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Department of Housing and Urban Development
HUD-2020-0017 (RIN 2501-AD91)
Paula Lincoln
Director
Center for Faith and Opportunity Initiative
OS
451 7th Street SW
Room 10184
Washington, DC 20410

Re: Ensuring Equal Treatment of Faith-Based Organizations – RIN 2501-AD91, Docket ID HUD-2020-0017

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 Housing and Urban Development. 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 24 C.F.R. 5.109 and 92.508 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 and requirements that secular organizations are not required to follow. For instance, only faith-based organizations that participate in HUD programs are mandated to provide additional notices to those they serve and to make referrals to secular organizations if an individual objects to the organization's religious identity or mission. The proposed rule removes this unique burden. It

also provides clarity to faith-based organizations on their rights and obligations while participating in Department programs. The proposed rule is necessary because the current HUD regulations violate the free exercise rights of faith-based organizations and explicitly violate the Supreme Court's precedent in *Trinity Lutheran*.

A. Faith-Based Organizations Should Not Be Forced to Abide by Extraneous Requirements

The Supreme Court held in *Trinity Lutheran* 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 Court held that excluding Trinity Lutheran Church from a program run by the Missouri Department of Natural Resources violated the Church's rights under the Free Exercise Clause of the First Amendment.[2] The Court found that "denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion."[3]

The current HUD regulations violate this precedent as faith-based organizations must abide by burdens and requirements that secular organizations do not have to follow. The proposed rule brings HUD regulations in line with Supreme Court precedents.

The proposed rule is also necessary to address current violations to the Religious Freedom Restoration Act (RFRA). Under RFRA, if the government places a substantial burden on religion, it must prove that the burden is in furtherance of a compelling government interest and that the government action is the least restrictive means of accomplishing that interest.[4] Requiring only faith-based organizations to comply with extraneous regulations imposes a burden on religion that cannot survive heightened scrutiny.

24 C.F.R. § 5 provides examples of this burden on religion. Under § 5.109, only faith-based organizations must give written notice to beneficiaries of their right to obtain a referral to another organization.[5] Section 5.109(g)(3), which describes the referral policy, further forces religious organizations to provide beneficiaries with referrals to alternative providers, even if the religious organization disagrees with the alternative provider's policies and services.[6] Under each of these current regulations, religious organizations are burdened with unique requirements that are not placed on secular organizations.

In *National Institute of Family & Life Advocates v. Becerra*, the Supreme Court struck down a California law that mandated notice requirements on a "narrow subset" of pregnancy clinics, but did not impose similar requirements on other similarly situated clinics.[7] The Court

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[1] *Trinity Lutheran*. at 2019; *accord Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 542-43 (1993) ("The Free Exercise Clause protects religious observers against unequal treatment" and the government "cannot in a selective manner impose burdens only on conduct motivated by religious belief.").
[2] *Id*. at 2019.
[3] *Id*.
[4] 42 U.S.C. § 2000bb-1(a)-(b).
[5] 24 C.F.R. § 5.
[6] 24 C.F.R. § 5.109.
[7] *NIFLA v. Becerra*, 138 S. Ct. 2361, 2377 (2018).

warned that its "precedents are deeply skeptical of laws that distinguish among different speakers, allowing speech by some but not others."[8] "Speaker-based laws run the risk that the State has left unburdened those speakers whose messages are in accord with its own views."[9]

ADF supports the proposed changes to § 5.109 to remedy these infirmities. 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. By deleting the discriminatory regulations, HUD's regulations will come into compliance with RFRA and the Supreme Court's holding in *Trinity Lutheran*.

B. Faith-Based Organizations Should Receive Funding on the Same Basis as Secular Organizations

The proposed rule also clarifies the rights of faith-based organizations. The Attorney General's Memorandum on Religious Liberty prohibits the government from excluding religious organizations from secular aid programs "when the aid is not being used for explicitly religious activities such as worship or proselytization."[10]

The proposed rule creates new sections 5.109 (h) and (m), which ensure that any restrictions on the use of grant funds will be applied equally to faith-based and secular organizations. The new requirements will clear up the confusion on whether a faith-based organization can use and access federal funds and still operate according to their religious beliefs. The current regulation forces only faith-based organizations to give assurances and notices—a requirement that violates the Free Exercise Clause.

