obama made it clear he would retain the faith-based office established under President Bush, but in a high-profile speech, he pledged to pursue important reforms, including a policy of no discrimination in employment based on religion. Speaking in Zanesville, Ohio, on July 1, 2008, Senator Obama stated, "[I]f you get a federal grant, you can't use that grant money to proselytize to the people you help and you can't discriminate against them or against the people you hire on the basis of their religion." Unfortunately, we have yet to see these reforms enacted. In fact, the renamed "White House Office of Faith Based and Neighborhood Partnerships" now maintains that employment decisions based on religion will be looked at on a case-by-case basis. I believe that it's either discrimination or it's not, and case by case makes no sense. It's time that we restore these civil rights protections that existed for decades.

Unfortunately, the Executive Order on Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations failed to address the most important issue, thereby leaving in place Bush era policies in the form of regulations that permit such discrimination. The Executive Order protects the right of beneficiaries to be free from discrimination and the right of organizations to be free from discrimination, but any mention of the right of employees or prospective employees to be free from discrimination is conspicuously absent.

It ignores nearly 70 years of civil rights history. In June, we will mark the 70th anniversary of President Roosevelt's groundbreaking Executive Order

banning discrimination in federal defense contracts, which, as I mentioned, has been expanded over the years to prohibit discrimination in all federal contracts covering nearly one-fifth of the U.S. labor force.

The Executive Order also does nothing to address Bush era policies to use the Religious Freedom Restoration Act (RFRA) to circumvent statutory civil rights provisions in federal social service programs. A number of federal social service programs contain provisions that explicitly prohibit religious discrimination in the administration of that program, [including: Community Development Block Grant (CDBG); National Service Programs (including AmeriCorps); Family Violence Prevention and Services; Head Start; Juvenile Justice Delinquency Prevention Act; Justice Assistance Act of 1984; Low-Income Home Energy Assistance Act (LIHEAP); Maternal and Child Health Services Block Grant; Omnibus Crime Control and Safe Streets Act of 1978; Preventive Health and Health Services Block Grant; SAMHSA's Projects for Assistance in Transition from Homelessness (PATH) Grants; and Workforce Investment Act]. A memo issued by the Department of Justice Office of Legal Counsel under the Bush Administration eroded these statutory anti-discrimination provisions. Unfortunately, the Executive Order fails to correct this issue.

So I look forward to the testimony of our witnesses as we discuss the policy and constitutional implications of the faith-based initiative.

PREPARED STATEMENT OF THE HONORABLE HENRY C. "HANK" JOHNSON, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA, AND MEMBER, SUBCOMMITTEE ON THE CONSTITUTION, CIVIL RIGHTS, AND CIVIL LIBERTIES

Congressman Henry C. "Hank" Johnson, Jr.

Statement for the Hearing on
"Faith-Based Initiatives: Recommendations of the President's Advisory Council on Faith-Based and Community Partnerships and Other Current Issues"

November 18, 2010

I would like to begin by thanking the Chairman for holding this hearing today.

It will give us the opportunity to explore the President's Advisory Council on Faith-Based and Neighborhood Partnerships, the Advisory Council's recommendations, and legal and policy issues related to government partnerships with faith-based organizations.

On February 5, 2009, President Obama signed an Executive Order that created the President's Advisory Council on Faith-Based and Neighborhood Partnerships.

The Advisory Council was charged with making recommendations for changes in policies, programs, and practices of the Faith-Based Initiative President George W. Bush established while in office.

President Bush created the Faith Based Initiative to strengthen faith-based and community organizations and expand their capacity to provide federally-funded social services, with the idea being that these groups were well-situated to meet the needs of low-income families.

The Advisory Council was tasked with making recommendations that cut across a wide range of areas from strengthening the effectiveness of partnerships and strengthening the constitutional and legal footing of partnerships.

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of race, national origin, color, religion, and sex.

The First Amendment, however, ensures the right of religious organizations to exercise their religion without governmental interference. As a result, religious organizations are exempted from this Title VII provision and are allowed to adopt hiring practices that favor individuals of their particular faith.

This has been a very contentious issue. To date, neither the Supreme Court, nor any court of appeals, has directly addressed whether this exemption permits a faith-based organization to discriminate on the basis of religion for jobs that are funded with government dollars.

Unfortunately, the Advisory Council did not address this issue in its recommendations.

Another issue of major concern has been the charitable choice provision.

Charitable choice refers to Section 104 of the welfare reform law enacted in 1996. It allows religious organizations, such as places of worship, to receive government funds to subsidize social services to help underprivileged individuals.

It requires various governmental agencies to contract with faith-based organizations on the same basis as any nonprofit provider without discriminating against the religious character of the organization.

Charitable choice is controversial because questions remain as to its constitutionality.

The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment
of religion . . . ."

The U.S. Supreme Court has construed the Establishment Clause to mean that the government is prohibited from sponsoring or financing religious instruction on indoctrination.

In 1987, the Supreme Court, in *Corporation of the Presiding Bishop v. Amos*, held that Title VII's exemption allowing a private religious organization to discriminate on the basis of religion was constitutional under the Establishment Clause.

However, the case did not address whether the exemption applies to entities receiving public funds which may be used to fund the position.

I am a strong advocate of all Americans having equal access to all of the opportunities this country has to offer. Faith-based social services have a special place in our society. They play a vital role in helping individuals obtain shelter, overcome substance abuse, and reintegrate into society after incarceration.

I am looking forward to hearing from the witnesses because I have serious concerns about organizations discriminating against employees or applicants for employment based on religion, especially if the organization is receiving federal funds.

There are a number of questions I have for the witnesses.

Most notably, does charitable choice simply provide for equal opportunity for religious organizations or does it in reality attempt to legitimize otherwise illegal discrimination by faith-based service providers?

Is it fair for faith-based organizations that receive government funding to refuse to hire individuals, who pay taxes, because they do not share the organization's religion or faith? What can Congress do to address this issue?

The fact that President Obama issued an Executive Order on this very issue yesterday speaks to its significance.

The Executive Order attempts to clarify the rules for religious groups partnering with the federal government.

I am eager to hear from our witnesses about the major changes made in the Executive Order. I also would like to hear about any outstanding issues with regard to recommendations from the Advisory Council that the Executive Order did not address.

Again, I thank the Chairman for holding this important hearing and yield back the balance of my time.

Addendum to the
Written Testimony of

The Rev. Barry W. Lynn

Executive Director

Americans United For Separation of Church and State

Submitted To

U.S. House of Representatives Committee on the Judiciary
Subcommittee on Constitution, Civil Rights, and Civil Liberties

for the Hearing Record on

"Faith-Based Initiatives: Recommendations of the President's Advisory Council on Faith-Based and Community Partnerships and Other Current Issues"

Submitted on November 23, 2010

I am writing to update my November 18, 2010, written testimony. At the time I submitted that testimony, President Barack Obama's Administration had not yet adopted any of the reform recommendations proposed by the President's Advisory Council on Faith-Based and Neighborhood Partnerships. The day after I submitted my testimony—and one day before the hearing—President Obama signed an executive order, implementing many of the Council's reform recommendations.

The executive order takes some important steps towards reforming some aspects of the Faith-Based Initiative and we applaud the White House for that. Unfortunately the executive order fails to address many of the most important reforms that are needed. It leaves in place the Bush-era rules that (1) permit federal funds to go directly to houses of worship and other pervasively sectarian organizations; (2) allow religious organizations to display "religious art, icons, scriptures, or other symbols"[1] in the very rooms in which they offer federally funded programs and (3) sanction federally funded religious discrimination. I remain disappointed, therefore, that even with the new executive order, much of Obama's Faith-Based Initiative still mirrors President Bush's.

The Council's Consensus Reform Recommendations that Were Adopted

For the last eight months, Americans United has been urging the Administration to adopt the consensus reform recommendations offered by the Council. We are heartened that the Administration did offer the following in its executive order:

(1) Significantly stronger protections for beneficiaries;
(2) Increased transparency by requiring the posting of guidelines and policy documents, as well as the listing of grantees and sub-grantees awarded federal funding;
(3) Requirements that the government monitor and enforce church-state separation standards;
(4) A mandate that the Working Group develop guidance and regulations that set out proper training requirements for grantees and government employees who administer grants;
(5) A mandate that the Working Group develop guidance and regulations that clarify the restrictions on and obligations of intermediaries and sub-grantees; and
(6) A mandate that the Working Group provide clear guidelines on the prohibited uses of federal funding.

Much of the Bush-era executive order establishing the Faith-Based Initiative, however, still remains in place.[2] Thus, the true test of whether the new executive order will result in any real reform of the Faith-Based Initiative remains to be seen. We remain hopeful that the principles adopted therein will be implemented and enforced in a way that stays true to the Council's consensus recommendations.

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[1] Exec. Order No. 13,559, 75 Fed. Reg. 71,317 (Nov. 22. 2010).
[2] *Compare* Exec. Order No. 13,279, 67 Fed. Reg. 77,141 (Dec. 16, 2002) *with* Exec. Order No. 13,559, 75 Fed. Reg. 71,317 (Nov. 22. 2010).

For example, the Council suggested that the Administration provide more accurate and specific guidance "about how to create a meaningful and workable separation between a program funded by a government grant or contract and a privately funded religious one."[3] The executive order contains some revisions on this topic, but true change will only come through the promulgation of regulations. In order to actualize the true intention of the Council's recommendation, the Obama Administration must follow the Council's explicit recommendation that it insert the provisions established by the HHS-produced "guidance document entitled *Safeguards Required*"[4] into its regulations and guidance.

Similarly, the Council recommended that the Administration make clear "that direct Federal aid should not be used to pay for activities such as religious instruction, devotional exercises, worship, proselytizing, or evangelism; production or dissemination of devotional guides or other religious materials; or counseling in which counselors introduce religious content."[5] Even though this recommendation would bring about significant change to the Bush-era Faith-Based Initiative, the Obama Administration made no changes at all to President Bush's executive order in this area—the Obama executive order and the Bush executive order are identical on this matter. Therefore, the only way that the Council's true intentions can be accomplished is if the Administration adopts this change in its regulations and guidance. We hope that the new Working Group is true to this recommendation and that the regulations and guidance reflect it.

Furthermore, it is important to note that the executive order is merely a first step. It triggers the process of developing Working Group recommendations, promulgating regulations, and instituting policies. This process could take as long, if not longer, than the Administration's process for enacting the executive order in the first place: The Working Group has 120 days to offer recommendations on how to implement the executive order; agencies must then draft regulations based upon the Working Group's findings; and the regulations must then go through the notice and comment process. There is no telling just how long this process will take. And until this process is complete, the current Bush-era regulations will continue to govern the funds distributed by the federal government for social service programs. It could be months or years until the regulations are actually changed to reflect the executive order and the Council's consensus recommendations.

The Council's Non-Consensus Recommendations

The Council could not reach consensus on two issues: (1) whether the government may or should permit federal funds to go directly to houses of worship and other pervasively sectarian organizations; and (2) whether religious organizations may display "religious art, scripture, messages, or symbols" in rooms where they offer federally funded programs—even if feasible to remove such items.[6] Without explanation as to why, the Administration adopted the majority position on the non-consensus recommendation regarding iconography, but not the majority position on the issue of separate incorporation. I am disappointed by both decisions.

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[3] President's Advisory Council on Faith-Based and Neighborhood Partnerships *A New Era of Partnerships: Report of Recommendations to the President* 131 (Mar. 2010) (Council Report).
[4] Council Report at 132, 149-151.
[5] Council Report at 130.
[6] Council Report at 131.

Separate Incorporation
The majority of the Council, including its Chair, Melissa Rogers, recommended that "the government should also require houses of worship that would receive direct Federal social service funds to form separate corporations to receive those funds."[7] I too supported this recommendation. I believe it is both constitutionally mandated[8] and good policy. I agree with the majority of the Council members, who explained: "forming a separate corporation is a uniquely valuable and indispensable method for achieving the goals of church-state separation, church autonomy, accountability and transparency, and insulation from liability."[9]

The executive order, unfortunately, does not include this recommendation, and therefore, it does not restore this fundamental church-state protection that was eliminated by the Bush Administration. Now, even after the signing of the executive order, federal funds can still go directly into the coffers of houses of worship.

Iconography in Federally Funded Programs
As I explained in my prior written testimony, I urged the Council to require religious organizations to remove religious art, iconography, and scripture from the rooms in which they perform federal programs, during such programs. The Council refused to take the position that religious organization should remove or cover such items even when doing so is reasonably feasible. I am disappointed that both the Council and the President have chosen to continue the Bush-era rule of allowing such iconography, art, and scripture even though the Constitution requires their removal from government-funded programming.[10]

Employment Discrimination
My original written testimony clearly explained my opposition to federally funded employment discrimination and expressed my deep disappointment that the Obama Administration has done nothing to overturn Bush-era rules that permit such discrimination. The executive order is equally disappointing, as it does nothing to address the hiring discrimination issue. In short, the Administration has still done nothing to implement President Obama's campaign promise to end

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[7] Council Report at 143.
[8] The Establishment Clause prohibits the government from making direct cash payments to pervasively sectarian institutions. *See Bowen v. Kendrick*, 487 U.S. 589, 610-12, 621 (1988); *Roemer vs. Bd. of Pub. Works*, 426 U.S. 736, 755 (1976); *Hunt v. McNair*, 413 U.S. 734, 743 (1973). An institution is "pervasively sectarian" if its "secular activities cannot be separated from sectarian ones" (*Roemer*, 426 U.S. at 755) or a "substantial portion of its functions are subsumed in the religious mission" (*Hunt*, 413 U.S. at 743). Some recent circuit decisions are in disagreement as to whether the "pervadively sectarian" test remains good law. While the Fourth Circuit has held that the test is no longer applicable (*Columbia Union Coll. v. Oliver*, 254 F.3d 496, 504 (4th Cir. 2001)), the Sixth Circuit has affirmed its continued validity (*Steele v. Indus. Dev. Bd.*, 301 F. 3d 401, 408-09) (6th Cir. 2002); *Johnson v. Econ. Dev. Corp.*, 241 F.3d 501, 510 (6th Cir. 2001)). Because only the Supreme Court can overrule its previous decisions establishing the "pervasively sectarian" test (*see Agostini v. Felton*, 521 U.S. 203, 237 (1997)) but has not done so, that test remains the law in most jurisdictions.
[9] Council Report at 143.
[10] *Berry v. Dep't of Soc. Servs.*, 447 F.3d 642, 652, 657 (9th Cir. 2006) (Policy that prohibited government social workers from displaying religious items in plain view of clients was constitutional.); *see also Cooper v. USPS*, 577 F.3d 479, 497 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 1688 (2010) (Contract unit of Postal Service housed in church-related building must remove religious material from where postal customers seek services.); *cf. Spacco v. Bridgewater Sch. Dep't*, 722 F. Supp. 834, 843 (D. Mass. 1989) (Public school could not hold classes in leased church parish center, because, even though religious symbols and messages were covered in classrooms, schoolchildren were still exposed to religious symbols in the rest of the building and grounds.).

federally funded religious discrimination. I will continue to urge the President to take action on this crucial matter.

I would like to take the opportunity to clarify one matter in my prior testimony. In my discussion of the unconstitutionality of federally funded religious discrimination, I discussed two cases—*Dodge v. Salvation Army*,[11] and *Lown v. Salvation Army*.[12] I explained how these cases addressed the issue of whether the Constitution permits religious organizations to claim the statutory exemption from Title VII's ban on religious hiring discrimination when the employment positions in question are funded with federal money.

I neglected, however, to explain that the question (1) whether a private employer which discriminates based on religion with respect to publicly-funded positions can be held liable for damages under Title VII or enjoined under Title VII to change its hiring practices is a different question than (2) whether the government can constitutionally provide public funds to such an employer in the first place. A policy that prohibits employers from using public funds to pay the salaries of employees which are selected based on religious criteria would not have the effect of subjecting employers to liability for past religious discrimination in publicly funded positions. Such a policy also would not compel religious organizations which are currently accepting public funds to change their internal operations, as such employers would have the options of declining public funds in the future or refraining from using the funds for positions that are filled based on religious criteria.

[11] No. S88-0353, 1989 WL 53857 (S.D. Miss. Jan. 9, 1989).
[12] 393 F. Supp. 2d 223 (S.D.N.Y. 2005).

POST-HEARING QUESTIONS AND RESPONSES OF MELISSA ROGERS, DIRECTOR, CENTER FOR RELIGION AND PUBLIC AFFAIRS, WAKE FOREST UNIVERSITY DIVINITY SCHOOL

ONE HUNDRED ELEVENTH CONGRESS

Congress of the United States
House of Representatives
COMMITTEE ON THE JUDICIARY
2138 RAYBURN HOUSE OFFICE BUILDING
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December 14, 2010

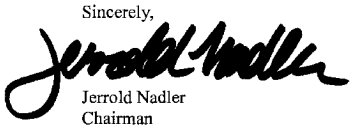
Ms. Melissa Rogers
Wake Forest School of Divinity
Center for Religion and Public Affairs
1834 Wake Forest Road
Winston-Salem, NC 27106

Dear Ms. Rogers:

Thank you for your recent appearance before the Subcommittee on the Constitution, Civil Rights and Civil Liberties at its November 18, 2010 hearing on Faith-Based Initiatives: Recommendations of the President's Advisory Council on Faith-Based and Community Partnerships and Other Current Issues. Enclosed you will find additional questions from members of the Committee to supplement the information already provided at the hearing.

Please deliver your written responses to the Subcommittee on the Constitution by December 29, 2010. Please send them to the Committee on the Judiciary, Attention: Matthew Morgan, B-353 Rayburn House Office Building, Washington, DC, 20515. If you have any further questions or concerns, please contact Matthew Morgan at (202) 225-2825.

Sincerely,



Jerrold Nadler
Chairman
Subcommittee on the Constitution,
Civil Rights, and Civil Liberties

cc: Hon. F. James Sensenbrenner

Enclosure

Chairman Jerrold Nadler
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
House Committee on the Judiciary

Questions for the Record

Hearing on Faith-Based Initiatives: Recommendations of the President's Advisory Council on Faith-Based and Community Partnerships and Other Current Issues
November 18, 2010

Professor Melissa Rogers

1. You testified that the Department of Justice Office of Legal Counsel's (OLC) interpretation of the Religious Freedom Restoration Act (RFRA) should be withdrawn because it incorrectly interpreted the burden prong of the RFRA analysis. In your view, requiring grant recipients to follow nondiscrimination requirements for jobs in federally funded programs is not a substantial burden on the free exercise of religion.

   Determining whether or not a law constitutes a "substantial burden" on religion is one part of the RFRA analysis, which – provided there is a substantial burden on religion – allows that burden so long as the government demonstrates that application of the burden is – (1) in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that interest.

   Does the government have a compelling interest in eradicating discrimination based on religion for jobs in federally funded programs?

   Is there a less restrictive means of further the government's interest?

   What, if any, role should the interests of employees or applicants play in this equation?

2. Very few courts have yet to address the question of whether an employer can discriminate based on religion in jobs that are paid for by government funds. In his testimony, Reverend Lynn cited two cases – *Dodge v. Salvation Army* and *Lown v. Salvation Army*. Is it fair to say that, in both cases, the court found that the claims made by plaintiffs – who were objecting to religious discrimination in federally funded jobs – raised constitutional concerns? If so, please explain those concerns.

   While this may not be an issue fully settled by the courts yet, would you agree that the few courts to consider whether religion-based discrimination in federally funded jobs have been troubled by religious discrimination and certainly have not taken the position that permitting such discrimination is clearly permissible?

