UNITED STATES DEPARTMENT OF AGRICULTURE

NATIONAL APPEALS DIVISION

Care Net Pregnancy Center of Windham County

v.

U.S. Department of Agriculture

(On Remand from US District Court for the District of D.C., Case #1:11-cv-02082-RBW)

Remand Brief of Care Net

Michael J. Tierney, Esq., NH Bar 17173
Wadleigh, Starr & Peters, PLLC
95 Market Street
Manchester, NH 03101
Tel. (603) 669-4140
Fax. (603) 626-4808
Mtierney@wadleighlaw.com

&

Steven H. Aden, Esq., D.C. Bar 46777
801 G. Street NW
Washington, D.C. 20001
Tel: (202) 393-8690
Fax: (202) 347-3622
Saden@telladf.org

TABLE OF CONTENTS

I. Introduction and Procedural Posture

On May 16, 2011 USDA Rural Development denied Care Net eligibility to obtain a government sponsored loan solely on the basis of the Care Net's desire to engage in occasional religious speech in the facility renovated using a USDA loan. Care Net was denied eligibility on the basis that with its proposed new facility it would, in addition to providing critically needed community services including an emergency shelter for pregnant women and new mothers and pregnancy and parenting classes, also provide voluntary Bible study classes in its classroom space when not used for other purposes.

Care Net timely appealed the May 16, 2011 decision and a hearing was held in July 2011 before an NAD Hearing officer. Although both Care Net and USDA argued that the Establishment Clause/Free Speech Clause and other Constitutional provisions either prohibited or required denial of Care Net's loan eligibility on the basis of Care Net's intended religious speech, the Hearing Officer refused to rule on the Constitutional and statutory issues. An action was filed in U.S. District Court on November 22, 2011. On October 15, 2012, the District Court held that the Hearing Officer erred in refusing to rule on the Constitutional questions presented and remanded the case back to the NAD. On October 30, 2012 Hearing officer Christopher J. Hanifin asked for briefs "how NAD should proceed, and on the issues that NAD should consider on this remand" by November 28, 2012. At a telephonic conference held on November 20, 2012, USDA requested that the parties be allowed to present arguments on issues not previously raised and the Hearing Officer agreed to consider any and all arguments presented.

Care Net respectfully requests that Hearing Officer Hannifin consider Care Net's legal arguments contained in this brief and rule that USDA violated Care Net's rights under the Religious Freedom Restoration Act [RFRA], 42 U.S.C. §2000bb, as well as Care Net's

constitutional rights under the First and Fifth Amendments, the Equal Credit Opportunity Act and the Fair Housing Act by denying Care Net eligibility to participate in USDA's Community Facilities Loan and Grant program on the basis on Care Net's intended religious speech. Should Hearing Officer Hannifin determine that a hearing or oral argument is helpful, Care Net would be glad to present its arguments and answer any questions Hearing Officer Hannifin may have.

II. **Facts**

The facts necessary to determine this case are limited and not in dispute. Care Net sought aid under USDA's Community Facilities Grant and Loan program and was denied eligibility on the basis that the proposed classrooms would be used for voluntary Bible study when not used for pregnancy and parenting classes. See AR 000228.[1] In addition to the classrooms, Care Net's new facility would provide emergency housing to pregnant women and new mothers in need. AR 000135; AR 000228. Care Net was told that they could qualify for a government backed loan as long as they relegated any religious speech to a separate facility. AR 000228, AR000154. Care Net does not have the financial means to have one facility for pregnancy and parenting classes and a completely separate facility for voluntary Bible study classes. See AR000102, AR000136-139. See also Affidavit of Chechile attached as Exhibit A.

The decision under appeal in this case is USDA's May 16, 2011 decision letter. See AR000088-000091. In this decision, USDA denied Care Net the ability to apply for a loan or grant to USDA on the same basis as non-religious applicants. The reason given for the denial was "Constitutional issues with potential excessive government entanglement with religion." See AR000088. USDA explained its decision and argued to the hearing officer that the

[1] For the Hearing Officer's convenience, we will refer to the Administrative Record as it was filed by USDA in the District Court with references to AR.

Establishment Clause forbids granting loan eligibility to Care Net. See AR000247-251. In the first NAD decision, the Hearing Officer chose to affirm USDA's decision on the basis of a regulatory interpretation and expressly chose not to consider the Constitutional arguments made by both the Appellant and the Agency. See AR000066. The District Court held that Hearing Officer erred in not considering the Constitutional arguments.