In *Trinity Lutheran*, the Court discussed how the government's policy forced Trinity Lutheran Church to make a choice between operating as a church and "automatic and absolute expulsion" from the public benefits program.[11] But conditioning the receipt of public benefits on a willingness to surrender religious beliefs penalizes the free exercise of religion.[12]

The current HUD regulations create confusion on whether faith-based organizations can receive federal funding and continue operating according to their beliefs. Yet nothing is specially mentioned about secular organizations and their specific requirements to receive funding. The new regulation is necessary to ensure that federal regulations do not single out faith-based organizations for their religion, as they should be able to receive federal funding on the same footing as their secular counterparts.

C. Faith-Based Organizations Should Be Free to Retain Their Autonomy, Right of Expression, and Religious Character

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[8] *Id*. at 2378 (quoting *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 340 (2010)).
[9] *Id*. (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 580 (2011)).
[10] U.S. Att'y Gen. Mem on Federal Law Protections for Religious Liberty at 2 (October 6, 2017) *available at* https://www.justice.gov/crt/page/file/1006786/download.
[11] *Trinity Lutheran*, 137 S. Ct. at 2022.
[12] *Id.*; *see McDaniel v. Paty*, 435 U.S. 618, 626 (1978).

The proposed rule also includes added protections for religious organizations to operate according to their religious beliefs. This proposed revision to 24 C.F.R. § 5.109 (d) is necessary to clarify that the Constitution places strict limits on the ability of government to interfere with the autonomy of religious organizations.

The First Amendment broadly protects the freedom to exercise religion and prohibits efforts by the government to dictate what beliefs are permissible. The U.S. Supreme Court has recognized that both individuals and organizations are guaranteed the freedom to exercise their religious beliefs and to associate with others who share those same beliefs.[13] Our Constitution protects "a spirit of freedom for religious organizations, an independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."[14] Within this sphere of freedom and religious autonomy, the government has no authority to interfere. Such governmental non-interference is compelled by the "doctrine of avoiding excessive entanglements under which a state may not inquire into or review the internal decision making or governance of a religious institution."[15]

The sphere of religious autonomy is broad. It encompasses "questions of discipline, or of faith, or ecclesiastical rule, custom, or law."[16] It "prohibits civil courts from resolving disputes on the basis of religious doctrine and practice."[17] It extends to "matters of church government,"[18] and "question[s] of membership … [and] the rights of members."[19] "[E]ven where the government's action is not aimed at establishing, sponsoring, or supporting religion, the government action still violates the establishment clause if the end result of the action is an excessive government entanglement with religion."[20]

The sphere of autonomy is not limited to houses of worship. "[A]n employer need not be a traditional religious organization such as a church, diocese, or synagogue, or an entity operated by a traditional religious organization."[21] "[R]eligiously affiliated schools, corporations, and hospitals"—any entity whose "mission is marked by clear or obvious religious characteristics"—is included in the First Amendment's protections for religious autonomy.[22]

Specifically in the context of employment decisions, "the Free Exercise Clause prevents [the government] from interfering with the freedom of religious groups to select their own."[23]

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[13] *See, e.g., Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Braunfeld v. Brown*, 366 U.S. 599 (1961).
[14] *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952).
[15] *Egan v. Hamline United Methodist Church*, 679 N.W.2d 350, 358 (Minn. Ct. App. 2004).
[16] *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 185 (2012).
[17] *Jones v. Wolf*, 443 U.S. 595, 602 (1979).
[18] *Little v. Wuerl*, 929 F.2d 944, 947 (3d Cir. 1991).
[19] *Bouldin v. Alexander*, 82 U.S. 131, 139 (1872).
[20] *Crowder v. S. Baptist Convention*, 828 F.2d 718, 722 (11th Cir. 1987).
[21] *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007).
[22] *Id*. at 226 (quoting *Shaliehsabou v. Hebrew Home of Greater Wash, Inc.*, 363 F.3d 299, 310 (4th Cir. 2004)) (emphasis added).
[23] *Hosanna-Tabor*, 565 U.S. at 184.