3. The Advisory Council recommended, and the President's executive order adopted, requirements to assure that a program beneficiary's right to receive services from a secular (or different religious) provider are protected. This issue – the need to assure alternate providers – seems most often to be viewed from the perspective of program beneficiaries and their free exercise rights. Do we also have potential Establishment Clause problems, from the government's perspective, if we fail to provide alternate, non-religious providers?

4. You testified that in the November 17, 2010 executive order, *Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations*, President Obama adopted many of the Advisory Council's recommendations but failed to require churches to form separate corporations if they wish to receive direct government aid. While not a consensus recommendation, that position was supported by a majority of the Advisory Council, including you. Why, in your view, is it important to have such a requirement?

   Is this something that the Interagency Working Group established by the President's executive order might, or should, consider?

5. In the November 17, 2010 executive order, *Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations*, President Obama created an Interagency Working Group to, among other things, develop model uniform regulations and guidance documents on a range of issues. What should Congress look for as the key necessary components of these regulations and guidance?

6. There is strong consensus that the rights of beneficiaries/clients in federally funded programs must be protected. If – during a federally funded program – a provider invites beneficiaries to a separate religious activity (for example, an invitation to worship services, prayer meetings, bible study), is that permissible?

   How might we guard against the risk that a beneficiary might feel pressure to attend – is it enough that, at the time of the invitation, it is made clear that this is voluntary?

   Is it permissible at all to use federally funded time to do religious outreach?

Questions for the Record

Hearing on Faith-Based Initiatives: Recommendations of the President's Advisory Council on Faith-Based and Community Partnerships and Other Current Issues

Melissa Rogers

1.

When determining whether the government has violated the Religious Freedom Restoration Act (RFRA), a court must engage in "a case-by-case determination of the question, sensitive to the facts of each particular claim."[1] As explained in my testimony, in the World Vision memo, I believe the Department of Justice erred in its judgment that placement of the nondiscrimination condition on jobs within the government-funded program at issue would have placed a substantial burden on the organization's religious exercise. If there is no substantial burden on religious exercise, the RFRA claim fails. There is no need to consider whether the government possesses a narrowly tailored compelling interest.

If I must assume that a substantial burden exists in this particular case (again, a proposition I do not accept), the next step would be to assess whether the government has a narrowly tailored compelling interest that justifies such a burden. A compelling interest is an interest "of the highest order,"[2] and one that speaks to the "gravest abuses."[3] Further, a compelling interest is not simply an interest that is compelling in the abstract. It must be compelling in a way that justifies the specific burden that applies to the free exercise claimant.[4] In other words, the interest must justify the harm of refusing to grant a specific exemption to a particular religious claimant.

The Department of Justice's analysis of this issue is not convincing. It says: "Given that many statutes exempt religious organizations from prohibitions on religious discrimination in employment, we conclude that applying the Safe Street Act's nondiscrimination provision to World Vision in this instance would not further a compelling governmental interest."[5] However, the prime sponsors of the most prominent and longstanding of these provisions, Title VII's 702 exemption, marshaled support for that exemption by pointing to cases in which they said religious organizations did not receive government funds.[6] For many, including me, whether jobs are supported by government funding would be a crucial factor in determining whether there is a compelling governmental interest in nondiscrimination.

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[1] Gonzales v. O Centro Espirita, 546 U.S. 418, 431 (2006) (quoting Employment Division v. Smith, 872, 899 (O'Connor, J., concurring in judgment))
[2] Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).
[3] Sherbert v. Verner, 374 U.S. 398, 406 (1963).
[4] Gonzales v. O Centro Espirita, 546 U.S. 418, 430-31 (2006).
[5] World Vision Memo at 20.
[6] *See* Melissa Rogers, "Federal Funding and Religion-based Employment Decisions," chapter in *Sanctioning Religion? Politics, Law, and Faith-based Public Services*, ed. David K. Ryden and Jeffrey Polet (Lynn Rienner Publishers) (2005).

Further, the fact that some other statutes specifically allow religious organizations to apply religious tests to all government-funded jobs does not mean preventing such discrimination cannot be a compelling interest. In the social service context, there are a few federal statutes of relatively recent vintage that specifically allow this kind of discrimination and some older ones that specifically prohibit it. Litigation is ongoing about whether the former kinds of statutory provisions violate the Constitution, and no court has yet decided a RFRA challenge to the latter type of statutory provision. In contrast, in the case the Justice Department cites on this point, the Supreme Court referenced an exemption for peyote use that had been in place for thirty-five years, and there was no indication that that exemption had been the subject of a legal challenge or was otherwise controversial.[7] The issue of discrimination on the basis of religion in government-funded social service jobs, however, has been and continues to be hotly contested, and the first statute specifically permitting religious organizations to apply religious tests to all government-funded jobs was enacted fifteen years ago.[8]

To make its case, the Department of Justice memo also notes that the Title VI of the Civil Rights Act does not prohibit recipients of federal financial assistance from engaging in religious discrimination.[9] But as the Department of Justice's Legal Manual on Title VI states, "Title VI was not meant to be the primary Federal vehicle to prohibit employment discrimination, [although] it does forbid employment discrimination by recipients in certain situations."[10] Title VI applies only "where a primary objective of the Federal financial assistance is to provide employment."[11] Thus, Title VI has a relatively limited scope, and it does not make sense to deem all Congress failed to prohibit in it as things it wished to uphold. For example, Title VI does not prohibit nonreligious entities that receive federal financial assistance from discriminating on the basis of religion, and yet most would agree that such discrimination is objectionable. Further, Title VI's legislative history on religious organizations and religious discrimination is murky and does not reveal a clear intent to condone this practice.[12]

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[7] *See* World Vision Memo at 20; Gonzales v. O Centro Espirita, 546 U.S. at 433.

[8] *See* Melissa Rogers and E.J. Dionne, Jr., *Serving People in Need, Safeguarding Religious Freedom: Recommendations for the New Administration on Partnerships with Faith-Based Organizations*, (Brookings Institution)(2008).

[9] World Vision Memo at 21.

[10] http://www.justice.gov/crt/grants_statutes/legalman.php#Scope

[11] 42 U.S.C. § 2000d-3. The Department of Justice's Legal Manual on Title VI says that this provision has also interpreted to cover situations "where employment discrimination by a recipient has a secondary effect on the ability of beneficiaries to meaningfully participate in and/or receive the benefits of a federally assisted program in a nondiscriminatory manner . . . ."
http://www.justice.gov/crt/grants_statutes/legalman.php#Scope

[12] *See* 110 Congressional Record 1528-1529 (January 31, 1964), 110 Congressional Record 2462 (February 7, 1964).

In another part of its discussion of Title VI of the Civil Rights Act, the Department of Justice appears to have confused that civil rights statute with the Adolescent Health Services and Pregnancy Prevention and Care Act of 1978, a precursor to the Adolescent Family Life Act (AFLA), the statute that was at issue in *Bowen v. Kendrick*. 487 U.S. 589, 593 (1988). In the section of its opinion discussing Title VI of the Civil Rights Act, the Justice Department drops a footnote stating, "Subsequent amendments to [T]itle VI indicate 'that Congress was aware that religious organizations had been grantees under Title VI and that it did not

Finally, the Justice Department memo makes no effort to articulate the competing value of equal opportunity in federally funded employment or to consider the impact that granting the exemption in this case would have on job applicants who do not meet World Vision's religious test. The federal government has a long and rich history of upholding the principle of equal opportunity in federally funded employment.[13] Neglecting to even mention that history is inexcusable. Likewise, it simply won't do to pay close attention to the specific interests of World Vision in this case and to give absolutely no attention to those who would suffer if the government's equal opportunity principle is not applied to federal funding in this case. The failure to even attempt to address these important issues makes the compelling interest analysis woefully inadequate.

Thus, the Justice Department memo did not make a persuasive case that the government lacked a compelling interest in imposing the religious nondiscrimination requirement in

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disapprove of that practice.' " Bowen v. Kendrick, 487 U.S. 589, 604 n.9 (1988)." World Vision Memo at n.16.

In the opening paragraphs of the *Kendrick* decision, however, the Court states:

> The Adolescent Family Life Act (AFLA or Act), Pub. L. 97-35, 95 Stat. 578, *42 U. S. C. § 300z et seq.* (1982 ed. and Supp. IV), was passed by Congress in 1981 in response to the "severe adverse health, social, and economic consequences" that often follow pregnancy and childbirth among unmarried adolescents. *42 U. S. C. § 300z*(a)(5) (1982 ed., Supp. IV). Like its predecessor, the Adolescent Health Services and Pregnancy Prevention and Care Act of 1978, Pub. L. 95-626, ***Tit. VI***, 92 Stat. 3595-3601 (***Title VI***), the AFLA is essentially a scheme for providing grants to public or nonprofit private organizations or agencies "for services and research in the area of premarital adolescent sexual relations and pregnancy." S. Rep. No. 97-161, p. 1 (1981) (hereinafter Senate Report).

Id. at 593 (emphasis added). The *Kendrick* case later states, "There is no requirement in [AFLA] that grantees be affiliated with any religious denomination, although [AFLA] clearly does not rule out grants to religious organizations," *id.* at 604, and the footnote connected to the end of this sentence, footnote nine, explains:

> Indeed, the legislative history shows that Congress was aware that religious organizations had been grantees under Title VI and that it did not disapprove of that practice. The Senate Report, at 16, states: "It should be noted that under current law [Title VI], the Office of Adolescent Pregnancy Programs has made grants to two religious-affiliated organizations, two Christian organizations and several other groups that are indirectly affiliated with religious bodies. Religious affiliation is not a criterion for selection as a grantee under the adolescent family life program, but any such grants made by the Secretary would be a simple recognition that nonprofit religious organizations have a role to play in the provision of services to adolescents.

Thus, the reference to Title VI in footnote nine of the *Kendrick* opinion appears to be to the Adolescent Health Services and Pregnancy Prevention and Care Act of 1978, not a reference to Title VI of the Civil Rights Act. *See also* Website of the Department of Health and Human Services, Title XX of the Adolescent Family Life Program, at
http://www.hhs.gov/opa/familylife/strategicplanning/overview_v6.html

[13] *See* Melissa Rogers, "Federal Funding and Religion-based Employment Decisions," chapter in *Sanctioning Religion? Politics, Law, and Faith-based Public Services*, ed. David K. Ryden and Jeffrey Polet (Lynn Rienner Publishers) (2005).

this case. I do not have the facts necessary to determine whether the government did (or does) have such an interest here, but the Department of Justice did not make a convincing argument for its conclusions on either the substantial burden or compelling interest prongs of the RFRA test.

2.

Let me begin by offering a summary of each of these cases.

In 1989, a federal district court considered a claim brought by a woman who had been fired from her position as a Victims' Assistance Coordinator in a Mississippi shelter owned and operated by the Salvation Army.[14] The coordinator alleged she had been terminated because she was a practicing Wiccan and that her dismissal violated the federal Constitution and Title VII. The case name was *Dodge v. Salvation Army*.

The court determined that the position within the Salvation Army was "*funded substantially, if not entirely,* by federal, state and local government. . . ."[15] In an unpublished decision, it concluded that when the government "allow[ed] the [religious organization] to choose the person to fill or maintain the position based on religious preference[, it] clearly ha[d] the effect of advancing religion and is unconstitutional."[16] The court understood Title VII to permit the religious body to discriminate on the basis of religion, but the facts "[gave] rise to constitutional considerations which effectively prohibit the application of the exemption to the facts in this case."[17] In this context, the court said, "*the government itself* ha[d] advanced religion through its own activities and influence,"[18] something the First Amendment's Establishment Clause prohibits.

The court did not say the Salvation Army lost its ability to discriminate on the basis of religion with regard to privately funded jobs. It did not say the Army waived its rights to a Title VII exemption.[19] Rather, the court said constitutional concerns prevented the Army from discriminating on the basis of religion with respect to jobs funded substantially, if not exclusively, by the government.

Sixteen years later, a group of present and former Salvation Army employees in the state of New York raised similar claims in *Lown v. Salvation Army*.[20] They took issue with a variety of actions by the Salvation Army, including its firing of at least one employee for refusing to compel employees to disclose information about their religious affiliations.[21]

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[14] Dodge v. Salvation Army, 1989 U.S. Dist. LEXIS 4797, No. S88-0353, 1989 WL 53857 (S.D. Miss. Jan. 9, 1989).
[15] *Id.* at *7.
[16] *Id.* at *11.
[17] *Id.* at *7-8.
[18] Amos, 483 U.S. at 337.
[19] Melissa Rogers, "Federal Funding and Religion-based Employment Decisions," chapter in *Sanctioning Religion? Politics, Law, and Faith-based Public Services*, ed. David K. Ryden and Jeffrey Polet (Lynn Rienner Publishers) (2005).
[20] Lown v. Salvation Army, 393 F. Supp. 2d 223 (S.D.N.Y. 2005).
[21] *Id.* at 232.

"Historically," the court said, "the Salvation Army did not scrupulously monitor [social service] employees for adherence to [its] religious tenets."[22] That changed in late 2003, when the Army instituted a "Reorganization Plan" meant to further what it called a "One Army Concept."[23] The aim of this plan, according to the court, was to ensure that all employees conducted themselves in ways consistent with the Army's religious mission and that " 'a reasonable number of Salvationists along with other Christians [will be employed]' because the Salvation Army is 'not a Social Service Agency [but] a Christian Movement with a Social Service program.'"[24] The Army revised its employee manual to state that employees must agree to do nothing to undermine its religious mission.[25] The Army's religious beliefs include disapproval of non-marital sexual relationships, abortion, same-sex sexual contact, social drinking, gambling, contraceptive use outside of marriage, smoking, and drug use, the court noted.[26]

At some point, Salvation Army leaders asked certain employees to name gay people who were working at the organization[27] and to ensure that other employees completed forms disclosing the churches they had attended regularly over the past ten years and the names of the ministers of those churches.[28] Some employees refused to do so. The Salvation Army terminated at least one such employee.[29] Certain other employees subsequently resigned, citing constructive termination.[30] They were paid "virtually in full" with funds the Army received through contracts with the state.[31] Indeed, the court noted that this division of the Salvation Army received more than 95 percent of its approximately $50 million budget from government contracts,[32] and the salaries of 900 employees were paid almost entirely with these government funds.[33] A group of these employees filed suit against the city of New York and the Salvation Army. They claimed that the application of the employment policy to government-funded jobs violated the federal Constitution and Title VII.

The federal district court in *Lown* dismissed the plaintiffs' federal constitutional and statutory claims. First, it said that "mere approval or acquiescence" on the part of the government in this employment discrimination by a religious organization did not make the government responsible for it.[34] Second, the court dismissed the plaintiffs' claims that the Title VII exemptions should not be construed to apply to the circumstances at issue or, alternatively, that those exemptions were unconstitutional as applied to these facts.[35] The plaintiffs had argued that when the government permitted the Salvation

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[22] *Id.* at 229.
[23] *Id.*
[24] *Id.*
[25] *Id.* at n.5.
[26] *Id.* at 233.
[27] *Id.* at 230.
[28] *Id.* at 231.
[29] *Id.* at 232.
[30] *Id.* at 232-233.
[31] *Id.* at 228.
[32] *Id.*
[33] *Id.*
[34] *Id.* at 243.
[35] *Id.* at 246 -252.

Army to engage in religious discrimination with regard to government-funded jobs, it impermissibly advanced religion rather than permissibly accommodated it. The court said:

> Religious organizations undoubtedly forfeit certain free exercise interests when they agree to provide social services on behalf of the government. For example, the Establishment Clause requires that such organizations not possess unfettered discretion over the content of the services provided with public funds. Nevertheless, the Establishment Clause does not mandate that such organizations abandon all free exercise interests. Nothing in the Constitution precludes Congress from accommodating the Salvation Army's residual free exercise interest in selecting and managing its employees with reference to religion.[36]

The *Lown* court was careful to note, however, that "[t]his is not to imply that the Constitution forbids Congress from imposing a universally applicable, neutral rule that government contractors not discriminate on the basis of religion."[37]

Further, the *Lown* court refused to dismiss the plaintiffs' claims that some of the government contract money had been used for religious activities, including the implementation of the Salvation Army's Reorganization Plan. "[I]t is a reasonable inference from the allegations in the [complaint] that government funds have been used in furtherance of [the Salvation Army's] compliance with the Reorganization Plan, particularly given that [this branch of the Salvation Army] is 95% funded by government sources and that its employees are paid virtually in full by government funds," the court said.[38] Thus, the court left the door open to a claim that an employer could not use direct government aid to subsidize the process of identifying a religiously qualified workforce and managing it according to those precepts. As Professors Ira C. Lupu and Robert W. Tuttle have said, if a court were to arrive at such a finding, the government would have to require religious organizations "to establish accounting mechanisms to ensure that [government] funds are not used to implement or enforce the organization's religious selectivity."[39]

Some argue that the ruling in the 1989 *Dodge* case is no longer good law.[40] According to these critics, the *Dodge* court "refused to follow the Supreme Court decision most directly in point, *Corporation of the Presiding Bishop v. Amos*" and "reasoned from a

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[36] *Id.* at 250 (citation omitted).
[37] *Id.* at n.14.
[38] *Id.* at 240.
[39] Ira C. Lupu and Robert W. Tuttle, *The State of the Law 2005: Legal Developments Affecting Partnerships Between Government and Faith-Based Organizations* (Roundtable on Religion and Social Welfare Policy) at 45, available at http://www.socialpolicyandreligion.org/publications/publication.cfm?id=67.
[40] Testimony of Carl H. Esbeck, Isabelle Wade and Paul C. Lyda Professor of Law, University of Missouri-Columbia, before the Subcommittee on Select Education of the House Committee on Education and the Workforce (April 1, 2003)(arguing that Dodge "was of doubtful rationale when decided, and given later developments the opinion is clearly not the law today").

fifteen-year-old case that was essentially irrelevant, *Lemon v. Kurtzman*."[41] Others argue the test used in *Dodge* seems more akin to the pervasively sectarian test because it focuses on religiously restricted hiring.[42] Because that test has been undermined, they argue, the conclusion in *Dodge* has been undermined as well.

The Court has significantly relaxed some of the rules governing the flow of government financial aid to religious bodies over the past two decades.[43] The pervasively sectarian test clearly has been weakened. [44] But the multi-factor pervasively sectarian test dealt with the nature of certain religious institutions, and the employment issue is about how government funds are used.[45] The Court continues to ask whether direct aid has been diverted to religious use.[46] In the employment context, a key question is whether the government directly subsidizes certain positions. Whether that position is within a pervasively sectarian or a non-pervasively sectarian organization is irrelevant.[47]

Turning to the 2005 *Lown* decision, the New York court concluded that the Salvation Army was not a state actor. An organization, including a religious organization, usually does not become a state actor merely by accepting a government grant or contract.[48] Further, the Court has generally held that the state's "mere acquiescence" in a private group's activities does not convert those activities to state action.[49] However, the Court has long held that the use of direct aid for religious purposes or activities violates the First Amendment.[50] Thus, it is arguable that the Establishment Clause bars the government from allowing a religious group to use direct aid to pay the salaries of employees selected because of their faith.

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[41] *Id.*

[42] Church Autonomy and Conditions on Benefits, 2008 Church Autonomy Conference of the Federalist Society (March 14, 2008), available at http://www.fed-soc.org/publications/id.514/default.asp.