The undisputed facts are that (1) USDA denied Care Net eligibility to apply for a loan on the basis that Care Net intended to have voluntary Bible Study classes in the proposed new facility's classrooms when those rooms were not being used for pregnancy or parenting classes and (2) there is no additional construction necessary to allow Bible Study to take place in these classrooms. See Affidavit of Chechile attached as Exhibit A at ¶¶ 12 & 14; AR000155; See also AR00008 (statement of USDA Director Rhonda Shippee that "it is our opinion there are no factual issues in dispute as Appellant's filing clearly holds that they hold religious education and hold it in the same classrooms as their other services.") It is further undisputed that USDA determined that Care Net met all of the standard eligibility criteria and that Care Net would be eligible to participate in USDA's Community Facilities Grant and Loan program as long as Care Net agreed to keep all religious speech in a separate building. See Hearing Officer Decision of 9/26/2011, at AR00065-AR00066; AR000155. Based on these undisputed facts, Care Net is entitled to a ruling as a matter of law that USDA has violated the Religious Freedom Restoration Act [RFRA], 42 U.S.C. §2000bb, as well as Care Net's constitutional rights under the First and Fifth Amendments, the Equal Credit Opportunity Act and the Fair Housing Act by denying Care Net eligibility to participate in USDA's Community Facilities Loan and Grant program on the basis on Care Net's intended religious speech.

III. Argument

A. Denial of Care Net's Eligibility Because of Care Net's Intention to Provide Bible Study Classes Violated the Religious Freedom Restoration Act [RFRA], 42 U.S.C. §2000bb

The government may not impose a substantial burden on religious exercise without a compelling governmental interest. The Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb-2, provides that:

> (a) In general. Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).
>
> (b) Exception. Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person--
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest

1. USDA's Denial of Loan Eligibility Unless Care Net Discontinues its Bible Study Classes is a Substantial Burden on Care Net's Religious Exercise

USDA's denial of eligibility constitutes a substantial burden on Care Net's religious exercise[2] under RFRA. USDA indicated that Care Net had to choose between offering Bible study classes at its proposed new facility or obtaining a loan from the Community Facilities loan program. See Affidavit of Chechile, ¶ 12, attached at Exhibit A; AR000154. Care Net could be eligible for a loan if, and only if, Care Net agreed to relegate its religious speech to an offsite location. See AR000228, ¶ 7; AR000154. This choice of participating in exercising one's First

[2] RFRA, 42 U.S.C. §2000bb-2(4) defines exercise of religion by referring to the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §2000cc-5. RLUIPA provides that "The term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief," and that "The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose." Therefore, Care Net's purchase and renovation of a building to host pregnancy, parenting and Bible study classes constitutes religious exercise under RFRA. The issue is not whether Bible study can happen somewhere else or whether Care Net is compelled by its religious faith to have Bible study in the same building as pregnancy classes, but rather whether Care Net needs to choose between having Bible study or obtaining a government backed loan.

Amendment rights to engage in religious speech or participating in a government program is a clear substantial burden.

"[T]he right to the free exercise of religion unquestionably encompasses the right to preach, proselyte, and perform other similar religious functions . . . ." McDaniel v. Paty, 435 U.S. 618, 626 (1978). The Supreme Court has held that a person "may not be compelled to choose between the exercise of a First Amendment Right and participation in an otherwise available public program." *Thomas v. Review Board*, 450 U.S. 707, 716 (1981). The choice between receiving the benefit of a government program and exercising one's religion is a quintessential substantial[3] burden. See *Sherbert v. Verner*, 374 U.S. 398 (1963) (holding requiring one to choose between exercising one's faith by maintaining the Sabbath and obtaining unemployment insurance benefits to be a substantial burden); *Thomas v. Review Board*, 450 U.S. 707, 716 (1981) (same); *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136 (1987) (same). Therefore, Care Net has met its burden of establishing that the governmental action results in a substantial burden on religious exercise.