Courts have thus recognized a "constitutionally-protected interest of religious organizations in making religiously-motivated employment decisions[.]"[24] As a result, applying any employment non-discrimination laws "against religious discrimination to the [religious organization's employment] decision would … be suspect because it arguably would create excessive government entanglement with religion in violation of the establishment clause."[25]

The sphere of religious autonomy prohibits impermissible government entanglement with religion that occurs when government officials determine which beliefs and practices are consistent with a given religion and which are not. Such determinations are impermissible entanglement because they:

> will necessarily involve inquiry into the good faith of the position asserted by the [religious organization] and its relationship to the [organization's] religious mission. It is not only the conclusions that may be reached by the [government officials] which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry leading to findings and conclusions.[26]

The proposed rule preserves the autonomy of faith-based organizations that receive federal funding. It ensures that religious organizations are treated equally as they continue to act according to their religious identity and character. And it prevents impermissible government entanglement in the affairs of religious entities.

D. The Proposed Rule Properly Extends Constitutional Neutrality to Agency Funding Provisions

ADF also supports the proposed change to the indirect Federal financial assistance definition. In the current definition, the beneficiary of a 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."[27] 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 choices. The current regulation precludes an individual from using this aid at a religious entity chosen by the individual 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 *Zelman v. Simmons-Harris.*[28]

Zelman centered on a scholarship program that gave students tuition aid to attend any private or public school, religious or nonreligious.[29] The Court upheld this school-choice

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[24] *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 623 (6th Cir. 2000).
[25] *Little*, 929 F.2d at 948.
[26] *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490, 502 (1979); *accord Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 716 (1981) ("[I]t is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.").
[27] 24 C.F.R. §5.109(b).
[28] *Zelman v. Simmons-Harris*, 536 U.S. 639, 653-54 (2002).
[29] *Id.* at 645.

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.[30] The Court ruled that the voucher program was not unconstitutional simply because the majority of schools that ultimately received the vouchers were religiously-affiliated.

Under *Zelman*, 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.[31] 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 HUD regulation suggests.

The proposed rule correctly changes the definition of indirect federal financial assistance in 24 C.F.R § 5.109(c) by removing the geographical element of its definition of indirect aid. The constitutionality of a program cannot turn on whether a beneficiary chooses to establish a location within the geographic area of a religious shelter. Predicating the availability of aid based purely on the location of secular shelters in an area unnecessarily places a burden on religion and removing this requirement will bring the rule into compliance with RFRA.[32]

The removal of these requirements also ensures that religious shelters are not excluded from an aid program if most of the shelters receiving aid are religious.[33] 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.[34] 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.

D. <u>The Proposed Revision is Necessary to Protect the Existence of Faith-Based Shelters</u>

The current HUD regulation threatens faith-based shelters as they cannot receive grants and funds on the same footing as secular organizations. This funding discrepancy affects the homeless population by contributing to the removal of faith-based agencies from the industry and by placing more pressure on government and non-religious private agencies. That in turn means less housing for individuals in need. For that reason, the corrections in the proposed rule are necessary to ensure equality in funding, which ultimately benefits the homeless 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

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[30] *Id.* at 653-54.
[31] *Id.* at 652.
[32] 42 U.S.C. § 2000bb-1(a)-(b).
[33] 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).
[34] *Id.*

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."[35]

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, the city of Anchorage, Alaska targeted and attempted to force Downtown Hope Center—a faith-based ministry that provided a shelter to homeless women—to comply with a local public accommodation law or abandon its religious mission and message. Facing a grave threat to its existence, the Hope Center sued. The U.S. District Court for the District of Alaska then issued a preliminary order stopping Anchorage from applying its local law against the Hope Center, thereby allowing the Center to continue operating its women shelter consistent with its religious beliefs. This ruling eventually led to an order that permanently stopped Anchorage from using its local law against the Center and thereby allowed the Center to remain open while continuing to serve the homeless and hurting women in downtown Anchorage.[36] The proposed rule sends a strong message that faith-based shelters can operate consistent with their faith, and this message could help deter state and local officials who target organizations because of their faith, helping prevent scenarios like the one experienced by Downtown Hope Center.

By eliminating the restrictions on faith-based organizations, the proposed rule preserves the ability of these organizations to house the homeless according to their religiously motivated beliefs. HUD's proposed rule guarantees religious autonomy to faith-based organizations and offers hope for the homeless. ADF commends HUD for protecting a diversity of providers so organizations can operate according to their religious expression and character while continuing to care for the communities they are called to serve.

ADF applauds and supports the HUD's proposed regulations.

Respectfully submitted,

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[35] *Id.*
[36] *Downtown Soup Kitchen d/b/a Downtown Hope Center v. Municipality of Anchorage*, 2019 WL 3769623 (D. Alaska, August 9, 2019).