[43] *See, e.g.*, Mitchell v. Helms, 503 U.S. 793 (2000); Agostini v. Felton, 521 U.S. 203 (1997).

[44] *See Serving People in Need, Safeguarding Religious Freedom: Recommendations for the New Administration on Partnerships with Faith-Based Organizations,* available at http://www.brookings.edu/~/media/Files/rc/papers/2008/12_religion_dionne/12_religion_dionne.pdf.

[45] *Id.*

[46] *Id.*

[47] Further, the *Dodge* court's reliance on the *Lemon v. Kurtzman* decision as well as *Amos* was quite appropriate. As the *Dodge* court observed: "This Court is of the opinion that although *Amos* does not specifically address the issue of funding, the Supreme Court went to great lengths to distinguish *Amos* from *Lemon* on the questions of financial support and active involvement by the sovereign." Dodge, 1989 U.S. Dist. LEXIS at *11 (citations omitted).

[48] *See, e.g.*, Blum v. Yaretsky, 457 U.S. 991 (1982); Rendell-Baker v. Kohn, 457 U.S. 830 (1982).

[49] *Id.*

[50] In their controlling opinion in *Mitchell v. Helms*, Justices O'Connor and Breyer stated: "Although 'our cases have permitted some government funding of secular functions performed by sectarian organizations,' our decisions 'provide no precedent for the use of public funds to finance religious activities.'" Mitchell, 530 U.S. 793, 840 (2000)(O'Connor & Breyer, JJ., concurring in the judgment)(quoting Rosenberger v. Rector and Visitors, 515 U.S. 819, 847 (1995)(J. O'Connor concurring)). *See also* Mitchell v. Helms, 515 U.S. 840-41 (O'Connor & Breyer, JJ., concurring in the judgment)(discussing cases).

The *Lown* court rejected this argument as well, and some constitutional scholars believe this case was correctly decided.[51] Nevertheless, the court's conclusion on this issue is certainly debatable. For example, Professors Alan Brownstein and Vikram Amar have argued that giving direct government subsidies to religious organizations and allowing them to make employment decisions on the basis of religion with regard to those subsidies violates the Establishment Clause's prohibitions on government promotion and endorsement of religion.[52]

Also, as noted above, the *Lown* court refused to dismiss the plaintiffs' claims that some of the government contract money had been impermissibly used for religious activities. The court left open the possibility that it could be unconstitutional for an employer to use direct government aid to subsidize the process of identifying a religiously qualified workforce and managing it according to those precepts.

3.

If a social service beneficiary complains, for example, about religious symbols on the buildings of a provider that receives governmental social service funds, and the government refuses to provide an alternative that answers this objection, this could be seen as coercing or pressuring the beneficiary along religious lines, something the Establishment Clause forbids.[53]

4.

I would cite the arguments made by thirteen members of the Advisory Council on this matter.[54] In sum, churches and other houses of worship are special kinds of religious institutions, and the government often does and should treat them specially. Houses of worship should be required to form separate corporations in order to receive direct federal social service funds as a way of insulating them from government regulation and lawsuits; protecting their unique legal status, including the special exemptions these core religious bodies enjoy; and maintaining an appropriate separation of church and state. This is a matter the interagency working group could and should consider.[55]

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[51] *See, e.g.*, Carl Esbeck, The Application of RFRA to Override Employment Nondiscrimination Clauses Embedded in Federal Social Service Programs, Legal Studies Research Paper Series, Research Paper No. 2008-09 (June 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1118961#. *See also* Ira C. Lupu and Robert W. Tuttle, *The Faith-Based Initiative and the Constitution*, 55 DePaul L. Rev. 1, 51-57, 102-105 (2005).

[52] Alan Brownstein and Vikram Amar, *The "Charitable Choice" Bill that was Recently Passed by the House and the Issues it Raises* (Findlaw, April 29, 2005). *See also* Steven K. Green, Religious Discrimination, Public Funding, and Constitutional Values, 30 Hastings Const. L.Q. 1 (2002).

[53] *See, e.g.*, Lee v. Weisman, 505 U.S. 577 (1992).

[54] Recommendation 12 of Reform of the Office of Faith-Based and Neighborhood Partnerships, *A New Era of Partnerships: Report of Recommendations to the President* (March 2010) at http://www.whitehouse.gov/blog/2010/03/11/a-new-era-partnerships-advisory-council-faith-based-and-neighborhood-partnerships-pr

[55] *See infra* n.57 and accompanying text.

The interagency working group should address issues raised in the November 2010 executive order[56] and other issues covered in Advisory Council's Reform of the Office report.[57] In addition to the issues specifically discussed in the executive order, it should give attention to the following recommendations that appear in the Council's report:

- Develop guidance materials for social service providers that offer numerous examples or case studies to explain the meaning of the term "explicitly religious" and describe the kind of separation that is required between privately funded religious activities and activities funded by direct government aid. The "Safeguards Required" document that is included in the Advisory Council report can serve as a helpful starting point for this guidance. These materials should also give equal emphasis to the ways in which religious organizations receiving direct federal aid may maintain an institutional religious identity. Guidance materials should be formulated so that they cut across a wide variety of social service programs funded by direct federal funds.

- Ensure that the church-state standards are included in monitoring tools that the government uses to audit nongovernmental organizations that receive federal social service funds. More specifically, ensure that church-state safeguards are included in the monitoring tools used in the audit of all non-Federal entities expending $500,000 or more annually in Federal funds and all other audits of non-Federal entities receiving Federal funds.

- Develop specific guidance for nongovernmental intermediaries to instruct them in their obligations regarding monitoring of subgrantees and subcontractors. Subgrantees and subcontractors are subject to the same church-state standards that apply to the nongovernmental organizations receiving the primary government grants or contracts, including the requirement that privately funded explicitly religious activities be separated from government-funded non-religious ones.

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[56] http://www.whitehouse.gov/the-press-office/2010/11/17/executive-order-fundamental-principles-and-policymaking-criteria-partner.

[57] The November 2010 executive order notes that the interagency group's report should address "amendments, changes, or additions that are necessary to ensure that regulations and guidance documents associated with the distribution of Federal financial assistance for social service programs are consistent with the fundamental principles set forth in section 2 of th[e] order." *Id.* At the same time, the order states that the report should not be limited to the subjects specifically addressed in the order. *Id.* ("The Working Group's report should include, but not be limited to, a model set of regulations and guidance documents for agencies to adopt in the following areas . . . .") The order also states: "In developing this report and in reviewing agency regulations and guidance for consistency with section 2 of this order, the Working Group shall consult the March 2010 report and recommendations prepared by the President's Advisory Council on Faith-Based and Neighborhood Partnerships on the topic of reforming the Office of Faith-Based and Neighborhood Partnerships." *Id. See also* Reform of the Office of Faith-Based and Neighborhood Partnerships, *A New Era of Partnerships: Report of Recommendations to the President* (March 2010) at http://www.whitehouse.gov/blog/2010/03/11/a-new-era-partnerships-advisory-council-faith-based-and-neighborhood-partnerships-pr

- Comprehensively gather existing successful means of keeping direct aid separate from explicitly religious activities and promote those means to religious social service providers that may receive such aid. This would include developing a list of best practices regarding accounting procedures and tracking mechanisms that help facilitate and demonstrate the constitutional use of those funds.

- Instruct participants in the grant-making process to refrain from taking religious affiliations or lack thereof into account in this process. In other words, "an organization should not receive favorable or unfavorable marks merely because it is affiliated or unaffiliated with a religious body, or related or unrelated to a specific religion."[58]

- Develop guidance for those who recruit peer reviewers instructing them to advertise for those positions in a wide variety of venues and reminding them not to ask about religious affiliation or lack thereof when filling these positions.

- Ensure that each governmental body that disburses federal funds has a mechanism in place to allow that body to take necessary enforcement actions for noncompliance with church-state standards as well as other applicable standards.

- Train staff of White House Office and agency Centers on church-state rules and develop a plan for them (as well as others) to educate state, local and country officials on these matters.

- Ensure that nongovernmental organizations that are awarded federal social service funds and maintain a religious identity and/or offer religious activities undergo training about the church-state standards that follow these funds.

- Reduce some of the administrative burdens and other costs associated with obtaining formal recognition of 501(c)(3) tax-exempt status because this would facilitate the voluntary pursuit of that formal recognition and the creation of separate 501(c)(3) entities. This might be done by waiving existing filing fees, expediting processing, and taking other steps to help smaller organizations form separate 501(c)(3) organizations.

- State the administration's operative understanding of constitutional law regarding indirect aid and religious entities and activities. Clearly label programs as involving direct aid (e.g., government grants or contracts) and indirect aid (e.g., social service vouchers or certificates).

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[58] Recommendation 4, Reform of the Office of Faith-Based and Neighborhood Partnerships, *A New Era of Partnerships: Report of Recommendations to the President* (March 2010) at http://www.whitehouse.gov/blog/2010/03/11/a-new-era-partnerships-advisory-council-faith-based-and-neighborhood-partnerships-pr

Implementing some of the provisions of the November executive order and other Council recommendations would appear to require changes in agency regulations, policies, and guidance. The implementation of other reforms would simply require changes in agency or White House practices. Thus, Congress should look for a series of steps that continue the process of reforming the partnerships system.

6.

A memo prepared by the Department of Health and Human Services regarding a federally funded abstinence program provides some helpful guidance on these issues. This memo is titled "Safeguards Required," and it is included in the appendix of the report on Reform of the Office of Faith-Based and Neighborhood Partnerships.[59] The Advisory Council urged the Obama administration to use this memo as a springboard for formulating guidance for nonprofits that offer privately funded religious activities as well as government-funded programs.

Regarding invitations to privately funded religious activities that are separated from the government-funded program, the memo states:

> At the end of the federally funded . . . program, grantee may provide a brief and non-coercive invitation to attend the religious . . . program.
>
> The invitation should make it very clear that this is a separate program from the federally funded . . . program, that participants are not required to attend, and that participation in the federally funded programs are not contingent on participation in other programs sponsored by the grantee organization.
>
> Religious materials . . . and registration that includes religious follow-up may only be provided in the privately funded program rather than the federally funded program.

The memo also suggests other ways in which the religious entity can and should make it clear that these separate, privately funded activities are not required for any beneficiary. The written notice that is required by the November 2010 executive order should also note that beneficiaries are completely free to refuse to attend any privately funded religious activities.

The HHS memo also states that "[f]ederally funded programs cannot limit advertising the grant program services to only religious target populations." I would add that it is

[59] Appendix, Reform of the Office of Faith-Based and Neighborhood Partnerships, *A New Era of Partnerships: Report of Recommendations to the President* (March 2010) at http://www.whitehouse.gov/blog/2010/03/11/a-new-era-partnerships-advisory-council-faith-based-and-neighborhood-partnerships-pr

impermissible to use federally funded time to do outreach that has religious content because this involves the use of government funds to subsidize religious activities.[60]

[60] *See, e.g.*, Mitchell v. Helms, 503 U.S. 793 (2000); Agostini v. Felton, 521 U.S. 203 (1997).

POST-HEARING QUESTIONS AND RESPONSES OF DOUGLAS LAYCOCK, ARMISTEAD M. DOBIE PROFESSOR OF LAW, HORACE W. GOLDSMITH RESEARCH PROFESSOR OF LAW, PROFESSOR OF RELIGIOUS STUDIES, UNIVERSITY OF VIRGINIA SCHOOL OF LAW

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December 29, 2010

Hon. Jerrold Nadler
House Committee on the Judiciary
c/o Matthew Morgan
B-353 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Nadler:

Here are my answers to the supplemental questions that you asked in writing after the hearing on November 18, 2010. In reviewing my answers, I see that I have at times referred to clients, at times to service recipients, and at times to program beneficiaries. I intended to distinctions with this varying terminology; in each case, I mean the persons who receives services from the federally funded program.

1. You testified that you agree with the Department of Justice Office of Legal Counsel's conclusion that requiring religious organizations to follow nondiscrimination rules, which prohibit religion-based discrimination in jobs, is a "substantial burden" on the free exercise rights of religious grant recipients.

Does this determination require a case-by-case consideration of the potential burden or is it your position that such burden exists in every case? If it does require a case-by-case determination, what criteria should guide that determination?

The Office of Legal Counsel memorandum to which you refer addressed a claim under the Religious Freedom Restoration Act. A person or organization claiming a right to exemption under the Religious Freedom Restoration Act always has the burden of showing that, without the exemption, there would be a substantial burden on the claimant's exercise of religion.

In this context, the faith-based provider must be prepared to show that a religious preference in hiring to fill the position at issue is a sincere religious practice for that provider. If a religious preference in hiring is a sincere religious practice, then a government grant or contract conditioned on foregoing that religious practice would be a substantial burden on religion. But only some faith-based providers could or would make the initial showing. Some faith-based providers hire without regard to religion for at least some positions. Others give only a modest preference for religion, and may assume that this modest preference is unlikely to be challenged. Some organizations may have

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become substantially secularized yet continue to hire on the basis of religion. In this last case, the organization's hiring practice would serve no sincere religious purpose and would in fact simply be discrimination. An example from the Title VII context is *EEOC v. Kamehameha Schools/Bishop Estate*, 990 F.2d 458 (9th Cir. 1993).

2. *Lown v. Salvation Army* involved a workforce of 900 employees—whose salaries, according to the court, were paid "virtually in full" by government funds.

If these 900 employees are forbidden from advancing religion, or including any religious content iu virtually all their work, how does a requirement that Salvation Army abide by equal employment opportunity rules "substantially burden" its exercise of religion?

There are many answers to this question. First, because these employees are employees of the Salvation Army, they will be treated as representing the Salvation Army—by the Army itself, by journalists and other outsiders, and by clients. They may be asked questions about the Salvation Army's religious mission or religious beliefs. They may cause scandal by engaging in behavior the Army believes to be immoral or by espousing religious beliefs the Army believes to be false.

Second, these employees are likely to have incidental duties that involve religion. Few employees spend 100% of their time with clients. In staff meetings, in training sessions, and in other contexts where clients are not present, the Salvation Army may include religious content essential to its mission and self-identity. Nonbelievers may experience this content as a hostile environment; whether or not they file legal complaints, their resentment and discomfort may disrupt this part of the Army's work. Believers will be able to respond to and participate in the religious content, affirmatively enriching the experience for all the employees present. A religious organization may offer voluntary or mandatory religious services or devotional sessions for employees; in *Lown*, the plaintiffs complained even of signs announcing the time and place of such meetings. 393 F. Supp. 2d at 233.

Even when in contact with clients, when proselytizing is not permitted, employees may be expected to model a Christian life consistent with the Salvation Army's teachings. Clients who know they are receiving services from the Salvation Army may raise religious topics or pose religious questions. Employees are not forbidden to answer, and the Salvation Army has a strong interest in assuring that the content of any answers be faithful to its religious understanding.

Third, the Salvation Army performs its human services work as a religious mission, and it wants employees who will view the work the same way. The implicit assumption of this question is that a religious organization with a government grant or contract can subcontract with an essentially secular organization to deliver the government-funded services, but that the religious organization cannot actually deliver the services itself and retain its identity as a religious organization. The Salvation Army

believes that by serving those most in need and those hardest to help it is also serving God. It acts on a religious motivation and in a religious atmosphere; the services, the motivation, and the atmosphere are all part of its exercise of religion.

When an employee spends an allocable portion of work time doing religious work, it is appropriate for the religious employer to pay the allocable portion of that employee's salary with private funds. The court in *Lown* allowed the claim to go forward. But it is not the case that an employee in a position substantially funded by the government becomes a government agent or is forbidden to act as an employee of a religious organization.

3. Determining whether or not a law constitutes a "substantial burden" on religion is one part of the analysis but—both before and after Congress passed the Religious Freedom Restoration Act (RFRA)—even a substantial burden is permissible so long as the government demonstrates that application of the burden is—(1) in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that interest.

Is it your position that the government does not have a compelling interest in eliminating discrimination on the basis of religion for jobs in federally funded programs?

Assuming the government asserted a sufficiently compelling interest in a particular context, which the Bush Administration Office of Legal Counsel acknowledged as possible, are there less restrictive means of furthering the federal government's interest?

What, if any, role should the interests of employees or applicants play in this equation?

The government does not have a compelling interest in eliminating religiously based hiring by religious organizations, even in positions that receive government funding on the basis of religiously neutral criteria. The government does have a compelling interest in eliminating religious discrimination in federally funded hiring by secular employers, and even in hiring by secular employers without government funding. The distinction does not depend on government funding; the distinction is between hiring by religious organizations and hiring by secular organizations.

Religious hiring by religious organizations is not discrimination in the sense in which that word is used in our civil rights laws. It is not invidious; it is not irrelevant to the job; it is not based on irrational hostility or prejudice. Rather, it is the exercise of religion. Religious organizations constitute themselves religiously; they have professions of faith and similar tests of adherence; and these constitutive activities are an essential part of the exercise of religion.

If there were a compelling interest in eliminating religiously based hiring by religious organizations in a particular context, the existence of a less restrictive means would depend on the precise interest identified and the facts relevant to achieving that interest. Perhaps the government's interest could be achieved by reducing a religious requirement prerequisite to hiring to a religious preference in hiring, or by eliminating religious requirements or preferences for some jobs but not all.

No one can have a legitimate interest in working for a religious organization, and thus being responsible for carrying out the mission of that religious organization, without sharing the religious organization's beliefs and being religiously acceptable to the organization. The interest of employees and applicants is served by protection against religious discrimination by secular employers and by the great diversity of religious employers.

4. To the extent you do not believe the government has a compelling interest in eliminating discrimination based on religion—at least with regard to prohibiting religious-based employment decisions for jobs in federally-funded programs—is the government's interest in prohibiting religions discrimination when it makes grant funding decisions compelling? If so, what is the core distinction that makes the interest in prohibiting religious discrimination compelling in one context, but not the other?

To the extent you rely upon constitutional or other legal distinctions, is it your position that government interests are compelling only if legally required?

Are there any cases where a court found that the government is legally required to exempt a religious provider form nondiscrimination requirements with regard to employment decisions for jobs in federally funded programs?

The government has a compelling interest in eliminating religious discrimination by government, and in many contexts, a constitutional obligation to do so. This is why the government should, and now does, prohibit religious discrimination in its decisions to award grants and contracts. The government also has a compelling interest in prohibiting religious discrimination in secular employment. But the government has no legitimate interest—let alone a compelling interest—in prohibiting religiously based hiring by religious organizations. The core distinction is between the exercise of religion by religious organizations and invidious discrimination on the basis of an irrelevant criterion by government or by secular private organizations.

I believe that courts should be very cautious about identifying compelling interests at the suggestion of litigation attorneys for private or governmental litigants where Congress has not enacted legislation to protect the asserted interest. I take no position on whether the courts might in theory identify such an interest in some unanticipated context that Congress has had no opportunity to consider.

I am not aware of any cases on the question whether government is legally required to exempt a religious provider from nondiscrimination requirements with regard to employment decisions for jobs in federally funded programs. The issue has not been presented, because religious employers have generally been exempt under §702 of Title VII and similar state provisions. There is at least one decision holding that the §702 exemption applies even to federally funded positions at a religious employer, and that this application of the Title VII exemption is constitutional. *Lown v. Salvation Army*, 393 F. Supp. 2d 223, 245-52 (S.D.N.Y. 2005). And there are appellate decisions holding that receipt of federal funds more generally, not tied to the plaintiff's specific job, does not cause a religious employer to lose its §702 exemption. *Hall v. Baptist Memorial Health Care Corp.*, 215 F.3d 618, 625 (6th Cir. 2000); *Siegel v. Truett-McConnell College*, 13 F. Supp. 2d 1335, 1343-45 (N.D. Ga. 1994), *aff'd mem.*, 73 F.3d 1108 (11th Cir. 1995).