2. USDA is Unable to Prove That a Compelling Interest Exists to Deny Loan Eligibility Nor that Complete Denial of Eligibility is the Least Restrictive Means

Once an applicant has established a substantial burden on religious exercise, the burden is on the government to prove both that it has a compelling interest in burdening Care Net's religious exercise and that complete denial of loan eligibility to Care Net is the least restrictive means of furthering that compelling interest. The Supreme Court has recognized that the burden

[3] The evidence in the administrative record is clear that Care Net did not have sufficient means to renovate one building for pregnancy and parenting classes and then rent a separate space just for Bible study. See AR000102, AR000136-139. If Care Net had the means to operate two separate locations, why would they have applied for the renovation loan? See AR000102 (Care Net's current rent was $550 and the monthly payment on a $100,000 loan to renovate the Birge Street property would be $506 a month).

is on the government to prove both of these. *Gonzales v. O Centro Espirita*, 546 U.S. 418, 428 (2006) (affirming a preliminary injunction for religious claimants in a RFRA case). USDA does not have a compelling interest to ban religious speech in buildings constructed with government loans nor would a complete denial of loan eligibility be the least restrictive means of achieving any compelling governmental interest.

i. Allowing Care Net to Obtain a Loan on the Same Basis as Non-religious Applicants Does Not Violate the Establishment Clause

USDA asserted before the hearing officer that it had a compelling interest in not violating the Establishment Clause and that allowing Care Net to have Bible study in a facility renovated using a USDA loan would violate the Establishment Clause. USDA erred in both accounts. Allowing Care Net to obtain a loan from USDA on the same basis as a non-religious organization would not violate the Establishment Clause.

In determining if a government program violates the Establishment Clause, one must determine: (1) whether the program has a secular purpose and (2) whether the program has the primary effect of advancing or inhibiting religion. The effect of a program is determined by analyzing whether the government program will "[a] result in religious indoctrination by the government [b] define its recipients by reference to religion or [c] create an excessive entanglement." *Mitchell v. Helms*, 530 U.S. 793, 808 (2000). The test is applied to USDA's program as a whole and not to the individual loan that has been requested by Care Net. See *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (looking at program as a whole and not at religiosity of individual recipients).

a. USDA's Community Facilities Program Has a Valid Secular Purpose

It is undisputed that the Community Facilities program has a valid secular purpose. The stated purpose is to "assist in the development of essential community facilities in rural areas." 7 C.F.R. §3570.52. The purpose of the program is not to advance or inhibit religion.

In their arguments to the hearing officer, USDA seemed to argue that the Establishment Clause would be violated because Care Net has a religious purpose. But the focus of the inquiry is not on the religious entities' purpose but on the government's purpose. For example, in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), the Supreme Court upheld an aid program which directed 96% of its aid to religious schools. Although the three dissenting justices wished to discuss the sectarian purpose of the religious schools, the majority held that in a neutrally applied program, it is irrelevant how religious some of the recipients may be as long as the program is not designed to benefit religion. Likewise, the Sixth Circuit has upheld a challenge to a Detroit redevelopment program where the city paid for 50% of the improvements to buildings in a downtown area, including churches. The Sixth Circuit held that the redevelopment aid, only 6% of which went to churches, was neutrally available to all property owners in a certain geographic area and, therefore, the program had a valid secular purpose. See *American Atheists v. City of Detroit Downtown Development Authority*, 567 F.3d 278 (6th Cir. 2009). Similarly, USDA's Community Facilities program has a valid secular purpose.

b. The Community Facilities Program Does Not Have the Primary Effect of Advancing or Inhibiting Religion

1. The Community Facilities Program Does Not Result in Religious Indoctrination by the Government

The fact that religious speech may take place in a building renovated by a government loan does not convert that speech into government speech any more than the fact that prayers are

said in a private home renovated with a government loan converts that family's prayers into government speech. The Supreme Court has held that as long as a program is neutral toward religion and does not favor certain sects over others, then any religious indoctrination will be properly attributed to private parties.

> In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion. If the religious, irreligious, and a religious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government. For attribution of indoctrination is a relative question. If the government is offering assistance to recipients who provide, so to speak, a broad range of indoctrination, the government itself is not thought responsible for any particular indoctrination. To put the point differently, if the government, seeking to further some legitimate secular purpose, offers aid on the same terms, without regard to religion, to all who adequately further that purpose then it is fair to say that any aid going to a religious recipient only has the effect of furthering that secular purpose. The government, in crafting such an aid program, has had to conclude that a given level of aid is necessary to further that purpose among secular recipients and has provided no more than that same level to religious recipients. *Mitchell v. Helms*, 530 U.S. 793, 809 (2000).[4]

In order to avoid violating the Establishment Clause, then, the Community Facilities Program need only be neutrally available to secular and religious organizations without regard to religious belief.

