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Department of Health and Human Services
HHS-OS-2020-0001 (RIN 0991-AC13)
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OS
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Washington, D.C. 20201

Re: Ensuring Equal Treatment of Faith-Based Organizations – RIN 0991-AC13, Docket ID HHS-OS-2020-0001

To Whom It May Concern:

Alliance Defending Freedom (ADF) submits these comments on the Notice of Proposed Rulemaking (NPRM) on the Equal Treatment of Faith-Based Organizations issued by the U.S. Department of Health and Human Services. ADF strongly supports the revision of existing regulations to remove religious discrimination against faith-based organizations and to clarify their rights as they participate in Department programs.

ADF is an alliance building legal organization that advocates for the right of people to freely live out their faith. It pursues its mission through litigation, strategy, and funding. Since its launch in 1994, ADF has handled countless matters involving the religious freedom principles addressed by the Notice of Proposed Rulemaking. ADF routinely advises and represents faith-based organizations and individuals facing religious discrimination stemming from state and federal regulations. For example, ADF represented before the Supreme Court the petitioner in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), in challenging its exclusion by the state of Missouri from a playground surface material grant program because of its religious identity.

ADF believes that the proposed revisions to 45 C.F.R. 87 are necessary to protect our nation's faith-based organizations from religious discrimination. The proposed rule ensures a level playing field for faith-based organizations by removing extraneous burdens not required of secular organizations, and also provides clarity to faith-based organizations on their rights and

obligations while participating in Department programs. The proposed rule is necessary because: (1) the current HHS regulation violates the free-exercise rights of faith-based organizations, and (2) the current HHS regulation enshrines discrimination against faith-based organizations.

A. The Current Regulation Violates the Free Exercise Rights of Faith-Based Organizations

The Supreme Court held in *Trinity Lutheran Church of Columbia, Inc. v. Comer* that the Free Exercise Clause protects religious observers from discrimination and "unequal treatment" and subjects any law that targets their religious status to the strictest scrutiny.[1] The provisions encompassed in the current HHS regulation directly conflict with this holding, as the regulation holds faith-based organizations to specific requirements that secular organizations do not have to observe. The proposed rule brings HHS regulations in line with Supreme Court precedents, the Religious Freedom Restoration Act (RFRA), and the Attorney General's Memorandum on Religious Liberty.[2]

a. *Regulations Need to Be Neutral Towards Religion and Religious Organizations*

In *Trinity Lutheran*, the Supreme Court held that the program run by the Missouri Department of Natural Resources violated the rights of Trinity Lutheran Church under the Free Exercise Clause of the First Amendment by requiring Trinity Lutheran "to renounce its religious character in order to participate in an otherwise generally available public benefit program."[3] The Court has held repeatedly that "denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion."[4] Even so, the current HHS regulation institutes stringent, burdensome provisions on religious organizations by forcing them to operate under procedures that secular organizations do not have to follow. These regulations are facially discriminatory against religion and cannot satisfy strict scrutiny.[5] The proposed rule is needed to ensure religious organizations will be treated equally and bring the current HHS regulations into compliance with the Court's holding in *Trinity Lutheran*.

The proposed regulations are also necessary to address current violations of RFRA. Under RFRA, if the government places a substantial burden on religion, it must prove that the burden furthers a compelling government interest and that the methods are the least restrictive

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[1] *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2019 (2017); *see also Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 533 (1993) ("[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid….") (internal citations omitted).
[2] U.S. Att'y Gen. Mem. on Federal Law Protections for Religious Liberty (October 6, 2017, https://www.justice.gov/opa/pressrelease/file/1001891/download).
[3] *Trinity Lutheran*, 137 S. Ct. at 2024.
[4] *Id.* at 2019.
[5] *See Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 533 ("[F]or the minimum requirement of neutrality is that a law not discriminate on its face.").

means of meeting that interest.[6] The current HHS regulations cannot survive the most exacting scrutiny the Court places on laws imposing disabilities based on religious status.[7] For example:

- 45 C.F.R. § 87.3(e) currently requires faith-based organizations to provide assurances and notices about where and how they use their federal financial assistance;
- 45 C.F.R. § 87.3(i) requires faith-based organizations to provide written notices to beneficiaries explaining to them their various rights, such as nondiscrimination based on religion, the requirement that the involvement in religious activity is voluntary, and that the beneficiaries can report any violations of these provisions; and
- 45 C.F.R. § 87.3(j) and (k) force faith-based organizations receiving direct social assistance to attempt to identify alternative providers if the beneficiary, or prospective beneficiary, objects to the religious character of the organization. If an alternative provider was available, the regulation forces the faith-based organization to refer the beneficiary to that provider and make the referral.

Under each of these current regulations, religious organizations are saddled with unique burdens and requirements that are not placed upon their secular counterparts.

Additionally, under these regulations, religious organizations could be forced to abandon core principles. For example, under the referral requirement a pro-life pregnancy center could be legally obligated to refer a beneficiary to an abortion clinic. Using the force of government to make a pro-life advocate culpable in the termination of a life violates the First Amendment right to free exercise and places a burden on their religious freedom, in addition to protected free speech rights.

ADF supports the proposed changes to 45 C.F.R. § 87.3 (e), (i), (j), and (k). Forcing only faith-based organizations to follow specific requirements violates RFRA and places a clear burden on religion without establishing a reasonable, much less compelling, government interest.[8] Significantly, as noted in the NPRM, the Department is unaware of even a single instance in which a beneficiary sought an alternative provider because of the religious nature of the organization.[9]

The current regulations also violate *Trinity Lutheran* because they facially treat faith-based organizations differently based solely on their religious status. In *Trinity Lutheran*, the Court struck down a similar form of religious status discrimination, thus protecting "religious observers against unequal treatment."[10] The Court ruled that the Free Exercise Clause protects against "indirect coercion or penalties on the free exercise of religion, not just outright prohibitions."[11]

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[6] 42 U.S.C. § 2000bb-1(a)-(b).
[7] *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 726 (2014).
[8] 42 U.S.C. § 2000bb-1.
[9] Ensuring Equal Treatment of Faith-Based Organizations, 85 FR 2974-01 (proposed rule January 17, 2020) (to be codified at 45 C.F.R. pt. 87 and 45 C.F.R. pt. 1050l).
[10] *Trinity*, 137 S. Ct. at 2019.
[11] *Id.* at 2022 (quoting *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988)).

Here, the current HHS regulations impose conditions and requirements on religious organizations that they must follow to participate in HHS programs. The conditions are imposed purely because of their religious character. Under *Trinity Lutheran*, "such a condition imposes a penalty on the free exercise of religion that must be subjected to the 'most rigorous' scrutiny."[12]

b. *The Proposed Rule Should Extend Constitutional Neutrality to School Funding Provisions*

ADF also supports the proposed change to the indirect Federal financial assistance definition. In the current definition, the beneficiary of a school voucher payment must have "at least one adequate secular option for the use of the voucher, certificate, or other similar means of Government-funded payment."[13] This regulation prefaces the receipt of aid on the existence of other secular options in the area with no regard to religious or faith-based school choice. The current regulation precludes a student from using this aid at a religious school chosen by the student if there is not a secular option in the surrounding area. This requirement imposes a special burden on religiously affiliated beneficiaries, directly violating Supreme Court precedent in *Trinity Lutheran* and also *Zelman v. Simmons-Harris.*[14]

Zelman centered on a scholarship program that gave students tuition aid to attend any private or public school, religious or nonreligious.[15] The Court upheld this school-choice program as it conferred assistance on a broad class of individuals without a reference to religion and made the program available to both religious and non-religious beneficiaries.[16] The Court ruled that the voucher program was not unconstitutional simply because the majority of schools that ultimately received the vouchers were religiously-affiliated.