5. You testified that "nothing is more important to religious identity than the ability to hire employees who support the religious mission and will faithfully implement it."

Is it your position that employees who have been hired to provide secular services paid for by federal funds are permitted to "faithfully implement" an organization's religious mission in provision of those services?

If so, how—in the course of performing secular services—do they carry out this religious mission without running afoul of the Establishment Clause of the free exercise rights of program participauts?

It is my position that employees who have been hired to provide secular services paid for with federal funds are permitted to "faithfully implement" an organization's religious mission in providing those services, subject to several important constraints. They must actually perform the services promised to the government in conformance to the specifications in the grant or contract. They must perform those services well enough to earn the grant or contract on the secular merits and without regard to religion. They cannot use federal funds to support activities that would be religious from the government's perspective—which generally means activities that are expressly or overtly religious. (The religious provider's view of the services provided is often rather different, and is explained below.) They cannot pressure service recipients to participate in privately funded religious activities. And under the President's Executive Order, any privately funded religious activities for service recipients must be separated in time and space from government-funded services. These constraints will sharply limit explicitly and overtly religious activities, but they are very far from rendering the organization's religious mission irrelevant.

As stated in my answer to Question 2, these employees have many responsibilities that are not limited by these constraints. They represent the religious organization to service recipients and others; they participate in voluntary and required employee

activities not involving contact with service recipients; and perhaps most fundamentally, providing these services is itself a religious mission for many of these organizations.

Providing services to those in need is a secular activity for the government; that is why the government can and does fund these services. But for many faith-based providers, providing the same services is an exercise of religion, even if no overtly religious content is added. These organizations believe that service to those in need is service to God. Some of these organizations proselytize when that is legally permitted; some make a point of *not* proselytizing even when it *would be* legally permitted. This latter group of organizations hopes and believes that their religiously motivated service will speak for itself, and that it will inspire further religious activity and further religious service without the aid of any explicit proselytizing. Not everything that is part of an organization's religious mission is explicitly or overtly religious, and thus not everything that is part of the religious mission is precluded even when the employee is in direct contact with service recipients.

In addition to all that, a provider may choose to supplement an employee's pay with its own privately raised funds. If an employee is paid 90% with government money and 10% with private money, and if the rules protecting program beneficiaries are observed, 10% of the employee's duties could be explicitly and overtly religious.

My vision of these programs, which I think is the vision of the original legislation in 1996 and largely the vision of the President's recent Executive Order (Nov. 17, 2010), is that government-funded services will be offered by both religious and secular organizations, and that these providers will be genuinely different from each other. The religious providers will be religiously motivated, and supplemental religious services may be available with private funding.

These questions imply a radically different vision. They seem to assume that the religious mission and motivation of the religious providers is to be wholly irrelevant. Religious providers must in effect create a secular arm, divorced from the religious mission and staffed without regard to that mission—staffed in part by persons who may be incidentally supportive of the religious mission but also by others who are indifferent to it and still others who are actively hostile to it. Such a secular arm of the faith-based provider would be indistinguishable from a secular provider.

Such a requirement would defeat all the purposes of including both religious and secular providers in the first place. There would be no difference among providers, and no choices for program recipients. Faith-based providers would not be allowed to retain their religious identity. And discrimination between religious and secular providers would be institutionalized rather than eliminated. The government would say to religious providers that they are eligible for funding only if they create a secular subdivision or affiliate to compete for government funds.

6. Yon testified that a program beneficiary's right to receive services from a secnlar, rather than religions, provider is constitntionally reqnired by the Free Exercise Clanse and that the inability or failure to provide such an alternative would violate the constitution.

Wonld the inability or failnre to provide a secnlar alternative also create Establishment Clanse problems?

Yes. The underlying principle here is that government cannot require any person to participate in religious programs or services against his will. I think that principle is part of both Religion Clauses.

The 1996 legislation and the President's recent Executive Order implement this underlying principle in two ways: by guaranteeing a secular service provider to those program beneficiaries who request one, and by protecting those who accept services from a religious provider from religious discrimination or coercion to participate in religious activities. In part these are redundant safeguards, each backstopping the other against the risk of imperfect implementation. But they also protect different levels of objection from potential program beneficiaries—the guarantee of a secular provider for those who do not want to be in a religious atmosphere at all, and the protections against discrimination and coercion for those who are willing to work with a religious provider but do not wish to actively participate in religion or may wish to limit their participation at some point.

7. The incoming Republican majority has indicated that it intends to cut social services programs. To the extent that ensuring a range of diverse providers is fundamental to the legality of federal partnerships with religious organizations, does that pledge call into question the constitutionality of such partnerships?

Reduced funding certainly would make it more difficult to implement these programs constitutionally. I testified to this Subcommittee in 2002 that implementing these programs as envisioned by the 1996 legislation would require increased funding. It seemed to me at that time that the guarantee of a secular provider to those who want one requires that multiple providers be funded and that there be some excess capacity in the system—empty slots in secular programs that beneficiaries could transfer to.

I still think that would be the safest way to do it. But there are other ways to address the problem. A reduced appropriation can be divided into smaller grants and contracts, so that there is still a diversity of providers. Even if there is not enough service capacity to meet the need, some slots can be held open and in reserve to meet requests for a secular provider. If there are no slots available in any secular program, and a beneficiary requests a secular provider, the funding agency may be able to refer that beneficiary, at government expense, to a professional who is not running a government-funded program but instead sees private patients.

So there are ways to meet the promise of a secular provider even in a regime of reduced funding. But there is inevitably tension between reduced funding and the theory of these programs. Holding slots open means that even fewer recipients can be served, thus aggravating the effect of reduced funding; referring individuals to for-profit providers will be expensive, and the cost will reduce the funds available to serve others. Reduced funding increases the risk that agencies will drag their feet on meeting the demand for secular providers. But it is clear that the obligation to provide a secular provider falls on the government, not on the religious provider who wins a government grant or contract on the merits.

With sufficient commitment to constitutional values, these programs can be made to work across a wide range of funding levels. But the vision of multiple providers offering a choice of genuinely religious and genuinely secular program would work best with greater funding.

8. In the November 17, 2010 executive order, *Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations*, President Obama created an Interagency Working Group to, among other things, develop model uniform regulations and guidance documents on a range of issues. What would Congress look for as the key necessary components of these regulations and guidance?

Congress should insist that the regulations and guidance protect the religious liberty of providers and of program beneficiaries. This means no religious discrimination in the award of grants and contracts, no religious discrimination against program beneficiaries, no compelled participation in religious services, and serious implementation of the guarantee of a secular provider.

The requirements of these programs must be clearly explained to funding agencies, which are staffed by program experts and not by religious liberty experts. To avoid religious discrimination in the awarding of grants and contracts, funding agencies must be required to develop clear merit-based criteria for awards, and clearly reminded that they cannot consider religion, pro or con, when they award grants or contracts.

The obligation to provide a secular provider should be clearly stated, and ways of meeting that obligation should be set out. Funding agencies should be explicitly warned against discriminating against religious providers as a means of avoiding the obligation to provide secular alternatives.

Rules for religious providers should be clearly and sensitively stated to protect both the providers and the program beneficiaries. Program beneficiaries cannot be required or pressured to participate in religious services; providers cannot be required to surrender their religious identity or their religiously committed workforce, or remove religious art or objects from their physical space. Each of these protections should be carefully spelled out, with examples. Requirements for separating explicitly religious

services from government-funded services should be clearly stated, so that they can be understood and complied with.

9. There is a strong consensus that the rights of beneficiaries/clients in federally fuuded programs must be protected. If—duriug a federally funded program—a provider invites beueficiaries to a separate religious activity (for example, an invitation to worship services, prayer meetings, bible study), is that permissible?

How might we guard against the risk that a beneficiary might feel pressure to atteud—is it enough that, at the time of the invitation, it is made clear that this is voluutary?

Is it permissible at all to use federally funded time to do religious outreach?

This is an issue that requires careful attention in the guidelines of the President's Interagency Working Group and in the implementing regulations of each funding agency. Training for employees of religious providers must give careful attention to this issue. Program beneficiaries will often be vulnerable and dependent.

It is permissible for religious providers to invite these program beneficiaries to participate in religious activities at a later time. It is sufficient protection to make clear that any religious participation is voluntary; the question is how to make that clear.

The invitations should be brief and respectful; the assurance that participation is voluntary must be sincere and believable. It is probably better if invitations to religious participation come after the recipient receives government services rather than before, to reduce the risk that participants might fear that services will be withheld if they do not agree to attend the later religious event. Program beneficiaries could be given a toll-free number to call if they are feeling coerced or if they want to request a secular provider.

But we should not run these programs on the assumption that religious providers are inherently untrustworthy and eager to cheat. Some religious providers may behave improperly, just as some secular providers overcharge, underserve, or embezzle. But most religious traditions in the United States believe that true religious faith is voluntary. If rules against coercing or pressuring program beneficiaries are clearly and prominently stated, most providers will comply in good faith. The controlling opinion of Justices O'Connor and Breyer in *Mitchell v. Helms* shows the way here: compliance can be enforced on complaint, and by spot checks and appropriate levels of audit, but funding agencies should not assume violations or treat all religious grant recipients with suspicion. 530 U.S. 793, 860-67 (2000) (O'Connor, J., concurring in the judgment).

Religious proselytizing, worship services, prayer sessions, and the like should not happen on government-funded time. But brief invitations to such events at a later time can be issued on government time. And I believe that a federally paid employee can

respond to religious questions raised by a program beneficiary on federally funded time, although I have seen no regulation that clearly addresses this point. The appropriate response will often be to invite the beneficiary to continue the religious discussion later on privately funded time, especially if any religious discussion would be a diversion from the federally funded service. But sometimes, especially in a counseling situation, it might be appropriate to continue the client-initiated religious discussion for a reasonable time.

Respectfully,

Douglas Laycock

POST-HEARING QUESTIONS AND RESPONSES OF REVEREND BARRY W. LYNN, EXECUTIVE DIRECTOR, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE

December 14, 2010

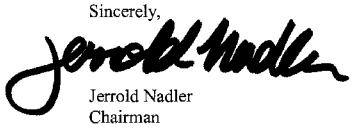
Rev. Barry W. Lynn
Executive Director
Americans United for Separation of Church and State
518 C Street, NE
Washington, DC 20002

Dear Reverend Lynn:

Thank you for your recent appearance before the Subcommittee on the Constitution, Civil Rights and Civil Liberties at its November 18, 2010 hearing on Faith-Based Initiatives: Recommendations of the President's Advisory Council on Faith-Based and Community Partnerships and Other Current Issues. Enclosed you will find additional questions from members of the Committee to supplement the information already provided at the hearing.

Please deliver your written responses to the Subcommittee on the Constitution by December 29, 2010. Please send them to the Committee on the Judiciary, Attention: Matthew Morgan, B-353 Rayburn House Office Building, Washington, DC, 20515. If you have any further questions or concerns, please contact Matthew Morgan at (202) 225-2825.

Sincerely,



Jerrold Nadler
Chairman
Subcommittee on the Constitution,
Civil Rights, and Civil Liberties

cc: Hon. F. James Sensenbrenner

Enclosure

Chairman Jerrold Nadler
Subcommittee on the Constitution, Civil Rights, and Civil Liberties
House Committee on the Judiciary

Questions for the Record

Hearing on Faith-Based Initiatives: Recommendations of the President's Advisory Council on Faith-Based and Community Partnerships and Other Current Issues
November 18, 2010

Reverend Barry Lynn

1. You testified that the free exercise of religion is not burdened when a group voluntarily accepts government funds knowing that it contains constraints on certain religiously-motivated conduct like hiring only your own followers.

   During the Bush Administration, the Department of Justice's Office of Legal Counsel took the contrary position. Determining whether or not a law constitutes a "substantial burden" on religion is one part of the analysis. However, both before and after Congress passed the Religious Freedom Restoration Act, even those laws that substantially burden religion are permissible so long as the government demonstrates that application of the burden is – (1) in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that interest.

   Does the government have a compelling interest in eradicating discrimination based on religion for jobs in federally funded programs?

   Is there a less restrictive means of further the government's interest?

   What, if any, role should the interests of employees or applicants play in this equation?

2. The Advisory Council recommended, and the President's executive order adopted, requirements to assure that a program beneficiary's right to receive services from a secular (or different religious) provider are protected. This issue – the need to assure alternate providers – seems most often to be viewed from the perspective of program beneficiaries and their free exercise rights. Do we also have potential Establishment Clause problems, from the government's perspective, if we fail to provide alternate, non-religious providers?

3. In the November 17, 2010 executive order, *Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations*, President Obama created an Interagency Working Group to, among other things, develop model uniform regulations and guidance documents on a range of issues. What should Congress look for as the key necessary components of these regulations and guidance?

4. There is strong consensus that the rights of beneficiaries/clients in federally funded programs must be protected. If – during a federally funded program – a provider invites beneficiaries to a separate religious activity (for example, an invitation to worship services, prayer meetings, bible study), is that permissible?

   How might we guard against the risk that a beneficiary might feel pressure to attend – is it enough that, at the time of the invitation, it is made clear that this is voluntary?

   Is it permissible at all to use federally funded time to do religious outreach?

Answer to Questions for the Record of the
Rev. Barry W. Lynn
Executive Director
Americans United For Separation of Church and State

Submitted to

Chairman Jerrold Nadler
Subcommittee on Constitution, Civil Rights, and Civil Liberties
Committee on the Judiciary

Hearing on Faith-Based Initiatives: Recommendations of the President's Advisory Couucil on Faith-Based aud Community Partnerships and Other Current Issues
November 18, 2010

Answer to Question 1

The June 29, 2007, Memorandum issued by the Bush Administration's Department of Justice's Office of Legal Counsel (OLC)[1] is flawed both because it concluded that the statutory bar on government-funded religious discrimination created a substantial burden on a government grantee's religious exercise (triggering the Religious Freedom Restoration Act (RFRA)) and because it reasoned that the government lacked a compelling interest to create the alleged burden (thus violating RFRA).

Indeed, in *Grove City College v. Bell*,[2] the Supreme Court rejected a private religious college's argument that "conditioning federal assistance on compliance with Title IX['s anti-discrimination provisions] infringes First Amendment rights of the College and its students." The Court held that such an argument "warrants only brief consideration," as "Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept."[3] The Court explained that the religious school could simply terminate participation in the funding program to avoid the anti-discrimination provisions and students could decide whether to attend schools that accept the financial assistance and abide by Title IX or to attend the religious school without the federal assistance. Therefore "[r]equiring Grove City to comply with

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[1] Memorandum for the General Counsel, Office of Justice Programs, from John P. Elwood, Deputy Assistant Attorney General, Office of Legal Counsel *Re: Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act* (June 29, 2007) (OLC Memo).

[2] 465 U.S. 555, 575 (1984). *Grove City* held that the receipt of federal grants by some college students meant that Title IX applied only to the college's financial aid program rather than the entire institution. This decision led Congress to amend Title IX to create institution-wide coverage. 20 U.S.C. § 1687. The decision also prompted Congress to craft a new, broader exemption for religious schools. 20 U.S.C. § 1687 (4). These statutory changes, however, have no effect on the constitutional question relevant to this discussion.

[3] *Id.*

Title IXÑs prohibition of discrimination as a condition for its continued eligibility to participate in the [federal financial assistance] program infringes on no First Amendment rights of the College or its students.Š[4] Religious social service providers are free to make the same decisionÙ they may forgo the federal funds and, consequently, the anti-discrimination requirement; or they may accept the funds and end religious their hiring discrimination policies.

Statutes that bar government-funded social service providers from discriminating on the basis of religion do not substantially burden religious providers.

Recent Supreme Court and federal circuit court precedent supports the argument that the governmentÑs mere unwillingness to subsidize sectarian activity does not impose a substantial burden on the exercise of religion.[5]

In *Locke v. Davey*, the Supreme Court upheld the Washington state law that barred recipients of the stateÑs Promise Scholarship Program from using the state-funded scholarship towards a major in devotional theology. The Court concluded that the refusal to fund theology majors did not substantially burden students who pursued such a major, but instead Èthe exclusion of such funding places a *relatively minor burden* on Promise Scholars.Š[6] Similarly, the federal governmentÑs refusal to fund religious discrimination does not place a substantial burden on religious providers.

Nonetheless, the OLC Memo applied Supreme Court cases[7] dealing with unemployment benefits to conclude that a religious organization suffers a substantial burden when the government bars federal grantees from employment discrimination on the basis of religion in federally funded positions.[8] In those cases, the Court struck down the denial of government benefits to employees who had been fired because they refused to perform tasks or work on certain days that conflicted with their religious obligations. There are extreme differences, however, between unemployment benefits and discretionary government grants. È[U]nemployment benefits are a form of insurance, to which employers have contributed premiums on behalf of their employees, and so the

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[4] *Id.* at 575-76.

[5] *Locke v. Davey*, 540 U.S. 712, 720-25 (2004) (upholding stateÑs exclusion of theology degrees from scholarship program); *Teen Ranch v. Udow*, 479 F.3d 403, 408-10 (6th Cir. 2007) (upholding application of statute barring direct state aid for Èsectarian activityŠ to prohibit placement of children in residential program that incorporated religious teaching); *Eulitt v. Maine Dep't of Educ.*, 386 F.3d 344, 354 (1st Cir. 2004)(upholding stateÑs exclusion of religious schools from tuition aid program); *KDM ex rel. WJM v. Reedsport Sch. Dist.*, 196 F.3d 1046, 1051 (9th Cir. 1999) (upholding stateÑs refusal to provide special education services to disabled student at parochial school); *Goodall by Goodall v. Stafford County Sch. Bd.*, 60 F.3d 168, 172 (4th Cir. 1995) (holding that school that had been providing transliteration services for disabled child at a public school was not obligated to continue providing those services after child transferred to religious school).

[6] 540 U.S. at 721-22, 725 (emphasis added).

[7] RFRA reinstated Èthe compelling interest test as set forth in prior Federal court rulings [as] a workable test for striking sensible balances between religious liberty and competing prior governmental interests.Š 42 U.S.C. § 2000bb(a)(5).

[8] OLC memo at 11-12.

withholding of such benefits may be more akin to a penalty than a pure failure to subsidize.Š[9] In contrast, a faith-based organization that applies for and competes with many other organizations for a government grant is *not entitled to receive the grant* and would have Èno claim of legal right to the grant if [the government] had declined to make it.Š[10]

Moreover unemployment benefits are often a lifeline to our citizens most in needÙ a person may be relying on these benefits for daily survival. There is no comparison between such an individualÑs need and a religious organizationÑs desire to win a government grantÙ to supplement its private fundingÙ to perform social services.

According to a 2008 Report by Chip Lupu and Bob Tuttle of the George Washington University Law School, the argument that a religious institution is substantially burdened under RFRA when Ègovernment benefits are conditioned on compliance with a policy that is inconsistent with a religiously motivated practiceŠ takes Èa *much more expansive view* of what constitutes a õsubstantial burdenÑunder RFRA than the federal government ever has before, or that the lower courts have recognized.Š[11] They explained:

> For the most part, the lower courts have held that a Èsubstantial burdenŠ on religious exercise can only be created by a coercive government rule; that is, one that requires action in conflict with a religious conviction or that effectively prohibits action required by religious conviction. Conditions on government benefits are typically not coercive in either of these ways, because religious entities can reject such benefits and maintain their practices.[12]

Thus, the OLC MemorandumÑs conclusion that statutory bars on government-funded religious discrimination are a substantial burden on a government granteeÑs free exercise is incorrect.