[4] Justice O'Connor's concurrence in Mitchell v. Helms, 530 U.S. 793, 809 (2000) does not limit the holding of the plurality in a way relevant to the facts of this case. Justice O'Connor disagreed with the plurality that neutrality in the availability of a government program could ***always*** guarantee compliance with the Establishment Clause. Nevertheless, Justice O'Connor did not hold that any use of a building renovated using government funds violates the Establishment Clause. In fact, Justice O'Connor upheld the program in Mitchell even though she found that there were *de minimis* instances of public aid being used to advance religious instruction. Id. at 861-866. Her concurring opinion held that the party asserting the Establishment Clause violation must show more than just a *de minimis* use of public funds to advance religious instruction. Id. at 864. Likewise, citing Justice O'Connor's concurrence in Mitchell, the D.C. Circuit has also recognized that *de minimis* use of public aid does not violate the Establishment Clause. See American Jewish Cong. v. Corp. for Nat'l and Cmty. Serv., 399 F.3d 351 (D.C. Cir. 2005).[4] In the present case, ***there would be no "diversion" of public funds to religious instruction*** as the three classrooms would be built and necessary for the parenting and pregnancy classes regardless of whether Bible study took place in the classrooms when not being used for other purposes. USDA indicated that they were willing to provide a loan for the complete cost of the renovations to the classrooms as long as the classrooms sat empty when not being used for pregnancy and parenting classes. AR000154. There are no additional renovation loan funds necessary so Justice O'Connor's concurrence indicating that neutrality is not sufficient when there is actual evidence of actual diversion is inapplicable. USDA has presented no evidence of actual diversion.

The neutrality principle of the *Mitchell* plurality has been recognized by the majority of the Court in several other cases. In *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001), the Supreme Court held that allowing a club to engage in religious instruction in an elementary school classroom, when not being used for school purposes, does not violate the Establishment Clause. Id. at 114. The Court expressly rejected the school's argument that because the speech would be occurring in an elementary school classroom, the speech would be presumed to be government endorsed speech. To the contrary, the Court held that **not allowing the Good News Club to engage in after school religious speech while allowing non-religious clubs to engage in after school religious speech would evidence an impermissible hostility to religion**. *Id*. at 114. Likewise, allowing Care Net to participate in USDA's Community Facilities' Loan Program only if religious speech is kept out of the building to be renovated with a USDA backed loan would not only not be required by the Establishment Clause, but the Establishment Clause would prevent USDA from evidencing such hostility to religion. See also *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993)(a school that allowed the use of school building for showing of educational movies could not deny an applicant because it wished to show movies relating to religious education); *Widmar v. Vincent*, 454 U.S. 263 (1981)(when a university allows rooms to be used for non-religious purposes, a university must allow use of publicly funded rooms for religious education and worship).

2. The Community Facilities Program Does Not Define Its Recipients By Reference to Religion

7 C.F.R. § 16.2(a) provides that "A religious organization is eligible on the same basis as any other eligible private organization . . . [and the government shall not] discriminate for or against a religious organization on the basis of the organization's religious character or affiliation." Therefore, the program does not define loan recipients by reference to religion.

3. The Community Facilities Program Does Not Create an Excessive Entanglement With Religion

USDA's May 16, 2011 denial letter (AR00005) implies that concern over entanglement was the primary reason for denial. USDA appears to opine that government funds can never be used to renovate a building, even for a secular purpose, if religious activity will take place there. It further erroneously suggests that it has an obligation to monitor usage of Care Net's building to make sure it is never used for religious instruction. This is both contrary to the Constitution and USDA's own regulations. The Supreme Court has held several times that government buildings, built with government funds, must allow religious education or even worship to take place in the building. *Good News Club*, 533 U.S. 98 (public elementary school must allow group to host Bible study classes in publicly funded and maintained room); see also *Lamb's Chapel*, 508 U.S. 384 (use of public high school classroom for religious movies); *Widmar*, 454 U.S. 263 (state university must allow student group to conduct religious worship in state funded and maintained room). Likewise, in *Rosenberger*, 515 U.S. 819, the Supreme Court held that a University that provides funding to secular groups does not violate the Establishment Clause by providing funding to religious groups as well. In none of the aforementioned cases did the Court find an excessive entanglement issue because not only did the government not have to monitor compliance, the public buildings were neutrally available to all. The Court has never held that a neutrally applied program of government aid for construction or renovation of buildings cannot be utilized by religious organizations.

ii. USDA's Interest in Preventing Care Net From Providing Religious Instruction in Buildings Renovated with USDA Loans Cannot Be Said to be Compelling as USDA Allows Others to Engage in Religious Instruction in Buildings Renovated with USDA Loans

USDA has recognized in its own regulations that it can provide a loan to an entity that will sometimes use its space for religious instruction. 7 C.F.R. § 16.3(d)(1) provides that:

> Where a structure is used for both eligible and inherently religious activities, direct USDA assistance may not exceed the cost of those portions of the acquisition, construction, or rehabilitation that are attributable to eligible activities in accordance with the cost accounting requirements applicable to USDA funds. Sanctuaries, chapels, or other rooms that an organization receiving direct assistance from USDA uses as its principal place of worship, however, are ineligible for USDA-funded improvements.