The *Zelman* Court's ruling makes it clear that a government aid provision is not unconstitutional if it is neutral to religion, helps a large group of citizens, and only gives direct federal aid as a result of the genuine and private choices of program beneficiaries.[17] Likewise, the legality of a neutral aid program does not turn on the number, composition, or geographical location of entities that participate in the program, like the current HHS regulation suggests.

The proposed rule correctly changes the definition of indirect federal financial assistance in 87.1(c) by removing the geographical element of its definition of indirect aid. The constitutionality of a program cannot turn on whether a secular school chooses to establish a location with the geographic area of a religious school. Predicating the availability of aid based purely on the location of secular schools in an area unnecessarily places a burden on religion and removing this requirement will bring the rule into compliance with RFRA.[18]

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[12] *Id*. at 2024.
[13] 45 C.F.R. § 87.1(c)(1)(iii).
[14] *Zelman v. Simmons-Harris*, 536 U.S. 639, 653-54 (2002).
[15] *Id.* at 645.
[16] *Id.* at 653-54.
[17] *Id.* at 652.
[18] 42 U.S.C. § 2000bb-1(a)-(b).

The removal of these requirements also ensures that religious schools are not excluded from an aid program simply because most of the schools receiving aid are religious.[19] The Attorney General's Memorandum on Religious Liberty states that the government cannot exclude religious organizations from secular aid programs, as long as the aid is not used for an explicit religious activity, such as proselytization or worship.[20] Therefore, this proposed change brings the definition of indirect Federal financial aid in line with *Zelman*, RFRA, and the Attorney General's Memorandum on Religious Liberty. ADF agrees that the proposed rule reflects this precedent and supports the new definition of indirect aid.

B. The Proposed Revision is Necessary to Protect the Existence of Faith-Based Adoption and Foster Care Providers

The current HHS regulation threatens faith-based adoption and foster care providers as they cannot receive grants and funds on the same footing as secular organizations. This funding discrepancy weakens the already overpopulated foster care system by contributing to the removal of faith-based agencies from the industry, placing more pressure on government and non-religious private agencies. For that reason, the corrections in the proposed rule are necessary to ensure equality in funding, which ultimately benefits the children served by the program.

This clarification ensures that the federal regulation falls in line with President Trump's Executive Order No. 13798 and the Attorney General's Memorandum. The memo explicitly states that individuals and organizations do not give up religious liberty protections by providing government-funded social services, and that the "government may not exclude religious organizations as such from secular aid programs . . . when the aid is not being used for explicitly religious activities such as worship or proselytization."[21]

These federal protections for faith-based organizations are necessary to prevent their closure at the hands of government officials who are hostile to their religious identity. For example, because of its religious beliefs, New Hope Family Services in New York was given an ultimatum by the state that it either revise its policy or it would have to submit a close-out plan for its adoption program. Facing a grave threat to its existence, New Hope sued, contending that the state's actions violate the agency's First Amendment right to operate according to its religious beliefs. The Second Circuit granted an emergency order allowing New Hope to keep operating during the ongoing appeal.[22]

In the current regulation, it is unclear whether a child-welfare provider can operate according to its religiously held convictions on the best interests of the child and still receive federal funding. Deleting the unnecessary restriction in 45 C.F.R. § 87.3(c) avoids the confusion of whether faith-based organizations could receive federal funds, operate according to their

[19] U.S. Att'y Gen. Mem. on Federal Law Protections for Religious Liberty (October 6, 2017, https://www.justice.gov/opa/pressrelease/file/1001891/download).
[20] *Id.*
[21] *Id.*
[22] Order Granting Mot. for Prelim. Inj., New Hope Family Services v. Poole, No. 19-1715, (2d Cir. Nov. 4, 2019).

convictions, and remain active. The new provision in subsection (c) clears up the confusion and ensures that faith-based agencies can still receive federal funding while operating according to their religious beliefs, helping prevent scenarios like the one experienced by New Hope.

Along with providing funding on an equal footing, the proposed rule also ensures that faith-based organizations retain their autonomy, right of expression, and religious character. HHS proposed these specific provisions to the regulation to clarify that faith-based organizations do have the independence to operate according to their religious beliefs.