<u>The government has a compelling interest in eradicating discrimination based on religion for jobs in federally funded programs.</u>

The government has advanced its compelling interest in not funding religious discrimination for decades. President Roosevelt in 1941 prohibited defense contractors from discriminating on the basis of religion in hiring.[13] Subsequent presidents extended

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[9] Michael C. Dorf, *Why the Constitution Neither Protects Nor Forbids Tax Subsidies for Politicking from the Pulpit, and Why Both Liberals and Conservatives May be on the Wrong Side of this Issue* (Oct. 6, 2008), http://writ.news.findlaw.com/dorf/20081006.html.
[10] Ira C. Lupu & Robert W. Tuttle, *The State of the Law – 2008: A Cumulative Report on Legal Developments Affecting Government Partnerships with Faith-Based Organizations* 36 n.103.
[11] *Id.* at 34 (emphasis added).
[12] *Id.*
[13] Exec. Order No. 8802, 6 F.R. 3109 (June 27, 1941).

this prohibition to all government contractors and took measures to ensure compliance.[14] President Kennedy explained the importance of this compelling interest in 1961 when establishing a committee on equal employment opportunity: È[I]t is the plain and positive obligation of the United States Government to promote and ensure equal opportunity for all qualified persons, without regard to race, creed, color, or national origin, employed or seeking employment with the Federal Government and on government contracts. . . .Š[15]

The Supreme Court subsequently confirmed that the government does indeed have a compelling government interest in eradicating discrimination.[16] Furthermore, È[i]t is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars . . . do not serve to finance the evil of private prejudice.Š[17] Indeed, the Supreme Court has upheld anti-discrimination requirements as applied to religious organizations, even where the restrictions conflicted with the religious missions of the organization.[18]

In *Bob Jones University v. United States*, the university sought an exemption from the IRS policy that denied tax exempt status to organizations that discriminate on the basis of race, arguing that its policy barring interracial dating and marriage was mandated by its religious tenets.[19] The Supreme Court upheld the IRS policy, finding that it did not violate the free exercise rights of the religious school, even if it conflicted with the schoolÑs religiously motivated policy. The Court explained that the È[d]enial of tax benefits will inevitably have a substantial impact on the operation of private religious schools, but will not prevent those schools from observing their religious tenets.Š[20] And, the need to eradicate discrimination in education Èsubstantially outweighs whatever

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[14] Exec. Order No. 10,308, 16 F.R. 12,303 (Dec. 6, 1951); Exec. Order No. 10,479, 18 F.R. 4899 (Aug. 18, 1953.); Exec. Order No. 11,246, 30 F.R. 12,319 (Sept. 28, 1965).

[15] Exec. Order No. 10,925, 26 F.R. 1977 (Mar. 8, 1961).

[16] *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 14 n.5 (1988) (recognizing that state has Écompelling interestŠ in Écombating invidious discriminationŠ); *Young v. N. Ill. Conf. of United Methodist Church*, 21 F.3d 184, 185 (7th Cir. 1994) (explaining it Éis unquestionably the caseŠ that Èelimination of discrimination is a compelling state interest õof the highest orderÑ®) (*quoting Rayburn v. Gen. Conf. of Seventh Day Adventists*, 772 F.2d 1164, 1169 (4th Cir. 1985); *Jews for Jesus v. Cmty. Relations Council for N.Y.*, 968 F.2d 286, 295 (2d Cir. 1992) (explaining that state had Èsubstantial, indeed compelling, interest in prohibiting, racial and religious discriminationŠ).

[17] *Norwood v. Harrison*, 413 U.S. 455, 463 (1973); *id.* at 467 (ÈA StateÑs constitutional obligation requires it to steer clear . . . of giving significant aid to institutions that practice racial or other types of invidious discrimination.Š); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989); *see also Gilmore v. City of Montgomery*, 417 U.S. 556, 569 (1974) (ÈThe constitutional obligation of the state requires it to steer clear . . . of giving significant aid to institutions that practice racial or other invidious discrimination.Š) (internal quotation marks omitted).

[18] *Bob Jones Univ. v. United States*, 461 U.S. 574, 602-03 (1983).

[19] *Id.*

[20] *Id.* at 603-04. The decision on this First Amendment issue was *unanimous*. Justice Powell, in his concurrence, joined the majority Èopinion holding that the denial of tax exemptions to petitioners does not violate the First Amendment.Š *Id.* at 606 (Powell, J., concurring). Justice Rehnquist, in dissent, also stated that the IRS policy Èwould not infringe on petitionersÑFirst Amendment rights.Š *Id.* at 622 n.3 (Rehnquist, J., dissenting).

burden denial of tax benefits places on petitionersÑexercise of their religious beliefs.Š[21] In short, the Court held that the need to eradicate racial discrimination is so compelling that the government can prohibit religious organizations from engaging in religiously motivated discrimination.[22] The government can, likewise, limit federal funds to only those organizations that prohibit religious hiring discrimination.

The governmentÑs interest in eradicating religious discrimination is supported not just by the invidiousness nature of religious discrimination, but also by the governmentÑs compelling interest to uphold the Establishment Clause.[23] The Establishment Clause Èmean[s] that government may not . . . discriminate among persons on the basis of their religious beliefs and practices.Š[24] Funding social service programs that hire employees of only certain religions violates that mandate, by overtly discriminating against certain applicants or employees based on nothing but their religious beliefs.[25] Because the government has a compelling interest in complying with the Establishment Clause, it has a compelling interest in barring federally funded religious discrimination.

Least restrictive means

RFRA requires that a law that substantially burdens a personÑs religion must be Èthe least restrictive means of furthering [a] compelling governmental interest.Š[26] The OLC Memo asserts that because many statutes exempt religious organizations from prohibitions on hiring discrimination based on religion, the federal government lacks a compelling interest in ending such discrimination.[27] To the contrary, this demonstrates that the federal government has narrowly tailored its law to permit religious organizations to discriminate in hiring with their own private dollars, but not with federal dollars. Indeed, even the OLC Memo acknowledges that ÈCongressÑs interest in forbidding religious discrimination in employment is arguably stronger in the context of federally

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[21] *Id.* at 604.
[22] *Id.* at 603. It is noteworthy that the Court applied strict scrutiny to this case. Thus, its analysis would essentially mirror the test required by RFRA.
[23] *Capitol Square Review & Advisory Bd. v. Pinette,* 515 U.S. 753, 761-62 (OÑConnor, J., concurring) (ÈThere is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech.Š); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.,* 508 U.S. 384, 394-95 (1993) (ÈThe interest of the State in avoiding an Establishment Clause violation õmay be [a] compellingÑone justifying an abridgment of free speech otherwise protected by the First Amendment.Š) (citing *Widmar v. Vincent*, 454 U.S. 263, 275 (1981)).
[24] *County of Allegheny v. ACLU,* 492 U.S. 573, 590 (1989); *see id.* at 611 (ÈThe antidiscrimination principle inherent in the Establishment ClauseŠ is a Èfundamental premise of the . . . ClauseŠ); *see also Bd. of Educ. v. Grumet*, 512 U.S. 687, 703 (1994) (ÈA principle at the heart of the Establishment ClauseŠ is Èthat government should not prefer one religion to another, or religion to irreligion.Š).
[25] The First Amendment also mandates basic fairness when it comes to government-funded jobs. All applicants for jobs should be judged on merit alone and not on religionÚ after all these applicants are taxpayers who themselves fund the jobs. The First Amendment has long protected all Americans freedom to worship (or not) according to the dictates of their conscience. This protection should not be waived when applying for government-funded jobs.
[26] 42 U.S.C. § 2000bb-1(a)(2).
[27] OLC Memo at 20.

funded programs, because Congress may have an interest in ensuring that federal funds do not promote religious discrimination.Š[28] To further that interest, the government has created exceptions in laws generally prohibiting discrimination to permit religious organizations, in certain instances, to discriminate with their own funds, but not to discriminate using taxpayer dollars.

Answer to Question 2

The Supreme Court has held that the Establishment Clause prohibits the government from showing È an official preference even for religion over nonreligion.Š[29] Indeed, the Court in *Texas Monthly v. Bulloch*,[30] explained the Clause means that the government È may not place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general, compelling nonadherents to support the practices or proselytizing of favored religious organizations and conveying the message that those who do not contribute gladly are less than full members of the community.Š

If the government were to fund only religious social providers but not secular social service providers, it would certainly be placing its resources behind religious belief, demonstrating a preference for religion over nonreligion.

The Establishment Clause also prohibits the government from providing benefits in a way that has the effect of compelling participation in religion. When the government fails to provide a secular alternative, a beneficiaryÑs only option may be receiving services in a church. Being forced to choose between receiving much needed government-funded social services at religious organizations or forgoing these services altogether thus violates this very principleÙ even if the services themselves are secular. The Supreme Court has held that the government contravenes the Constitution where the state È give[s] aid recipients *any* incentive to modify their religious beliefs or practices.Š[31] Indeed, the Establishment Clause forbids conditioning the receipt of a government benefit on participation in a religious exercise.[32] For instance, when students and their families participate in government programs designed to provide them educational choices, the programs are constitutional only if students have true choice about whether to attend secular or religious schools.[33] And when the government requires people participate in drug or alcohol rehabilitation programs or conditions special treatment on their

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[28] OLC Memo at 21.
[29] *County of Allegheny v. ACLU*, 492 U.S. 573, 604 (1989); *id.* at 648 (Stevens, J., concurring) (The Establishment Clause È forbids even a partial establishment . . . not only of a particular sect in favor of others, but also of religion in preference to nonreligion.Š) (citations omitted).
[30] 489 U.S. 1, 9 (1989).
[31] *Agostini v. Felton*, 521 U.S. 203, 231-32 (1997) (emphasis added); *see Zelman v. Simmons-Harris*, 536 U.S. 639, 650 (2002); *Comm. for Pub. Ed. & Religious Liberty v. Nyquist*, 413 US 756, 786 (1973).
[32] *See Santa Fe Ind. Sch. Dis.t v. Doe*, 530 U.S. 290, 310-12 (2000), *Lee v. Weisman*, 505 U.S. 577, 595-96 (1992) (È It is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice.Š); *DeStefano v. Emergency Hous. Group, Inc.*, 247 F.3d 397, 412-13 (2d Cir. 2001).
[33] *Zelman*, 536 U.S. at 662.

participation, these participants must be offered secular alternatives to AA or NA, for instance.[34]

Answer to Question 3

The model regulations and guidance to be issued by the Working Group established by the President ObamaÑs recent Executive Order[35] must foremost follow the United States Constitution. The Constitution, of course, may not be compromised even if adherence to the Establishment Clause may be more costly or inconvenient. This will be particularly important in the area of alternative providers, where finding alternatives in small towns and rural areas may be difficult. The fact that the framework of the Faith-Based Initiative may make it more difficult to provide an alternative provider, however, does not insulate it from the constitutional mandate that the government do so.

Another area where I am concerned that the Working Group may be willing to compromise the Constitution in favor of convenience is in the monitoring of service providers. Governmental aid to religious institutions is unconstitutional unless it is accompanied by Èan effective means of guaranteeing that the state aid . . . will be used exclusively for secular, neutral, and nonideological purposes.Š[36] Thus, state Èmonitoring of [public] grantsŠ to religious institutions Èis necessary if the [government] is to ensure that public money is to be spent . . . in a way that comports with the Establishment Clause.Š[37]

The PresidentÑs Advisory Council on Faith-Based and Neighborhood Partnerships, in its final report, also acknowledged this constitutional mandate, stating: Èthe First Amendment requires the Government to monitor the activities and programs it funds to ensure that they comply with church-state requirements, including the prohibition against the use of direct aid in a manner that results in governmental indoctrination on religious matters.Š[38] As a result, the Council recommended that the President issue an Executive Order that would Èdescribe the GovernmentÑs obligation to monitor and enforce constitutional, statutory, and regulatory requirements relating to the use of Federal social service funds, including the constitutional obligation to monitor and enforce church-state standards in ways that avoid excessive entanglement between religion and government.Š[39] The November 17, 2010, Executive Order acknowledged, but did not ÈdescribeŠ this obligation to monitor. Including the proper monitoring requirements in the regulations and guidance, therefore, is of utmost importance.

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[34] *Warner v. Orange County Dep't of Probation*, 115 F.3d 1068, 1075 (2d Cir. 1997); *Kerr v. Farrey*, 95 F.3d 472, 480 (7th Cir. 1996).
[35] Exec. Order No. 13,559, 75 F.R. 71,319 (Nov. 22, 2010).
[36] *Comm. for Pub. Ed. & Religious Liberty v. Nyquist*, 413 US 756, 780 (1973).
[37] *Bowen v. Kendrick*, 487 U.S. 589, 615 (1988); *accord Levitt v. Comm. for Pub. Educ. & Religious Liberty*, 413 U.S. 472, 480 (1973); *Freedom From Religion Found. v. Bugher*, 249 F.3d 606, 612-14 (7th Cir. 2001).
[38] PresidentÑs Advisory Council on Faith-Based and Neighborhood Partnerships *A New Era of Partnerships: Report of Recommendations to the President* 137 (Mar. 2010) (Council Report).
[39] *Id.* at 136.

Some of the monitoring procedures the Administration should require include:

- on-site monitoring visits of the funded programs or entities by government officials;[40]
- signed assurances by federally funded entities that they will comply with church-state separation requirements;[41]
- documentation of all expenditures with the federal funding and submission of a final report describing the actual use of funds;[42] and
- procedures for auditing the intended and actual use of funds.[43]

The Council also recommended that the Administration adopt regulations and guidance that more accurately and consistently describe the requirement that social service providers separate religion from their federally funded programming.[44] As a solution, the Council Èurge[d] the Administration to adapt the principles set forth inŠ the ÈHHS produced a guidance document entitled *Safeguards Required.*Š[45] The Executive Order made no reference to this document. The Working Group, therefore, must incorporate the principles of the document into the regulations and guidance.

One frustration that Members of Congress and outside groups that monitor government grants have had with the Faith-Based Initiative is the lack of available information about government grantees and the grants themselves. The Council made several recommendations that would increase transparency and help assure the public that taxpayer funding is being spent both constitutionally and in an efficient and effective way. Specifically, the Council recommended that Èdocuments needed to access or maintain Federal social service funds, including requests for proposals, grant agreements, assurances, and other materials be posted online.Š[46] The Executive Order calls only for Èregulations, guidance documents, and policies that reflect or elaborate upon the fundamental principlesŠ of the Executive Order to be posted. I believe it was the intent of the Council to have as many relevant documents readily availableÙ and thus the Working GroupÑ model regulations and guidance should require at least the documents described in the Council Report in order to further existing open government initiatives and oversight.

The Council Report also recommends that regulations require government agencies to post online a list of entities that receive government aidÙ including all subgrantees that receive government funding through intermediariesÙ and Èto do so in a timely manner,Š

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[40] *Mitchell v. Helms*, 530 U.S. 793, 861-63 (OÑConnor, J., concurring) (recognizing such visits as important safeguards); *Hunt v. McNair*, 413 U.S. 734, 746 (1973) (same).
[41] *Mitchell*, 530 U.S. at 861-63 (OÑConnor, J., concurring); *Roemer v. Bd. of Pub. Works*, 426 U.S. 736,741-42 (1976).
[42] *Roemer*, 426 U.S. at 741-42.
[43] *Columbia Union Coll. v. Oliver*, 254 F.3d 496, 506 (4th Cir. 2001).
[44] Council Report at 131-32.
[45] Letter from Jeffrey S. Trimbath, Director, Abstinence Education, Administration on Children, Youth and Families, to Denny Pattyn, Silver Ring Thing (September 20, 2005).
[46] Council Report at 135.

suggesting 30 days from the date of an award.[47] The Executive Order does not include any emphasis on timeliness. The Working Group should draft regulations that establish meaningful, timely deadlines for posting this information and clearly reiterate that information about subgrantees must also be posted.

Finally, the Executive Order requires the Working Group to address training for federal, state, and local governmental agencies and nongovernmental organizations that receive government grants to implement the requirements established under the Executive Order and subsequent regulations and guidance. This training is key to ensuring that the Faith-Based Initiative adheres to constitutional mandates. In the past, it has been clear that grantees[48] and even the government agencies implementing grants[49] have not understood their constitutional obligations. And since many of the principles set forth by the Executive Order depart from how the Faith-Based Initiative has previously been implemented, effective and thorough training on the new requirements is essential.

Answer to Question 4

Federally funded social service programs should never be co-opted for religious purposes. Religious providers may not use federally funded programs to proselytize, convert participants, or provide religious education. Moreover, taxpayer-funded social services cannot be used as an opportunity to invite beneficiaries to outside religious activities.[50] Nor may a religious organization providing government-funded social services use its position to aid Ėthe dissemination of [its] doctrines and ideals.Š[51]

I believe that federally funded providers should never be able to invite participants to religious activity, even if the activity is separate because it will always carry with it the message that (a) the government is advancing religion through its chosen social service provider and (b) the provider favors participants who attend such programs. The ĖHHS produced a guidance document entitled *Safeguards Required*,Š[52] supported by the Council, however, states that if a provider is going to invite participants to a separate religious activity, it must:

- be non-coercive;
- make clear that it is a separate program from the federally funded program;

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[47] Council Report at 135-36.
[48] *E.g.*, Government Accountability Office, GAO-06-616 Faith-*Based and Community Initiative: Improvements in Monitoring Grantees and Measuring Performance Could Enhance Accountability* 34-35 (June 2006); *Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 432 F. Supp. 2d 862, 890 (S.D. Iowa 2006), *aff'd* 509 F.3d 406 (7th Cir. 2007).
[49] David Kuo, *Tempting Faith: An Inside Story of Political Seduction* 214-16 (2006) (grant reviewers favored conservative Christian applicants, giving non-Christian applicants scores of zero; White House requested and received information on scores of applicants and perhaps determined the size of awards).
[50] *See Nartowicz v. Clayton County Sch. Dist.*, 736 F.2d 646, 649-50 (11th Cir. 1984).
[51] *McCollum v. Bd. of Educ.*, 333 U.S. 203, 211 (1948); *see also Culbertson v. Oak Ridge Sch. Dist. No. 76*, 258 F.3d 1061, 1065 (9th Cir. 2001).
[52] Letter from Jeffrey S. Trimbath, Director, Abstinence Education, Administration on Children, Youth and Families, to Denny Pattyn, Silver Ring Thing (September 20, 2005).

- make clear that participants are not required to attend; and
- make clear that participation on the federally funded program is not contingent on participation in the other program.

LETTER FROM C. WELTON GADDY, PRESIDENT, INTERFAITH ALLIANCE

November 17, 2010

The Honorable Jerrold Nadler
2334 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Nadler,

In anticipation of tomorrow's House Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties hearing on Faith-Based Initiatives: Recommendations of the President's Advisory Council on Faith-Based and Community Partnerships and Other Current Issues, I write to you to share my continuing concern regarding the constitutionality of this office in the White House. At stake in this concern are issues of great importance to Interfaith Alliance and our nearly 185,000 members nationally who belong to more than 75 different faith traditions.