USDA regulations explicitly recognize that it can provide loans to religious organizations without violating the Establishment Clause. Likewise, other regulations recognize that buildings renovated with USDA loans may have religious instruction take place in them without violating the Establishment Clause. USDA's own interpreting guidelines state "Where a structure is used for both eligible and inherently religious activities, the [adopted at 7 C.F.R. § 16.3(d)(1)] rule clarified that USDA funds may not exceed the cost of those portions of the acquisition, construction or rehabilitation that are attributable to eligible activities." See Equal Opportunity for Religious Organizations, 69 Fed. Reg. 41,376 (July 9, 2004).

Finally, and perhaps most telling, USDA regulations expressly provide that houses, farms, apartment buildings, or other types of dwellings can conduct as much religious exercise as the residents of such dwellings desire without violating the Establishment Clause. See 7 C.F.R. § 16.3(d)(3). Where USDA does not believe it is a violation of the Establishment Clause to conduct religious exercises in farms or homes constructed or renovated using USDA funds, it cannot seriously argue that renovating community facilities via a USDA loan would violate the Establishment Clause. Where a government agency has itself created exceptions, it cannot claim a compelling interest in imposing its requirements on other applicants. See *Gonzales v. O Centro Espirita*, 546 U.S. at 433 (the fact that government had a regulatory exemption for

religious users of peyote meant the government could not maintain that it had a compelling interest in enforcing its drug laws for other hallucinogens).

3. Complete Denial of Loan Eligibility is Not the Least Restrictive Means of Avoiding a Violation of the Establishment Clause

USDA argued that the Establishment Clause would not be violated if it could prorate the amount of a loan for the percentage of a building that would be used for non-religious purposes. For example, if a 100,000 square foot homeless shelter was built that had a 1,000 square foot room dedicated to religious gatherings, the homeless shelter could receive a loan for 99% of the cost of the building. In Care Net's case, when the classrooms are not in use for parenting or pregnancy classes, the classrooms may be used for Bible study classes. No construction is necessary to make these classrooms available for religious instruction. USDA is willing to provide a loan to fund the renovations and have the rooms sit empty when not being used for pregnancy or parenting classes. Therefore, no proration is necessary as no additional funds are necessary to make the classroom suitable for Bible study. If Care Net wished to put up crucifixes, scriptures or religious icons on the walls of the classrooms (which it has no current intention of doing), such religious images would be expressly allowed by 7 C.F.R. §16.2(b)(1) but such religious images would have to be prorated and could not be paid for using a USDA loan under the USDA regulations. Care Net does not intend to use loan funds for any religious purposes. Therefore, USDA's complete denial of Care Net's eligibility is not the least restrictive means of achieving compliance with the Establishment Clause.

Furthermore, even if pro-ration was constitutionally necessary, USDA failed to inquire as to the square footage that would be used to house the classrooms versus the other areas. As set forth in more detail at Exhibit B, the three classrooms constitute less than 20% of the square

footage of the proposed renovated building.[5] Therefore, even if pro-rating to exclude the classrooms was necessary, USDA still should have deemed Care Net eligible for 80% of the acquisition and rehabilitation cost.

B. USDA's Denial of Loan Eligibility is a Violation of Care Net's First Amendment Rights

i. USDA's Denial of Loan Eligibility is a Violation of Care Net's Right to Free Exercise Under the First Amendment

USDA's denial of Care Net's loan eligibility is also in violation of Care Net's rights to free exercise under the First Amendment. In order to show that a neutral and generally applicability law violates RFRA or the Free Exercise Clause, a plaintiff must establish that the regulation results in a substantial burden. Nevertheless, there is no need to establish substantial burden if the regulation is not neutral and generally applicable. See *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (U.S. 1993); *Employment Div. v. Smith*, 494 U.S. 872, 879 (U.S. 1990). In particular, the Supreme Court has held that strict scrutiny should be automatically applied when there were "individualized assessments" of one's entitlement to a government program. *Smith* at 884. It is clear that Care Net was not denied on the basis of neutral and generally applicable criteria but rather USDA individually assessed whether Care Net would qualify for a loan. Therefore, strict scrutiny applies regardless of whether USDA's actions result in a substantial burden on Care Net's religious exercise.