These provisions would help in situations like Catholic Charities West Michigan, a faith-based adoption and foster care provider, currently in a federal lawsuit against state officials. In 2015, Michigan passed a law to protect the rights of faith-based providers to operate consistently with their religious beliefs.[23] Catholic Charities wished to operate according to their faith-based beliefs that children thrive best in a home with a married mother and father. But in 2017, the ACLU sued Michigan to force the state to end these protections for faith-based providers.[24] The Attorney General of Michigan signed a collusive settlement agreement with the ACLU that would prohibit the faith-based providers from operating according to their religious beliefs.[25] ADF represents Catholic Charities West Michigan in their attempt to secure their religious freedom and reverse the religious discrimination settlement in Michigan.

Many faith-based adoption and foster care agencies face the same issues as they wish to continue operating according to their religious beliefs. The provisions in the proposed regulation that eliminate the restrictions on faith-based organizations preserve the ability of these organizations to place children according to their religiously motivated beliefs about what is best for a child. HHS's proposed rule ensures religious autonomy to faith-based organizations, offers hope for children, more options for birth mothers, and support for families. ADF commends HHS for protecting a diversity of providers so organizations can operate according to their religious expression and character.

C. The Final Rule Should Define "Religious Accommodation" In Order to Provide Clarity Regarding the Scope of the Government's Duty to Provide a Religious Accommodation and the Burden that the Government Must Satisfy Before Refusing a Religious Accommodation.

The Department seeks guidance on whether defining "religious accommodation" would cause clarity or confusion, and if clarity, what definition it should use. ADF submits that, in the administration of any government funding, contract, or other program, the government (including a state or local government entity charged with administering or distributing funding from a federal government program) must undertake a good faith, bona fide effort to provide a

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[23] Mich. Comp. Laws § 722.124e.
[24] *See Dumont v. Lyon*, 341 F. Supp. 3d 706, 713 (E.D. Mich. 2018).
[25] Kelsey Dallas, "Michigan settlement in favor of LGBTQ couples leaves faith-based adoption agencies wondering what's next," Deseret News (March 22, 2019), https://www.deseret.com/2019/3/23/20669116/michigan-settlement-in-favor-oflgbtq-couples-leaves-faith-based-adoption-agencies-wondering-what-s#married-couple-dana-and-kristy-dumont-with-pixie-.

"religious accommodation" to any participant in the program or recipient of funding whose religious exercise is substantially burdened by a condition or requirement of the program. The government should be guided by these principles derived from the caselaw interpreting RFRA and the Free Exercise Clause of the First Amendment:

1. In determining whether a condition or requirement of a government program or contract imposes a substantial burden on a participant, it is not permissible to question the reasonableness of the participant's religious beliefs. This means that it is inappropriate to challenge whether the specific belief or behavior at issue is really "compelled" by the participant's religion.[26] Likewise, it is irrelevant whether the religious beliefs are shared with other adherents of the same faith.[27]

2. The ability for a participant to exercise its religion in other ways that do not conflict with a condition or requirement of the government program is irrelevant to whether the government condition or requirement burdens the specific belief or behavior at issue.[28]

3. In determining whether a burden on the religious exercise of a participant is substantial, the government must recognize that the loss of a benefit, exclusion from a government program, the levying of a penalty or fine, and even indirect consequences satisfy the substantial burden requirement. "[T]he Free Exercise Clause protects against indirect coercion or penalties on the free exercise of religion" and "the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."[29] For example, in *Hobby Lobby*, the Court recognized that, even if the cost of the penalty for not providing insurance coverage employees was less than the cost providing such insurance, there were additional indirect costs, such as "a competitive disadvantage in retaining and attracting skilled workers," that demonstrated the substantial burden imposed by the contraceptive mandate.[30]

4. The government must prove that the specific condition or requirement of the program that imposes a substantial burden on the religious participant is necessary to accomplish the purpose of the program. For example, a government program that funds a food kitchen for families in need should provide a religious accommodation for a Muslim ministry that is unable to provide pork as part of its menu. Likewise, a government services contract that includes an employment nondiscrimination clause should not be applied to a Jehovah's Witness nonprofit that only hires co-religionists. In both scenarios, the government's purpose for the program

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[26] *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015) (the protections apply "to an exercise of religion regardless of whether it is 'compelled'"); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014); ("[I]t is not for us to say that their religious beliefs are mistaken or insubstantial.").