I am troubled by the way that the multiple iterations of faith-based initiatives and charitable choice programs have been administered and the consequent negative impact they have had for religious freedom. President Obama's Office of Faith-Based and Neighborhood Partnerships and the recommendations provided by his Advisory Council provided encouragement that positive changes would be made to bring the office more in-line with the Constitution. Indeed, President Obama's recent executive order that amended President Bush's executive order establishing a faith-based office in the White House provide long-awaited improvements, but prompt serious concerns in some areas about the chosen direction. For example, while the order puts in place important protections for recipients of social services through faith-based groups, it does not go far enough in ensuring that federal tax dollars are not used to support explicitly religious activity.

Even more troubling is the issue of government-funded and religion-based employment discrimination. As a candidate, President Obama stated his firm opposition to this practice, but his Administration has yet to act on the current troubling situation. The Administration's stated "case-by-case" policy does nothing to correct the existing policies which continue to allow faith-based social service providers to discriminate in hiring based on religion when filling positions paid for by tax-payer dollars. Religious organizations that receive government funds must be required to comply with civil rights laws, just as do all other federally funded organizations and initiatives. The battle to protect religious freedom is difficult enough without the government – which should be defending the Constitution – making it even more difficult. Such a scheme is neither good for religion nor for our Constitution.

As you have heard me say many times in numerous congressional hearings and public press conferences on this issue, if religious organizations want to discriminate in hiring

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on religious grounds, they have that right – but they should not expect a government committed to non-discrimination to fund such discrimination. My support for the provisions of the Civil Rights Act of 1964 that give houses of worship the freedom to hire co-religionists if they choose is unwavering – but when government money is involved, the rules change. Religious organizations desiring such a counter-Constitutional exception display a frightening insensitivity to the religious freedom clauses in the Constitution that have contributed to the vitality of religion in this nation.

Finally, there is a sweeping and blatantly false generalization that all too often characterizes this conversation and must be debunked—that this debate pits the religious right against the secular left. This is not the case. Not only do I serve as President of an organization made of people of faith, but I also serve as Pastor for Preaching and Worship at Northminster Baptist Church in Monroe, Louisiana. I am only one of countless people of faith who recognize that religion has made its greatest contribution to this nation as an independent voice of conscience calling the nation to the highest and best purpose in its founding vision. People of faith oppose charitable choice and faith-based initiatives because we recognize that the boundary between institutions of religion and government preserves the integrity of *both* institutions.

I am thankful for many of the changes implemented by President Obama's amended executive order released yesterday, and I am committed to continued efforts—such as this oversight hearing—to assure that remaining shortcomings are fixed. Thank you for your consideration.

Sincerely,

C. Welton Gaddy
President, Interfaith Alliance

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LETTER FROM JON O'BRIEN, PRESIDENT, CATHOLICS FOR CHOICE

CATHOLICS
FOR
CHOICE

IN GOOD CONSCIENCE

November 18, 2010

The Honorable Jerrold Nadler
Chairman, Subcommittee on the Constitution, Civil Rights and Civil Liberties
Committee on the Judiciary
US House of Representatives
B-353 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Nadler, Ranking Member Sensenbrenner and Members of the Subcommittee:

Catholics for Choice is pleased to have the opportunity to submit this statement in support of the Subcommittee's assessment of the Faith-Based Initiative, the status of the recommendations of the President's Advisory Council on Faith-Based and Neighborhood Partnerships and other issues related to federally-supported projects with faith-based organizations.

Catholics for Choice works to shape and advance sexual and reproductive ethics that are based on justice, reflect a commitment to women's well-being and respect and affirm the capacity of women and men to make moral decisions about their lives. For more than 35 years, CFC has been at the forefront of national and international debates on the intersection of faith, women's health and reproductive rights and justice.

American Catholics support policies that help men and women make informed decisions about their lives, be they regarding healthcare in general, specific matters of reproductive health or other social service needs. The role of individual, informed conscience in matters of moral decision making is at the core of the Catholic tradition—and the public policy views of Catholics in the United States reflect this tradition.

While it is clearly appropriate for religious voices to be present and heard in policy debates regarding social service delivery, it is important that they are not granted too much deference. Religion has a lot to offer the world, but all those involved need to be aware of the dangers of permitting religion too much influence. Measured examination of the roles, influence and deference paid to faith-based organizations in the delivery of social service programs is a vital part of balancing the ability of religious organizations to provide services in line with their moral and religious beliefs and the right of those served to have access to services no matter their religion. Institutions should not seek to impose an ideology on their employees nor those they serve, but should instead defer to the individual consciences of those involved in both delivering and receiving assistance.

This Subcommittee's study of the administration's progress on implementing necessary changes to the Faith-Based Initiatives and the consensus recommendations issued by the Advisory Council on Faith-based and Neighborhood Partnerships is an important part of maintaining that balance.

When clients seek services, especially from social service projects that receive federal support, the end result must be that the program provides the assistance the client needs, regardless of the religious affiliation of the sponsoring entity. In addition, organizations that receive federal grants to support project employment must not discriminate against any employee, applicant for employment or potential client based on religion. Concrete action to address the issue of federally funded employment discrimination on the basis of religion is an essential part of the necessary reform of the Faith-Based Initiatives. An additional element of reform will be moving forward with implementation of the consensus recommendations of the Advisory Council.

The debates over the proper role for religion in public policy are not new, nor will they be settled any time soon. Forty years ago, US president John F. Kennedy described his own determination to keep his religion and the demands of democracy and pluralism in appropriately distinct spheres. The Catholic hierarchy has a long history of involving itself in debates over public policy. From advocating for the poor to opposing war and the death penalty, there is much good the church has done in this arena. However, while even the bishops don't always speak with one voice on some issues, it is patently clear that they do not represent the views and actions of all Catholics. The world over, Catholics think and act independently, practicing what is best for their families and themselves.

Halting any employment discrimination in federally funded projects and thoughtful implementation of the Advisory Council's recommendations are proposals that Catholics can and do support. I appreciate the time that you are taking on this important issue. Thank you for your consideration of my testimony.

Sincerely,

Jon O'Brien
President

LETTER FROM THE REVEREND J. BRENT WALKER, EXECUTIVE DIRECTOR, AND K. HOLLYN HOLLMAN, GENERAL COUNSEL, THE BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY

200 Maryland Avenue, N.E.
Washington, D.C. 20002-5797

November 29, 2010

The Honorable Jerrold Nadler
Chairman
Subcommittee on the Constitution, Civil Rights, & Civil Liberties
Committee on the Judiciary
United States Honse of Representatives
2138 Rayburn House Office Building, B-353
Washington, DC 20515

The Honorable F. James Sensenbrenner Jr.
Ranking Member
Subcommittee on the Constitution, Civil Rights, & Civil Liberties
Committee on the Judiciary
United States House of Representatives
2142 Rayburn House Office Building, B-351
Washington, DC 20515

Dear Chairman Nadler and Ranking Member Sensenbrenner:

Thank you for convening the November 18, 2010, hearing on the Office of Faith-Based and Neighborhood Partnerships and other current, related issues. It provides a much-needed opportunity for Congress and the American people to gain a greater understanding of the policy issues that arise when the government funds social services through neighborhood and faith-based organizations. We appreciate your attention to these matters, in particular the status of the Advisory Council on Faith-Based and Neighborhood Partnerships Recommendations to the PresidentÙ some of which he adopted in November 17, 2010 amendments to Executive Order 13279Ù and the issue of faith-based entities engaging in taxpayer-funded employment discrimination.

We are the Executive Director and General Counsel of the Baptist Joint Committee for Religious Liberty, a 74-year-old agency serving 15 Baptist bodies on legal and policy matters relating to religious liberty and the separation of church and state. The Baptist Joint Committee has long affirmed both of the First AmendmentÑ religion clausesÙ No Establishment and Free Exercise. We are proud to have worked with many members of this subcommittee as we chaired the Coalition for the Free Exercise of Religion that pushed for passage of the Religious Freedom Restoration Act of 1993 and the Religious Land Use and Institutionalized Persons Act of 2000.

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BACKGROUND OF FAITH-BASED POLICY

The Baptist Joint Committee has defended the self-definition and autonomy rights of religious organizations, while opposing efforts on the part of government to advance, inhibit or interfere with the sacred enterprise of religion. As members of the U.S. Supreme Court Bar, with 30 years of combined experience fighting to protect religions liberty for all, we strongly believe that meaningful reform of the Faith-Based Initiative is necessary to protect the religious liberty that is one of our nationÑs defining attributes.

Since 1995, the Baptist Joint Committee has been actively monitoring Ècharitable choiceŠÙ the forerunner of the Faith-Based Initiative as we know it todayÙ and related legislative and administrative proposals concerning government funding of religious institutions. Our position is informed by our theology, our historical experience and our respect for the constitutional standards that have long protected the religious liberty interests of Americans. As stated in a Baptist Joint Committee board resolution adopted on October 8, 1996:

> From the founding of our country, Baptists have opposed the use of tax dollars to advance religion. Baptists believe that, when the government funds religion, it violates the conscience of taxpayers who rightfully expect the government to remain neutral in religious matters. Knowing that the government always seeks to control what it funds, Baptists have long rejected governmentÑs handouts for their religious activities. Government subsidization of religion diminishes religionÑs historic independence and integrity. When the government advances religion in this way, it inevitably becomes entangled with religious practice, divides citizens along religious lines and prefers some religions over others.

Baptist Joint Committee staff have previously testified before this subcommittee and other House and Senate panels on the threat to religious liberty represented by Ècharitable choiceŠ and by a Faith-Based Initiative that had inadequate legal safeguards. We have always acknowledged the propriety of government and religious organizations carefully cooperating in non-financial ways and, even financially, through a separately incorporated, religiously affiliated organization that does not proselytize, require beneficiaries to participate in religious worship or discriminate on the basis of religion in hiring. Too often, however, the government has encouraged and facilitated partnerships with religious entities while failing to provide adequate guidance on distinctions between what is permitted in a government-funded program and what is not.

Rev. Walker was honored to serve on the Reform of the Office Taskforce of the PresidentÑs Advisory Council on Faith-Based and Neighborhood Partnerships that worked diligently to recommend reforms that would greatly strengthen constitutional protections for religious liberty. We were pleased that many of the recommendations were included in the PresidentÑs November 17, 2010 amended Executive Order. We affirm all of the recommendations of the Reform of the Office Taskforce (adopted by the PresidentÑs Advisory Council) and will continue to advocate that religious entities entering into financial partnerships with the government only do so in ways that avoid government-sponsored religion. We look forward to the implementation of the amended Executive Order and believe the new regulations that will follow will go a long way toward improving partnerships between the federal government and religious entities without threatening constitutional principles that are so important to protecting religious liberty. This letter is intended to highlight for the subcommittee our primary concerns and recommendations for reform.

PRESIDENT BARACK OBAMA'S NOVEMBER 17, 2010 AMENDMENTS TO EXECUTIVE ORDER 13279

Prior executive orders addressing the Faith-Based Initiative failed to adequately explain the necessary separation of religious activity from any government-funded services provided by faith-based organizations.[1] Encouraging financial partnerships between the government and religious entities without sufficiently educating the disbursing agencies and recipient religious entities about their constitutional responsibilities has been a significant problem, contributing to constitutional violations and public controversy.

The Baptist Joint Committee recognizes that, in the overwhelming majority of cases, religious organizations do not want to violate the Constitution or take advantage of a community need to further their religious mission. That some social service providers act out of a religious motivation certainly does not imply constitutional suspicion. Ensuring that specific guidelines and relevant information are provided to the well-intentioned persons who are not church-state experts but who seek to play by the rules is a significant improvement and one that we are gratified to see addressed in President ObamaÑs November 17, 2010 amendments to Executive Order 13279.

The amended Executive Order makes some important changes designed to strengthen the legal foundations of the Faith-Based Initiative. Specifically, the changes prohibit Èexplicitly religiousŠ activities in programs that receive direct federal financial assistance and provide that any such activities offered by religious social service providers must be voluntary for beneficiaries, funded by non-governmental monies and conducted in a different time or location from the social services that involve direct federal financial assistance. New provisions promise to improve transparency and accountability, which will encourage compliance without unnecessarily threatening the autonomy of religious entities accepting government monies.

Another component of the policy that warrants reform relates to the distinction between ÈdirectŠ and ÈindirectŠ aid and the rules that follow. The Baptist Joint Committee has been concerned that this complicated issue was not adequately explained to faith-based social service providers. While most federal grants are disbursed throngh direct aid, some are paid indirectly, through a voucher, certificate or similar means. Such indirect aid, properly designed, involves a beneficiaryÑs private choice to select a religious programÙ a factor not present in direct aid grants. The U.S. Supreme Court has held that direct and indirect grants may carry divergent constitutional implications,[2] and it is important to ensure that this distinction is not lost on the disbursers and recipients of federal financial assistance. Previous guidance on this point, if provided at all, suffered from a lack of comprehensiveness and clarity. By referring to Èdirect Federal financial assistance (including through a prime award or sub-award),Š the amended Executive Order recognizes that the rules are not avoided simply because monies may be distributed through intermediary organizations.

Unfortunately, President ObamaÑs amendments to Executive Order 13279 required neither separate 501(c)(3) incorporation for religious service providers nor alleviated the bureaucratic demands of voluntary

[1] Executive Orders 13198, 13199 and 13279, all issued by President George W. Bush, were the operative policy on the Faith-Based Initiative at the time President Obama assumed office. Executive Orders 13198 and 13199, respectively, set forth agency responsibilities regarding funding to faith-based organizations and created what was then known as the White House Office of Faith-Based and Community Partnerships. Executive Order 13279, issued in December 2002 after Congress rejected Mr. BushÑs proposal to extend Ècharitable choiceŠ across the federal government, contains the Bush AdministrationÑs vision for federal policy on government partnerships with faith-based organizations and was amended by President Obama on November 17, 2010.
[2] *See generally Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

separate incorporation. The Baptist Joint Committee has long maintained that a religious entity wishing to enter into a financial partnership with the government should do so through a separate 501(c)(3) organization[3] that is organized and operated in a way that protects against any confusion and commingling of social services and religious activities. This requirement preserves the autonomy of pervasively religious organizations, such as houses of worship, while still allowing them to fulfill a community need in partnership with government. It is one significant step toward reducing what the U.S. Supreme Court has recognized as the Èspecial Establishment Clause dangersŠ[4] that exist where money is given directly to religious entities. Separate incorporation has the added advantage of ensuring that, in the event of a government audit, the government could not demand records from a house of worshipÙ an additional layer of protection from undue government inquiry and regulation of religion.

The Baptist Joint Committee believes that the most robust protection of religious liberty is attained by conditioning federal funds on the creation of such a separately incorporated entity. But even if such separate incorporation is not compulsory, few would argue that making it easier for religious organizations to avail themselves of this Èbest practiceŠ would not be a significant step forward. We regret that the President did not accept this consensus recommendation of his Council, and will continue to advocate that he do so in the future.

GOVERNMENT-FUNDED EMPLOYMENT DISCRIMINATION BY RELIGIOUS ENTITIES

We were deeply disappointed that the Reform of the Office TaskforceÑ charge did not include the issue of religious discrimination in hiring for government-funded programs. While this decision would be defensible if the Administration was making demonstrable progress on solving this issue by other means, to date there is scant indication that it is doing so.

The prospect of government-funded religious discrimination is a significant cloud over federal policy related to government partnerships with religious entities. Moreover, we believe the lack of clarity will continue to undercut support for the Faith-Based Initiative, despite the significant improvements in other aspects of the policy that are reflected in President ObamaÑ amended Executive Order.

As discussed above, religious providers have long been able to partner with the government in the provision of social services. Careful structuring of such relationships, however, is necessary to protect beneficiaries, religious providers and the public. One significant difference between religious and secular social service providers that deserves attention is the application of equal employment laws. As members of this subcommittee know, Title VII of the Civil Rights Act of 1964[5] is the landmark federal statute that prohibits employment discrimination based on race, color, sex, natural origin and religion. Applicable to employers with 15 or more employees, Title VII exempts religious organizations from the ban on religious discrimination. Title VIIÑ exemption, which the U.S. Supreme Court has upheld in the context of a *privately-funded* entity,[6] is broadly applicable to all employees of qualifying entities, not just to those with religious duties. A Baptist organization, for example, may choose to hire only Baptists who embrace specific beliefs and practices. As a matter of religious autonomy, it makes sense to protect institutional religious liberty in this way in the context of a *privately-funded* religious organization.

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[3] Houses of worship are typically organized and operated as nonprofits pursuant to I.R.C. § 501(c)(3) and dedicated to religious purposes and religious activities. The Baptist Joint Committee maintains that a house of worship, as the quintessential example of a pervasively religious entity, should not be engaged in financial partnerships with the government.
[4] *Mitchell v. Helms*, 530 U.S. 793, 818-819 (2000).
[5] 42 U.S.C. § 2000e *et seq.* (2010).
[6] *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327 (1987).

In positions funded by tax dollars, however, the interest in protecting religious autonomy conflicts with another significant federal policyÙ nondiscrimination in federally-funded jobs. Taxpayers should be able to compete for a federally-funded job without having to endorse specific religious teachings. Individuals from a wide variety of religious perspectives or no religious perspective at all can be equally dedicated to providing services to those in need, and disqualifying applicants based on religion cuts sharply against the policy goal of government funding the most effective social service programs. In short, extending the Title VII exemption to *government-funded* positions stretches the exemption beyond its legitimate purpose and undermines civil rights protections.

ÈReligionŠ as a category for employment decisions is unique and deserves special attention. Some argue, for example, that Title VIIÑ religious exemption is analogous to an environmental groupÑ ability to reject applicants who are not committed to environmental protection. The analogy is inapposite. Religion is different, singled out for special protection in the First Amendment. While the government may freely choose to support (or not support) a particular brand of environmentalism as a matter of policy, the Establishment Clause prohibits government from supporting religion. In addition, Title VII prohibits employment discrimination on the basis of religion and other protected categories. There is no analogous constitutional or statutory protection for anti-environmentalists. Allowing a government-funded program to announce a È no Catholics or Jews need applyŠ policy is categorically different from the Sierra Club refusing to hire proponents of strip-mining or, in another common example, Planned Parenthood refusing to hire abstinence-only activists. It is of no legal consequence if such non-religious organizations receive federal funds while hiring on the basis of ideology. By contrast, faith-based organizations are constitutionally barred from promoting religion in government-funded programs. While faith-based organizations certainly may refuse to hire individuals who do not believe in helping those in need of social services, they should not be allowed to impose a religious test with tax dollars.

We are mindful that some faith-based organizations that hire according to religion provide both government-funded social services and privately-funded religious services. Religiously affiliated groups that fill positions exclusively with members of their own faith community for valid reasons, such as preserving relationships with denominational entities, honoring historical commitments or ensuring continuity of purpose, may continue to do so outside the government-funded program. The law should draw distinctions between those who are regularly engaged in providing government-funded services and those who may oversee a variety of programs or are solely engaged in religious services. The difficulty of drawing such lines should not prevent changes in policy that would better reflect a proper balance between the autonomy of religious social services providers and compliance with constitutional and policy protections that attach to government funding.

Given the considerable threat posed to religious liberty by government-funded religious discrimination, we regret the AdministrationÑ apparent lack of willingness to act. At the time of the formation of the PresidentÑ Advisory Council on Faith-Based and Neighborhood Partnerships, it was announced that the Administration would embark on a È case-by-case basisŠ review of the hiring issue, with the White House Counsel and U.S. Department of Justice as the facilitators of such review. While the Baptist Joint Committee would have preferred the President put this matter to rest with a stroke of his pen, we did not oppose the È case-by-caseŠ method, confident that there would be little justification for denying taxpayers the ability to compete for positions funded by monies compulsorily collected from them, simply because of their religion. We are, however, disheartened that nearly halfway through the PresidentÑ term of office, the Administration has said nothing further publicly as to the operation of the È case-by-caseŠ review.