[5] USDA was provided with a floor plan of the proposed facility early on in the loan application process. See AR000135. Care Net suggested that if proration was necessary, that the square footage for a classroom might be an appropriate proration (see Transcript, 111:1 to 111:7) but USDA refused to consider proration by space because of the allegation that the heating or electrical renovations would benefit the teaching from a religious perspective. See Transcript 173:2 to 173:20. If USDA's argument that the use of heating ducts created an Establishment Clause problem had any merit, then the Supreme Court could not have explicitly held that religious instruction can take place in public schools without violating the Establishment Clause. See *Good News Club v. Milford Cent. Sch*., 533 U.S. 98 (2001).

USDA individually assessed whether it felt Care Net was "too religious" to be allowed to obtain a loan available to non-religious entities. USDA admits that Care Net met all of the standard eligibility factors but that additional requirements, not imposed on non-religious applicants, but additional "Faith Based Eligibility Factors" were individually imposed on Care Net's "[b]ecause of the overtly religious character of certain provisions of the applicant's promotional and program materials." AR000094; See also September 26, 2011 Hearing Officer Decision at AR00065-AR00066 (recognizing that Care Net met all of the standard eligibility factors but was denied eligibility solely on the basis that Care Net was not able to meet additional "Faith Based Eligibility Factors" only applied to religious organizations) and AR000095 ("there is no bright line test which would lead to a clear result; rather, there are nuanced decisions which depend on subtle differences in underlying facts.") Where USDA imposed additional requirements on Care Net's eligibility for a loan, not imposed on non-religious applicants, USDA's requirements are subject to strict scrutiny under the Free Exercise Clause regardless of whether there has been a substantial burden. Smith at 884.[6]

In order to meet strict scrutiny, USDA has the burden of showing that it had a compelling interest and complete denial of the loan was the least restrictive means of effecting that interest. USDA's only proffered compelling interest is the Establishment Clause, and as previously stated, the Establishment Clause does not require that Care Net be treated less favorably than a non-religious loan applicant. See also Bronx Household of Faith v. Bd. of Educ., 2012 U.S. Dist. LEXIS 91015 (S.D.N.Y. June 29, 2012)(Free Exercise clause requires strict scrutiny of school district policy prohibiting weekend worship services which cannot be justified by

[6] See also Bd. of County Comm'rs v. Umbehr, 518 U.S. 668, 674 (U.S. 1996) ("constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights [and] modern 'unconstitutional conditions' doctrine holds that the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech' even if he has no entitlement to that benefit.")

antiestablishment concerns.) Whereas the Supreme Court has repeatedly determined that there is no excessive entanglement of religion by allowing private religious speech in a publicly funded building, there can be no excessive entanglement by allowing Care Net to obtain a loan to renovate its building and conduct private religious speech in the classrooms when the classrooms are not being used for pregnancy or parenting classes. Therefore, if not required by the Establishment Clause, treating Care Net differently on the basis of its intent to engage in religious speech is a violation of its Free Exercise rights.

ii. USDA's Denial of Care Net's Eligibility on Basis of Care Net's Religious Speech Violates Care Net's Rights to Free Speech

Care Net was denied eligibility for a Community Facilities loan solely on the basis that Care Net intended to offer Bible study classes in the same classrooms that it offers pregnancy and parenting classes. See Affidavit of Chechile, ¶ 12, attached at Exhibit A; AR000154. Denial of eligibility on the basis of Care Net's intended religious speech is a violation of Care Net's Free Speech rights under the First Amendment to the Constitution.

Under the Free Speech clause, the government may not discriminate in providing benefits on the basis of the viewpoint of the speaker. It is well settled that the government may not provide benefits to a broad class of recipients while excluding it to religious groups. For example, in *Good News*, 533 U.S. 98, the Supreme Court held that a public school, that offered space to various community groups, must allow a group to host Bible study classes in publicly funded and maintained rooms. Likewise, in *Lamb's Chapel*, 508 U.S. 384 , the Supreme Court held that a school that allowed the use of school building for showing of educational movies could not deny an applicant because it wished to show movies relating to religious education. See also *Widmar*, 454 U.S. 263 (university must allow use of publicly funded rooms for religious

education and worship). In all these cases, the Supreme Court rejected the school's claims that the Establishment Clause required the schools to exclude religious instruction while allowing secular instruction. [7]

The Supreme Court has applied its religious free speech jurisprudence to governmental funding decisions as well. Where a government provides funding to secular organizations, it must apply funding to religious organizations on the same basis. "We have held that the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Rosenberger*, 515 U.S. 819, at 839. In *Rosenberger*, the Supreme Court rejected the University's claim that it could fund secular student newspapers but refuse to fund a Christian newspaper on concerns that direct funding of religious education would violate the Establishment Clause. In fact, the Supreme Court suggested that providing a governmental subsidy to non-religious speakers but not to religious speakers would itself be an Establishment Clause violation. *Id*. at 845-46.