[27] *Holt*, 135 S. Ct. at 863 (religious liberty protections are "not limited to beliefs which are shared by all of the members of a religious sect" (quoting *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 715–716 (1981))

[28] *Holt*, 135 S. Ct. at 862 ("RLUIPA's 'substantial burden' inquiry asks whether the government has substantially burdened religious exercise (here, the growing of a ½–inch beard), not whether the RLUIPA claimant is able to engage in other forms of religious exercise.").

[29] *Trinity Lutheran*, 137 S. Ct. at 2022 (internal citations and quotations omitted).

[30] 573 U.S. at 722

would still be accomplished even though a religious accommodation is provided to the participating organization.

5. In analyzing whether the condition or requirement of the government is necessary to serve a compelling interest, the focus must be on whether applying the government condition or requirement specifically to the participant and its religious exercise is necessary to further that interest.[31]

6. The government must also prove that requiring the participating organization to comply with the condition or requirement is the least restrictive means for the government to accomplish the purpose or goal of the funding, contract, or program. The government must establish that it "lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties."[32] "If a less restrictive means is available for the Government to achieve its goals, the Government must use it."[33] This may even "in some circumstances require the Government to expend additional funds to accommodate citizens' religious beliefs."[34]

7. The existence of exemptions and accommodations in other government programs is strong evidence that the government condition or requirement is neither necessary to serve a compelling interest nor the least restrictive means to achieve that interest.[35]

8. Finally, whether a program or contract is widely open to many organizations or only narrowly open to a select few is irrelevant to determining whether a condition imposes a substantial burden. The substantial burden analysis requires the government to examine whether a requirement or condition burdens the specific beliefs of the participant. The burden imposed by a program or contract that is only open to a select few is no different from a burden from a program that is widely open to many participants subject to a condition. This is shown in *Holt*, where the "benefit"—having a beard—was only available to a handful of inmates that had a medical need.[36] That most inmates, including others who shared Holt's Muslim faith, could not access this narrow benefit was irrelevant to whether the denial of the benefit burdened Holt's religious exercise.

These principles, along with the clear directives set forth by the Court in *Burwell*, *Holt*, and *Trinity Lutheran* must be strenuously followed in all actions by the government to ensure

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[31] *Hobby Lobby*, 573 U.S. at 726 ("This requires us to 'loo[k] beyond broadly formulated interests' and to 'scrutiniz[e] the asserted harm of granting specific exemptions to particular religious claimants'—in other words, to look to the marginal interest in enforcing the contraceptive mandate in these cases." (quoting *Gonzales v. O Centro Espírita Beneficente Uniao do Vegetal*, 546 U.S. 418, 431 (2006)); *Holt*, 135 S. Ct. at 863.
[32] *Hobby Lobby*, 573 U.S. at 728.
[33] *Holt*, 135 S. Ct. at 864 (quoting *United States v. Playboy Entertainment Group, Inc*., 529 U.S. 803, 815 (2000)).
[34] *Hobby Lobby*, 573 U.S. at 730.
[35] *Holt*, 135 S. Ct. at 866 ("That so many other prisons allow inmates to grow beards while ensuring prison safety and security suggests that the Department could satisfy its security concerns through a means less restrictive than denying petitioner the exemption he seeks.").
[36] *Holt*, 135 S. Ct. at 860.

that the intent and purpose of RFRA, and the First Amendment rights it is designed to protect, are respected.

ADF applauds and supports HHS's proposed regulations.

Respectfully submitted,

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