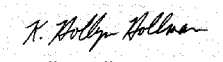
A constructive way for the Administration to begin addressing this flaw would be to order the review and withdrawal of the U.S. Department of Justice Office of Legal CounselÑ June 29, 2007, Memorandum[7] (ÈOLC MemoŠ) regarding the application of the Religious Freedom Restoration Act of 1993[8] (ÈRFRAŠ) to World VisionÑ requested exemption from a statutory nondiscrimination provision. The OLC Memo granting that exemption is not well-founded. RFRA permits the government to substantially burden the free exercise of religion only if its policy is the least restrictive means of furthering a compelling interest. Following the U.S. Supreme CourtÑ sharp curtailment of Free Exercise Clause protections (and decades of precedent) in *Employment Div. v. Smith*,[9] the Baptist Joint Committee chaired a diverse coalition that successfully advocated for RFRAÑ enactment. As suggested by its name, RFRA was intended to *restore* free exercise protections to the strict scrutiny standard of review in place prior to the unfortunate *Smith* decision. It was by no means intended to elevate the rights of religious persons and organizations above other civil rights in the context of a government-funded program, which is the logical application of the OLC MemoÑ erroneous reasoning. On this point, the Baptist Joint Committee endorses the written testimony and oral statements offered by Professor Melissa Rogers regarding the OLC Memo during the November 18, 2010 hearing.

While the OLC Memo concerned only one organizationÑ application for funding under one grant program, its aggressively broad interpretation improperly threatens statutory safeguards crafted to ensure that no discrimination on the basis of religion will be funded by taxpayer dollars. Unfortunately, some have seized on the OLC Memo to argue that RFRA provides religious organizations a blanket exemption from binding nondiscrimination laws. The Baptist Joint Committee, along with 57 other religious, education, civil rights, labor and health organizations signed a September 2009 letter to Attorney General Eric Holder urging that he order the review and withdrawal of the OLC Memorandum. General Holder has not responded to the request, acknowledged its receipt or given any indication that he, the President or any other Administration official believes that the OLC MemoÑ conclusions are flawed. Because we believe that this failure will continue to harm religious liberty, civil rights and the effectiveness of government partnerships with faith-based organizations, we will continue to push for withdrawal of the OLC Memo.

Thank you again for convening the recent hearing. As always, the Baptist Joint Committee stands ready to work with this subcommittee, the Congress and the White House to ensure that religious liberty for all is respected and ensured.

Respectfully submitted,

The Reverend J. Brent Walker
Executive Director



K. Hollyn Hollman
General Counsel

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[7] Memorandum for the General Counsel, Office of Justice Programs, from John P. Elwood, Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act* (June 29, 2007).
[8] 42 U.S.C. § 2000bb *et seq.* (2000).
[9] 494 U.S. 872 (1990).

PREPARED STATEMENT OF ALAN YORKER, MA, LMFT

U.S. House of Representatives
Committee on the Judiciary
Subcommittee on the Constitution, Civil Rights, and Civil Liberties

Hearing on Faith-Based Initiatives:
Recommendations of the President's Advisory Council on
Faith-Based and Community Partnerships
and
Other Current Issues

Statement of Alan Yorker, MA, LMFT

Plaintiff in *Bellmore v. United Methodist Children's Home*

Submitted for the Record

December 2, 2010

My name is Alan Yorker and I am grateful for the opportunity to tell the Subcommittee my story.

The issue of religious discrimination in government-funded social service jobs is particularly important to me because I am a victim of such discrimination.

In October 2001, I applied for a job as a psychological therapist with the United Methodist Children's Home in Decatur, Georgia. After reading the advertisement placed by the Children's Home in *The Atlanta Journal-Constitution*, I thought it would be the perfect job for me. With over 20 years' experience as an adolescent and family therapist, over a decade of teaching experience, and a number of appointments to state professional committees, I had the right credentials and experience to make a real difference for the children at the Home.

I was pleased to learn the Children's Home granted me an interview for the position. When I arrived for the interview, I was told to fill out an application form that included a section on religion. It required that I identify:

- my religion;
- my denomination, if I were Christian;
- whether I was a member of a church and for how long; and
- the name, address, and phone number of my church.

The reference section also required that I provide the name, address, and phone number of four references—one of which had to be a minister.

I answered the questions honestly. I identified myself as Jewish, provided the information for my synagogue, and included my rabbi of 24 years as one of my references.

After I filled out the application form, the director of social work services at the Children's Home began my face-to-face interview. Once she read the religion section of my application form, however, she told me, "We don't hire people of your faith," and ended the interview.

At first, I wondered if I were on an episode of *Candid Camera*.

And then I was shocked. This was so much worse than the embarrassment *Candid Camera* might cause. This was hurtful and demeaning. I was being told I did not qualify for a job: not because of any lack of relevant training or experience, but because of something intrinsic to me—my religious faith.

I also wondered how the Children's Home could refuse to hire me based on religion when I knew the children at the Home were frequently placed there by the state of Georgia and it received a significant amount of money from the state. It was painful to comprehend that my own taxes were being used to fund this blatant religious discrimination.

And, I wondered why the Children's Home had wasted its time and my time in even granting me an interview. The advertisement in the newspaper of public record didn't say, "No Jews." But in reality it should have, because I later learned that the Childreu's Home's established practice was to discard resumes from candidates with Jewish-sounding names.

I found this policy particularly astonishing because of my own family's past experience with religious discrimination. My grandfather, Harry Monjesky, worked for many years as a conductor on the New York Central Railroad. Then, during a recession, the railroad laid off the Jewish and African-American workers first, regardless of their seniority—including my grandfather. To ensure that our family would, in the future, be judged on merit and not by our name, my father changed our own family name to Yorker. Apparently, this helped me get around the Children's Home's policy of throwing out applications from people with Jewish-sounding names. But in the end, I was still a victim of religious discrimination.

In 2002, I sued the Children's Home and the state of Georgia for religious discrimination. At first, I was reluctant to do so. I was worried how a lawsuit would affect my teenage son, who was just about to start high school. We all know high school can be a difficult time for kids and I was concerned that the publicity of the lawsuit would end up subjecting him to the same prejudice I had faced. But my son was wise beyond his years. He told me that he knew what happened to me was wrong and that I should do something about it. He was right and I did.

As a result of the lawsuit, the state of Georgia adopted a clear policy that prohibited religious organizations receiving state funding to provide child welfare services from discriminating against job applicants, employees, or volunteers based on religion. I sincerely believe that the federal government must adopt the same policy. As my teenage son told me nearly a decade ago, government-funded hiring discrimination is wrong.

Thank you for allowing me to submit this statement for the record. I have attached the policies that the Georgia Department of Human Resources and the United Methodist Children's Homes adopted as a result of the lawsuit, *Bellmore v. United Methodist Children's Home*. I have also attached several items from newspapers and magazines discussing my battle against government-funded religious discrimination.

GEORGIA DEPARTMENT OF HUMAN RESOURCES AND
COMMISSIONER JIM MARTIN

TERMS TO APPLY TO CHILD WELFARE PROVIDERS

EXHIBIT

1. Applicability:

Child welfare agencies, child caring institutions and child-placing institutions as defined in O.C.G.A. § 49-5-3, funded in whole or in part by, or acting on behalf of the Department of Human Resources or its divisions, shall be required to confirm in writing their express agreement to abide by the following Department policies and conditions. Failure by any entity to abide by any of these policies and conditions shall be grounds for termination of any contract or relationship with, or funding by, the Department, and/or for reimbursement of funds already provided to such entity by the Department or its divisions.

2. Government-funded religious activities prohibited:

No child welfare agencies, child caring institutions and child-placing institutions as defined in O.C.G.A. § 49-5-3, or representative or employee of such entities, contracting with, funded in whole or in part by, or acting on behalf of the Department of Human Resources or its divisions, shall engage in religious activities including religious worship, instruction, proselytization, or promotion, funded with or supported by government monies. However, children in state custody have a right to voluntarily participate in religious activities and to follow their own religious beliefs, such as attendance at worship, religious observance, and religious study. Children who voluntarily choose to participate in religious activities shall be afforded reasonable opportunities to do so. Under no circumstances shall participation in religious activities be required in any way or be a condition of involvement in such entity's services or programs.

3. Discrimination prohibited against children:

All services provided by parties contracting with, funded in whole or in part by, or acting on behalf of the Department of Human Resources or its divisions, including individual foster parents, child welfare agencies, child caring institutions and child-placing institutions as defined in O.C.G.A. § 49-5-3, shall be performed without discrimination or harassment based upon a child's religion, religious beliefs, race, color, national origin, age, disability, creed, political affiliation, gender, sexual orientation, or HIV/AIDS status. The foregoing shall not prohibit such entities from considering these factors in providing for the health and safety of each child in foster care. The Department's mandate is to provide a safe, supportive environment for each child in state custody in accordance with his or her best interests.

4. Discrimination prohibited in employment:

No child welfare agencies, child caring institutions and child-placing institutions as defined in O.C.G.A. § 49-5-3, or representative or employee of such entities, contracting with, funded in whole or in part by, or acting on behalf of the Department of Human Resources or its divisions, shall discriminate in employment, with respect to paid, unpaid, volunteer or intern staff, on the basis of religion, religious beliefs, race, color, national origin, age, disability, or gender. Such entities may consider religion in the hiring or appointment of any positions serving a primarily spiritual, ministerial, or religious purpose. Under no circumstances will any government monies, either directly or indirectly, fund or support the employment of such non-secular positions, or any of the non-secular programs and services that they provide.

5. Notification of requirements:

Any child welfare agencies, child caring institutions and child-placing institutions as defined in O.C.G.A. § 49-5-3, contracting with, funded in whole or in part by, or acting on behalf of the Department of Human Resources or its divisions, shall be required to notify its staff, including paid, unpaid, volunteer or intern staff or consultants, and foster parents with whom it places children in state custody, of their ongoing responsibility to abide by the foregoing requirements, Notification of such requirements may include, but is not limited to, the dissemination of internal policies and procedures, official communications, and organized training. All entities must agree to read and abide by all relevant DHR policies and procedures.

6. Reporting requirements:

Any child welfare agencies, child caring institutions and child-placing institutions as defined in O.C.G.A. § 49-5-3, contracting with, funded by, or acting on behalf of the Department of Human Resources or its divisions, shall be required to maintain on file with the Department current financial statements; employment application forms; a list of all staff positions, serving a primary spiritual, ministerial, or religious purpose, for which exemption is claimed under paragraph four; and such other records as the Department may require to demonstrate compliance with the foregoing requirements. Such records shall be subject to the Open Records Act, and its exceptions.

UNITED METHODIST CHILDREN'S HOME POLICIES

- It is the Home's policy that it does not discriminate against staff and volunteers on the basis of sexual orientation or marital status, and the Home hereby represents that it has no intention of modifying such policy. The Home's Board of Directors retains the right to modify such policy in its discretion consistent with any applicable legal, regulatory or contractual requirements imposed by local, state or federal government. Additionally, the Home requires its staff and volunteers to follow professional standards in their work with children at the Home, and to retain appropriate boundaries and discretion about their private lives in interacting with the children. In this regard, all staff and volunteers should avoid discussion with the children of their domestic personal relationships.

- All children at the Home are supported and affirmed. Children who present issues about their sexual orientation or gender identity will not be subject to discrimination or harassment. All staff interacting with children at the Home will receive appropriate professional training on issues regarding sexual orientation and gender identity. Children who present issues regarding sexual orientation and gender identity will be referred for appropriate supportive services, such as to Youth Pride and/or trained counselors and therapists, who are best equipped to provide appropriate support. Staff should follow professional standards in interacting with all children, and should not express personal views or beliefs regarding sexual orientation or gender identity. The Home follows professional standards that warn against subjecting children to psychological or religious conversion therapies to alter their sexual orientation or gender identity, and under no circumstances will children be subjected to such therapies. The foregoing standards will be conveyed to volunteers interacting with children at the Home, who will be required to abide by them as well.

- Children at the Home will receive sexual health education appropriate to their age and sexual orientation.

- The Home follows the policies of DHR as codified in its published regulations with respect to consideration of and placements with prospective foster or adoptive parents. The Home follows professional standards respecting foster and adoptive parents, and is guided by the best interests of each child on a case by case basis in determining an appropriate placement.

The Haunting Of Government Money

BY: CLAIRE FRAZIER

The United Methodist Children's Home (UMCH) in Georgia learned an important lesson the hard way; you never can tell when government money will come back to haunt you, in the most unexpected and debilitating ways. UMCH, an admittedly church-related agency, accepts children referred to their care from the State of Georgia's Department of Family and Children's Services (DFCS) or the Department of Juvenile Justice (DJJ). For each child UMCH receives a per diem that provides about 50 percent of the cost of supporting the state child on campus. The North Georgia United Methodist Conference estimates that the total state payments for the children amount to about 57 percent of their total operating expense. The result of this arrangement between the State of Georgia and UMCH is that the children have a safe, if religious, environment in which to live. The state has a place to safely house children who would otherwise be forced to remain in dangerous or damaging environments or end up on the streets. Everyone is happy.

Everyone except Aimee Bellmore and Alan Yorker. Bellmore was employed by UMCH as a counselor. In July 2001 she was notified that she would soon be promoted to the position of family therapist. Instead of the expected promotion, however, Bellmore was terminated in November 2001 because UMCH discovered she was a lesbian. "She was informed that to promote its religious beliefs, the Home would employ only Christian heterosexuals who are married or celibate."[1]

Alan Yorker didn't make it as far as Bellmore did in his search for employment at UMCH. A psychotherapist in adolescent and family therapy for more than 20 years, with more than a decade's experience teaching in Emory University professional schools and a number of appointments to state professional committees, his résumé sparked interest at UMCH. In October 2001 he was called to come interview for a vacant position. Yorker's interview was terminated abruptly as soon as the interviewer realized Yorker was Jewish, a fact he was required to disclose on the application form he filled out just prior to the interview. Bellmore later revealed that a supervisor told her UMCH's practice was to throw away all résumés from candidates whose last names sounded Jewish. Ironically, the fact that Yorker made it as far as he did in the interview process at UMCH was because of discrimination his grandfather had faced. In order to prevent similar discrimination from subsequently affecting him or his family, Yorker's father changed the family's surname from the decidedly Jewish "Monjesky" to the not particularly ethnic "Yorker."

As UMCH's experience clearly demonstrates, it is not always possible for a religious institution to accept government funds and maintain their religious integrity.

As a privately funded entity UMCH would be entirely within its rights to hire and fire whomever it chose under the religious exemption to Title VII of the federal Civil Rights Act. Being forced to do otherwise would undermine the mission of UMCH as a religious institution. However, UMCH is not privately funded. The per diem they receive from the State of Georgia gives the state and its taxpayers a say in how UMCH, or any other agency receiving its funds, is run.

In the nineteenth century James G. Blaine proposed an amendment to the Constitution that was never enacted, but various versions of it were adopted by Georgia and 36 other states. These so-called Blaine amendments originally functioned as essentially anti-Catholic laws designed to prevent state funds from funding Catholic parochial schools. Applied more broadly, the amendments also apply to any church-related agency or program. For many years, while Georgia applied the amendment narrowly to Catholic institutions or services, it continued to contract with faith-based organizations such as UMCH. The lawsuit brought by Bellmore and Yorker against the State of Georgia and UMCH brought the issue into the spotlight and forced the State of Georgia to revise its contracts with faith-based service providers.

Like many other religious institutions UMCH relied on government money to support its programs, causing a dependence that Marc Stern, general counsel of the American Jewish Congress, is afraid religious institutions will not be able to overcome. "There's no guarantee at all that this sort of attitude won't become prevalent and having taken the money—become addicted to the money—it's not clear that religious institutions are going to be able to walk away."[2]

What is clear is that UMCH has a deep concern for Georgia's at-risk children who, without its help, may have to remain in dangerous home situations or end up on the streets. What is not clear is what, exactly, will change in the future. A position statement on the North Georgia United Methodist Conference's Web site discusses the church's take on the settlement between UMCH and the plaintiffs, claiming, "In relation to staff and volunteers, the agreement reaffirms our policies of non-discrimination and our commitment to training

our staff using professional standards and practices relating to all children."[3] As UMCH "reaffirms" its "non-discrimination" policies, it is implied that they are the same nondiscrimination policies that cost Aimee Bellmore her job and Alan Yorker his shot at one. According to the North Georgia United Methodist Conference, nothing much seems to have changed.

Reporting outside of the church gives a different picture. "This settlement is a significant breakthrough in the national debate over whether more taxpayer money should be given to religious organizations," said Susan Sommer, supervising attorney for Lambda Legal, and the lead attorney on this case. "Under the agreement, the State of Georgia will not fund religious groups that use public money to discriminate, and the United Methodist Children's Home will follow policies prohibiting discrimination in hiring and services."[4]

National Public Radio's Barbara Bradley Hagerty, reporting for *Morning Edition*, added further, "The Methodist children's home agreed that it would not discriminate against gay job applicants and that it would not discourage homosexuality or even teach the children its views on the issue."[5]

This case, while legally settled and morally unsettling, generates deep concerns about government money and religiously run social services, which, up to this point, have generally been mutually indulgent. As UMCH's experience clearly demonstrates, it is not always possible for a religious institution to accept government funds and maintain their religious integrity. Not only has UMCH been forced to hire people who do not represent its religious values, but it is prevented from sharing the very values that it represents with the people it set out to help. Government money, in this case, has effectively tied UMCH's hands behind its back.

While the case against UMCH might well have set a benchmark that will be used in other such cases, its roots are entwined in President Bush's faith-based initiatives, which many civil rights, religious, social service, and labor communities oppose on the grounds that funding religious institutions violates the establishment clause of the First Amendment. The outcome of the lawsuit with UMCH clearly validates their concerns.

"If we choose to be in ministry to state children we cannot require the children to go to church or participate in religious activities as a condition of residing in the Home," reads the statement regarding the lawsuit on the church Web site. "While we will be permitted to take children to church if they want to go, we cannot require it and will be obligated to offer a non-religious alternative to worship."[6] Which proves that when government money comes back to haunt you, all that's left are secular services masquerading as sanitized religion.

Claire Frazier is a freelance journalist and book author from Freeport, Maine.

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1 "New Lawsuit Charges Methodist Children's Home Uses Tax Dollars to Discriminate in Employment and to Indoctrinate Foster Youth in Religion," Lambda Legal News Release, Aug. 1, 2002.
2 Barbara Bradley Hagerty, "Faith-based Lawsuit Settled," National Public Radio's Morning Edition, Nov. 6, 2003.
3 www.ngumc.org/adobe/umchletter.pdf.
4 "In a First-of-Its-Kind Example, Lambda Legal Announces Settlement Agreement that Lays Groundwork for Civil Rights Safeguards in Public Funding of Faith Based Organizations," Lambda Legal News Release, Nov. 5, 2003.
5 Hagerty.
6 www.ngumc.org/adobe/umchletter.pdf.

1 of 1 DOCUMENT

Columbus Dispatch (Ohio)

November 15, 2002 Friday, Home Final Edition

CASE OPENS HIRING-BIAS DEBATE AGAIN

BYLINE: Felix Hoover, THE COLUMBUS DISPATCH

SECTION: NEWS - FAITH & VALUES; Pg. 01E

LENGTH: 1246 words

When the United Methodist Children's Home of Decatur, Ga., was looking for a psychologist, Alan M. Yorker seemed a good candidate: well-educated, mature and experienced.