USDA has acknowledged that it has not applied its policies and criteria evenly. USDA (similar to the governmental entities in *Good News Club*, *Lamb's Chapel*, *Widmar* and *Rosenberger*) defends its viewpoint discrimination alleging that it has a compelling interest in avoiding an Establishment Clause violation. The Supreme Court has suggested that fear of violating the Establishment Clause would not justify a violation of the Free Speech Clause. *Good*

[7] What is at issue here is not whether Care Net is entitled to a loan but whether USDA may deny a loan on the basis of Care Net's intended religious speech. The Supreme Court has recognized that "constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights [and] modern 'unconstitutional conditions' doctrine holds that the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech' even if he has no entitlement to that benefit." *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996). Similarly, regardless of whether USDA could deny Care Net for financial reasons, USDA could not deny Care Net on the basis of its intended speech.

News Club v. Milford Cent. Sch., 533 U.S. at 113 ("it is not clear whether a State's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination"). Nevertheless, even if a potential violation of the Establishment Clause could justify viewpoint discrimination in violation of the Free Speech Clause, allowing Care Net to apply for a loan or grant on the same basis as a non-religious non-profit would not violate the Establishment Clause.

C. USDA's Denial of Eligibility on the Basis of Care Net's Religious Speech is a Violation of Care Net's Rights to Equal Protection Under the Fifth Amendment

Pursuant to the Equal Protection guarantees of the Fifth Amendment, the government cannot treat similarly situated individuals differently. If the characteristic of the distinction is either the exercise of a fundamental right such as freedom of speech or freedom of religion or if the distinction is based on a protected class distinction, such as race, religion or ethnicity, the government is subject to strict scrutiny. It must justify the disparate treatment by showing it has a compelling reason and the disparate treatment is the least restrictive means of achieving that compelling interest.

Care Net is similarly situated to other non-profit organizations in rural areas that wish to apply for loans or grants from USDA's Community Facilities Program. USDA has no rational (or compelling) reason to treat religious and non-religious organizations' applications for loans differently. Nevertheless, USDA has, in violation of Care Net's rights to equal protection, required organizations wishing to engage in religious speech to comply with additional "Faith Based Eligibility Factors" not required of non-religious non-profits.

In addition, Care Net is similarly situated to other USDA loan applicants who intend to read the Bible or have religious instruction in buildings purchased or renovated using loans from a USDA program. USDA has no rational (or compelling) reason to treat applicants for

Community Facility loans differently than applicants for other types of USDA loans such as Farm Services Loans. Nevertheless, while USDA has required organizations applying for Community Facilities loans wishing to engage in religious speech to comply with additional "Faith Based Eligibility Factors," USDA regulations expressly provide that houses, farms, apartment buildings, or other types of dwellings can conduct as much religious exercise as the residents of such dwellings desire without violating the Establishment Clause. See 7 C.F.R. § 16.3(d)(3).

D. USDA'S Denial of Loan Eligibility on the Basis of Care Net's Intended Religious Speech is a Violation of the Equal Credit Opportunity Act [ECOA] 15 U.S.C. §1691.

ECOA makes it "unlawful for any creditor to discriminate against any applicant, with respect to any aspect of a credit transaction, on the basis of...[r]eligion." 15 U.S.C. § 1691(a)(1); see, e.g., *Garcia v. Johanns*, 444 F.3d 625, 629 (D.C. Cir. 2006). Under ECOA, "applicant" includes Care Net. 15 U.S.C. §§ 1691a(b), (f). "Creditor" includes a government agency such as USDA. Id. at (e), (f); 12 C.F.R. § 202.2(l). A creditor "discriminates" against an applicant when it "treat[s] an applicant less favorably than other applicants." Id. at (n). Any party harmed by a creditor's discrimination may maintain a private right of action against the creditor. 15 U.S.C. § 1691e(a); *Garcia*, 444 F.3d at 629.