But Yorker's job interview abruptly ended when he said he was Jewish.

For eight months, Aimee R. Bellmore worked as a counselor at the Decatur home.

But it fired her when it discovered that she was a lesbian.

Now Yorker, Bellmore and five Georgia taxpayers have filed a lawsuit against the home, which relies on state payments for nearly half its budget. They say it can't take government money while practicing religious discrimination in employment. The home, however, says it has the right to require workers to be Christians and refrain from nonmarital sex.

"This dispute is legally very complicated, and there is a good chance the courts will not resolve all the possible questions in one case," said Douglas Laycock, a professor at the University of Texas Law School who is an authority on religious-freedom law.

"But the facts here seem to present the issues very cleanly, so this could be a good test case for the Georgia courts or for the U.S. Supreme Court."

The suit was filed July 31 in the Superior Court of Fulton County against both the home and the Georgia Department of Human Resources. It says the home uses state money not only to discriminate in employment but also to indoctrinate foster children in religion, in both ways violating the state and federal constitutions and the U.S. Civil Rights Act of 1964.

Yorker, 55, has worked as a family therapist, and last year, he answered an advertisement for a psychological therapist at the children's home. His credentials include 14 years on the board of the Georgia Association of Marriage and Family Therapists.

The job application asked for his religion, church and four references, "including one minister." He wrote that he was Jewish and listed his synagogue and his rabbi of 24 years.

Sherri Rawsthorn, a supervisor at the home, later conceded in court papers that Yorker had been "one of the top candidates." Upon learning he was Jewish, however, she ended his interview.

On the advice of his attorney, Yorker declined to comment. He and Bellmore are represented by the Lambda Legal Defense and Education Fund, a New York-based advocacy group for gays and lesbians. Its Web site quotes him as saying: "It's painful to have someone tell you they won't even interview you for a job because of your religion. But the pain becomes greater when you realize your own taxes are supporting that discrimination."

Georgia and federal discrimination laws do not protect homosexuals, but Bellmore says she was fired for religious reasons -- because she does not adhere to Methodist doctrine, which says homosexuality is "incompatible with Christian teaching."

Yorker is suing for the job and for lost income; Bellmore wants to be rehired. The suit also seeks to bar Georgia from giving any more money to the 131-year-old home.

The foster home bases its defense on a Civil Rights Act exemption that permits religious institutions to discriminate in hiring, said Richard A. Puckett, its director of public relations and development.

The plaintiffs say the home waived that exemption by accepting state money, counters Greg Nevins, a lawyer at Lambda. Puckett said about 40 percent of the institution's $4.7 million annual budget is public money.

The home is represented by the Christian Legal Society's Center for Law and Religious Freedom in suburban Washington.

"The ability of faith-based organizations to serve people effectively is somewhat at stake," said center Director Gregory S. Baylor.

Although it would be wrong for a private employer to discriminate in hiring, Baylor said, "it makes eminent sense in our view that religious organizations ought to be treated differently.

"Receipt of funding or support or compensation from the government to provide services shouldn't make a difference," he said.

The lawsuit's outcome could extend far beyond Georgia.

The U.S. Supreme Court is at a crossroads in determining what religious organizations may do when they get government money, said James R. Beattie, a professor at Capital University Law School.

"It's fair to say the more you're churchlike, the greater your protection," he said. "And the more the religious function, the more discretion in religious organization."

A religious body's right to choose its clergy is practically absolute, for example, and most people accept that principle, Beattie said.

In Ohio, the U.S. Sixth Circuit Court of Appeals has distinguished between religious institutions, which receive the Civil Rights Act exemption, and

religious corporations, which don't, said David Goldberger, professor of law at Ohio State University.

He cites this example: If the Nation of Islam ran a dry cleaners and sent the profits back to Nation headquarters, it could not do some things in the business that it could do in hiring clergy.

"The question to me is whether the foster home is essentially like a religious or nonreligious institution," Goldberger said. "I believe religious schools can't be required to hire people outside their religion and can fire those who set a bad example, even those in the faith."

Unlike the United Methodist Children's Home in Georgia, the one based in Worthington relies almost entirely on public funding, said Scott Timmerman, assistant executive director. The money comes from child-welfare agencies for adoptions, behavioral treatment and other services.

Timmerman said he couldn't tell how many Methodists or non-Methodists work there.

"In practice, we don't even inquire about religious affiliation or religious preference of prospective employees or employees," he said. "We are a faith-based institution and have a spiritual life."

One of the complaints in the Georgia case is that the foster home forces its religion and morals on the children in its care. In Worthington, Timmerman said, prayer and worship are available to staff and youth, but not required.

"Everything is voluntary; nothing is imposed," he said.

Other faith-based institutions in the Columbus area welcome staff members not of their religion.

Joshua Platt, spokesman for the Columbus Jewish Federation, estimates that half of the nonclergy positions at the area's major Jewish institutions are held by non-Jews.

Ohio Dominican University, a Roman Catholic institution, has staff and faculty of various faiths and denominations, a spokeswoman said.

Much depends on the nature of a job, said the Rev. John Edgar, Southern District superintendent of the United Methodist Church's West Ohio Conference.

"The folks who are going to do pastoral care or religious education, we're very concerned they would be individuals whose beliefs are consistent with our doctrine and our faith," he said. "That doesn't mean they always have to be United Methodists even."

Job performance, rather than religious affiliation, is the main concern at the conference's headquarters and its more secular enterprises, including OhioHealth, the parent company of Doctors, Grant and Riverside hospitals, Edgar said.

The conference wants to promote its values, and one of them is pluralism, he said.

"We say our highest missional value is to make new disciples of Jesus Christ,

and you can't do that if all you do is hang out with our own folks."

This report includes material from The New York Times.

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GRAPHIC: Illustration, Photo, (1) EVANGELIA PHILIPPIDIS DISPATCH,, (2) The Rev. John Edgar,, (3) David A. Goldberger

The New York Times U.S.

A Right to Bias Is Put to the Test

By ADAM LIPTAK
Published: October 11, 2002

A lawsuit filed in Georgia recently may help answer this open legal question: Do religious institutions that are ordinarily free to discriminate in hiring on the basis of religion lose that freedom by accepting government money?

"This is an unresolved issue," said Douglas Laycock, a law professor at the University of Texas who is an expert in the law of religious liberty.

"Congress is bitterly divided over it," Professor Laycock added, referring to the uncertain fate of legislation to spend more government money on secular services provided by religious institutions. A crucial element of the debate over the legislation is whether receiving such money should limit an institution's ability to discriminate.

The Georgia lawsuit was brought by Alan M. Yorker, who was turned down for a job at a foster home in Decatur because he is Jewish.

"I remember thinking that this would be the perfect job," Mr. Yorker said, recalling an advertisement in The Atlanta Journal-Constitution last year: the United Methodist Children's Home was seeking a psychological therapist.

Mr. Yorker, 53, sent his résumé, which set out credentials that included degrees from Columbia and Georgia State, teaching at Emory, government service and decades of practice in adolescent and family therapy.

But the interview did not go well. The application he filled out that day called for his religion, church and four references, "including one minister." He wrote that he was Jewish, and listed his synagogue and his rabbi of 24 years.

Sherri Rawsthorn, a supervisor at the home, later conceded in court papers that Mr. Yorker had been "one of the top candidates for the position." On learning he was Jewish, though, she ended the interview. "We don't hire people of your faith," Mr. Yorker said she told him.

The home, which is an affiliate of the United Methodist Church and receives about 40 percent of its financing from the government, says it was entitled to reject Mr. Yorker. In court papers, it said it "declined to continue the application and interview process with Yorker because he is not a Christian."

Mr. Yorker sued, and the court will decide who is right. The answer will turn on whether government money alters the uneasy accommodation between religious liberty and civil rights.

"This is the perfect test case," Professor Laycock said.

Mr. Yorker said the answer in cases like his should be simple. "I resent that my money is being spent to discriminate," he said. "My money should be used for things that are not abridging my civil rights."

One of the home's lawyers, Gregory S. Baylor, director of the Center for Law and Religious Freedom at the Christian Legal Society, said it was important to allow religious organizations to prefer people of their own faith and to require conduct consistent with that faith. Government financing alters nothing, he said.

"Whether it's right or wrong is not affected by whether there is funding from the government or not," Mr. Baylor said. "The only question should be, Is it wrong?"

Mr. Yorker is joined in his lawsuit by another therapist, Aimee R. Bellmore, who was fired when the home learned that she is a lesbian. Her claim adds a twist to the debate.

In papers submitted to the Equal Employment Opportunity Commission, the home said Ms. Bellmore had been fired because "her religious beliefs were not in conformity with those required" and because she did not subscribe to the home's religious doctrines, including one that does not "condone the practice of homosexuality."

Discrimination on the basis of sexual orientation is not forbidden under federal or Georgia law, and Ms. Bellmore could have been fired from the local hardware store or coffee shop for being a lesbian. But she says the home's discrimination is different; in a kind of legal jujitsu, she is suing for religious discrimination.

Her lawyer, Susan L. Sommer of the Lambda Legal Defense and Education Fund, which also represents Mr. Yorker, said the home's policies amounted to religious discrimination in their effect on gays.

The civil rights laws, Ms. Sommer said, "protect against religious discrimination that takes the form of requiring an employee to lead the kind of life and subscribe to the kind of beliefs that assert there is only one true and virtuous path."

Courts have made only a handful of decisions in this area, and they are inconsistent.

In 1989, a federal court in Mississippi held that the Salvation Army could not fire Jamie Kellam Dodge, who worked in one of its shelters. The Salvation Army, which refers to itself as a Christian spiritual ministry, fired Ms. Dodge, the court said, because "she was a member of the

Wiccan religion and was involved at work with the reproduction and dissemination of Satanic manuals." The court ruled that the exemption allowing religious discrimination was lost when government money was involved.

Other courts have suggested that government financing does not create a prohibition on discrimination, or that a prohibition is created only where the government directly finances a particular job. In any event, legal experts caution that little should be read into a few scattered decisions.

Richard T. Foltin, legislative director of the American Jewish Committee, said the case in Decatur highlighted the dangers inherent in government financing of religious institutions that provide secular services.

"All the bright lines that should have been observed were crossed," Mr. Foltin said. "Organizations that are pervasively religious ought not to be receiving government funds." If such organizations do accept government money, he said, they should remember an old maxim: "With the king's shilling comes the king."

Bloomberg

Bush Blesses Religious Intolerance in Opposing It: Ann Woolner

Oct 31, 2003

Oct. 31 (Bloomberg) -- Alan Yorker's last name is an invention of his father, who changed it from Monjesky. He did so after the railroad where his own father worked fired blacks and Jews first in a job cutback.

The name change was to spare his descendants anti-Semitism, according to Yorker's account. Indeed, it let Yorker get through the door of the United Methodist Children's Home after he applied for a job as a psychotherapist. But that is as far as he got.

When the interviewer read on Yorker's application that he is Jewish, Yorker's status went from top applicant to ineligible, the home acknowledges.

Situated in the suburbs of Atlanta, the home offers foster care to some 70 children sent there by the state, which helps cover the costs. The home takes children of all faiths or none, but hires only Christians, and then only those who are either married or celibate. That's according to court papers the home's lawyers filed after Yorker and a fired counselor, a lesbian, sued.

Religious organizations can, in fact, discriminate according to religion under federal law. But until now they haven't been able to take money from the federal government if they do.

President George W. Bush is changing that. Thanks to new regulations he is pushing, groups can get Uncle Sam to pay for jobs barred to Jews, Catholics, Muslims or anyone of a disfavored faith. A constitutional court fight may be inevitable.

The Spin

The peculiar thing is that Bush pitches the new rules as if he is curbing religious discrimination instead of rewarding it.

Regulations that went into effect last month eliminate ``barriers that discriminated against faith-based groups,'' asserts the White House Web site. In fact, the barrier the new regulations remove is the one that kept tax dollars away from groups that discriminate against people of other faiths.

``The federal government should not ask, `Does your organization believe in God?'" when handing out

grants, Bush said last year.

That is not, of course, what the government has been doing. It's been handing out grants for a very long time to groups that believe in God. But until now it's been denying funds to groups that ask job applicants, ``Do you believe in God?''

Under Bush's rules, some adopted and some merely proposed, groups that do ask such questions are becoming eligible for federal funding.

Requiring Salvation

To get a job at the Orange County Rescue Mission near Los Angeles, you must sign a statement declaring, ``I have received the Lord Jesus Christ as my personal Savior'' and that you believe those who haven't will suffer ``eternal separation from God,'' according to the form provided by the mission.

The mission's aim is to ``reconstruct'' each homeless man and woman it shelters into a ``productive Christian member of society.'' To treat addicts, the mission uses ``the actual words of Jesus,'' according to the mission's Web site.

Bush and other administration officials have repeatedly said they find it just plain wrong that under the old rules the Orange County Rescue Mission was denied federal Housing and Urban Development funds because it refused to secularize.

``Goverument action like this is pure discrimination,'' Bush said in a speech this week in Dallas, again singling out the Orange County mission.

Ah, but things are changing.

Mission Accomplished

``After the regulations are finalized, groups like Orange County Rescue Mission will be able to apply for HUD funds while maintaining their religious identity,'' says a statement posted on the White House Web site.

Jim Towey, who runs the White House Office of Faith-Based and Community Initiatives, calls it an ``odious double standard'' that religious groups couldn't hire like-minded staff and still get government grants while groups like Planned Parenthood can.

``We feel there should be a uniform standard,'' he said in a telephone interview this week.

The way Towey sees it, by hiring people who agree with its mission, Planned Parenthood excludes those whose faiths oppose abortion, like Roman Catholics and Orthodox Jews.

The difference, of course, is that Planned Parenthood doesn't say, ``No Jews or Catholics allowed.''

Towey calls that a ``difference without a distinction.''

In fact, it's a critical difference which acknowledges that some people harbor views on family planning that aren't identical to those of their religion.

Helping Humanity

Plenty of faith-based organizations help the needy without requiring applicants to adhere to a particular faith. Some have been getting federal grants for years.

Devotion to Jesus' teachings has driven Habitat for Humanity to build 150,000 homes for the poor around the world since 1976. It welcomes people of all faiths onto its staff and volunteer force and into its new homes, according to its Web site.

Habitat got its first federal grant in 1996, says spokeswoman Tabitha Steinbock. And it didn't need any exemption from anti-discrimination law to do it.

No doubt the Orange County Mission Rescue is run by sincere folks who truly offer a lifeline to the desperate and the poor. I don't dispute that faith can play a powerful role in people's lives.

But don't use my money to pay an employer who turns away job applicants because of their religion.

Separating Church and State

``I am a 100 percent believer that if you only use your own, privately raised funds, you can do whatever you want,'' says the Reverend Barry Lynn, executive director of Americans United for Separation of Church and State.

The United Methodist Children Home in Decatur, Georgia, gets no federal funds. But 40 percent of its budget comes from the state, say lawyers for Yorker and Aimee Bellmore, a social worker fired by the home after it learned she is a lesbian. They are represented by Lambda Legal Defense and Education Fund, a gay rights group.

The home is in negotiations while Georgia, which was also sued, has in recent weeks settled. The state has agreed to fund no group that discriminates in hiriug. Clergy positions are allowed, but only if the salary is paid privately.

It's an idea that surely would have pleased Alan Yorker's grandfather, if not President Bush.

Slate

Is Bush Subsidizing Bigotry?

How the new faith-based executive order will work.

By Timothy Noah

Posted Monday, Dec. 23, 2002, at 5:37 PM ET

On Dec. 12, President Bush elevated the likelihood that Trent Lott would get dumped as Senate majority leader from "possible" to "certain." He did so by saying, "Recent comments by Senator Lott do not reflect the spirit of our country. He has apologized, and rightly so. Every day our nation was segregated was a day that America was unfaithful to our founding ideals." Bush's remarks, which eventually led to Lott's resignation, were meant to convey that he would give no quarter to discrimination. Ironically, though, the Lott-bashing came in the middle of a speech announcing an executive order easing up on a federal anti-discrimination policy that's been in effect in one form or another for 60 years.

The original policy was the handiwork of A. Philip Randolph. In 1941, Randolph, president of the Brotherhood of Sleeping Car Porters, threatened a march on Washington to protest discrimination against blacks in the armed forces and the defense industry. To avert the march, President Roosevelt agreed to sign an executive order banning workplace discrimination in the defense industry based on "race, creed, color, or national origin." Roosevelt subsequently broadened the ban to include all federal contractors, and the policy was further expanded by Truman, Eisenhower, and Kennedy. Here is the policy's final iteration, in a 1965 executive order issued by President Johnson:

The [federal] contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, creed, color, or national origin.

Bush's new executive order in effect says that if the federal contractor is a religious charity, it may now discriminate based on creed, but not based on race.

Slate

Is Bush Subsidizing Bigotry?

color, or national origin. Religious groups are already forbidden to discriminate based on sex under Title VII of the 1964 Civil Rights Act. The Bush executive order would essentially bring federally subsidized religious charities in line with the requirements of the 1964 law, which allows religious charities that aren't federally subsidized to discriminate based on religion, but not based on race, color, national origin, or sex. (Prior to Bush's executive order, a religious charity could take federal dollars, but only if it agreed, like Catholic Charities USA, to hire on a non-religious basis.)

At first blush, the Bush policy seems perfectly reasonable. Why shouldn't government-funded religious charities be allowed to favor members of their own religion when hiring, firing, and promoting? If the good works such charities perform are motivated by a strong sense of religious purpose, it would seem foolish to dilute that. The American Civil Liberties Union is currently exercised about the fact that a Jewish psychotherapist named Alan Yorker was denied employment at the United Methodist Children's Home in Decatur, Ga., which gets 40 percent of its funding from the state, for the sole reason that he is Jewish. So, what? The government doesn't withhold grant money from Mount Holyoke on the grounds that it won't admit men. Why should it withhold grant money from a Christian charity on the grounds that it won't hire Jews?

If Bush's get-out-of-jail-free card merely meant that religious groups could favor their own adherents in hiring federally subsidized charity workers, Chatterbox could live with it. Unfortunately, it doesn't. The difficulty arises from the subjectivity inherent in defining this or that person as belonging to this or that religion. If, on being told that Jews aren't eligible for employment, Alan Yorker were suddenly to proclaim himself a Methodist ("Consider me converted"), the United Methodist Children's Home would be right to disbelieve him. The determination that someone is a Methodist, Muslim, or Jew is inseparable from the determination that someone is a "good" Methodist, Muslim or Jew. Once you grant that, the ACLU correctly points out that other forms of discrimination

Slate

Is Bush Subsidizing Bigotry?

can slip in the back door. Although one can't really second-guess the Children's Home when it says Alan Yorker isn't a Methodist, the Lambda Legal Defense Fund, in a July brief, points out that the Children's Home has also decreed that homosexuals and unmarried heterosexuals who engage in premarital sex are also not Methodists—or at least not sufficiently Methodist to be eligible for employment there.

There isn't much one can do about the large discriminatory loophole religious groups have managed to carve out in the private sector. But it's infuriating that this loophole will now be subsidized by U.S. taxpayers. And it it's especially galling that the man responsible for opening that loophole is currently basking in praise for taking a brave stance against bigotry.

Timothy Noah is a senior writer at ***Slate***