In this case, there is no dispute that Care Net did not receive the loan solely "on the basis of religion." USDA informed Care Net that it met all of the standard eligibility factors and could qualify for the loan if, and only if, Care Net agreed to not engage in religious speech. See September 26, 2011 Hearing Officer Decision at AR00065-AR00066; Affidavit of Chechile attached as Exhibit A at ¶¶ 12 & 14; AR000154. USDA's decision to deny Care Net's loan clearly violates ECOA. See, e.g., *Anderson v. United Finance Co.*, 666 F.2d 1274, 1277 (9th Cir.

1982)(regulators interpreting ECOA "have repeatedly stated that if an applicant qualifies for a loan under the creditor's standards," creditor may not deny loan on impermissible basis). Therefore, Care Net is entitled to summary judgment on its ECOA claims.

E. USDA'S Denial of Loan Eligibility on the Basis of Care Net's Intended Religious Speech is a Violation of the Fair Housing Act, 42 U.S.C. § 3605.

The Fair Housing Act [FHA] prohibits lenders from denying loans for dwellings on the basis of religion. 42 U.S.C. § 3605. The facts are clear that Care Net's proposed new facility constitutes a dwelling. Dwellings include emergency shelters for pregnant women, abused women or new mothers.[8] See *Lakeside Resort Enters. v. Bd. of Supervisors of Palmyra Township*, 455 F.3d 154 (3d Cir. 2006)(dwelling under FHA includes drug and alcohol facility). The length of stay for Care Net's emergency shelter is variable, but in some cases may exceed the length of the pregnancy and a period of new motherhood – i.e. over 1 year. See Affidavit of Chechile, attached as Exhibit B. This is comparable or in excess of the length of stay of other transitional housing recognized to be a dwelling under the FHA. See *Cohen v. Twp. of Cheltenham*, 174 F.Supp.2d 307, 323 (E.D.Pa. 2001)(group home with stays of 9-10 months was a dwelling).

It is likewise clear that Care Net's loan eligibility was denied solely on the basis of Care Net's intent to engage in religious speech in other parts of the proposed renovated facility.[9] See

[8] It is undisputed that Care Net was denied eligibility for a Community Facility Program loan to renovate its proposed building including a shelter for women. See AR000135, AR000154, Affidavit of Chechile at Exhibit A. Throughout the loan application process, Care Net discussed with USDA that part of their new facility would be used for housing for this demographic. See AR000159 (notes from 1/14/11), AR000150 (discussing rental space), AR000135 (floor plan), AR000151(transitional rental for new mom/baby).

[9] Interestingly, USDA regulations explicitly prohibit USDA from denying a loan on the basis of prayer or religious discussion taking place in the emergency shelter portion of the new facility. See 7 C.F.R. § 16.3(d)(3). Nevertheless, USDA denied the entire loan based on Care Net's intent to have voluntary Bible study in the classrooms when not used for pregnancy or parenting classes. See AR00228, ¶ 7.

AR000154; AR000228, ¶ 7; Affidavit of Chechile, ¶ 12, attached at Exhibit A. Therefore, USDA's denial of loan eligibility, in addition to violating the Constitution, also constitutes a violation of the FHA.

VII. CONCLUSION

USDA violated Care Net rights under RFRA, ECOA, the FHA and the First and Fifth Amendments to the Constitution by denying Care Net eligibility to participate in USDA's Community Facilities Loan and Grant Program on the sole basis that Care Net intended to offer voluntary Bible study in its classrooms when the classrooms were not otherwise being used for pregnancy and parenting classes. USDA's argument that a complete denial of Care Net's eligibility was required by the Establishment Clause is unsupported by numerous cases holding that religious instruction may permissibly take place in buildings built or renovated using government funds. Therefore, the Hearing Office should grant Care Net's appeal and find that USDA violated Care Net rights under RFRA, ECOA, the FHA and the First and Fifth Amendments to the Constitution and that the violations were not required by Establishment Clause.

Respectfully submitted,

CARE NET PREGNANCY
CENTER OF WINDHAM COUNTY

By their attorneys,

WADLEIGH, STARR & PETERS, PLLC

Dated: November 28, 2012

By /S/ Michael J. Tierney
Michael J. Tierney, Esq., NH Bar 17173
95 Market Street
Manchester, NH 03101
Tel. (603) 669-4140

Fax. (603) 626-4808
Mtierney@wadleighlaw.com

ALLIANCE DEFENSE FUND

By /S/ Steven H. Aden
Steven H. Aden, Esq., D.C. Bar 46777
801 G. Street NW
Washington, D.C. 20001
Tel: (202) 393-8690
Fax: (202) 347-3622
Saden@telladf.org