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Department of Veterans Affairs
VA-2020-VACO-0003-0001 (RIN 2900-AQ75)
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Initiatives (00FB)
VA
810 Vermont Avenue NW.
Washington, DC 20420

**Re: AQ75-Joint Proposed Rule-Equal Participation of Faith-Based Organizations in Veterans Affairs Programs: Implementation of Executive Order 13831 – RIN 2900-AQ75, Docket ID VA-2020-VACO-0003-0001**

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 Veteran Affairs. 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* in challenging its exclusion by the state of Missouri from a playground surface material grant program because of its religious identity.[1]

[1] *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2017 (2017).

ADF believes that the proposed revisions to 38 C.F.R. 50, 61, and 62 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, faith-based organizations that participate in VA programs are mandated to provide additional notices to those they serve, and they are required to make referrals to secular organizations if an individual objects to the organization's religious identity. The proposed rule 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 VA 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.[2] The Court held that a 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.[3] The Court found that "denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion."[4]

The current VA 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 VA regulations in line with Supreme Court precedents.

The proposed regulations are 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 methods are the least restrictive means of meeting that interest.[5] Requiring only faith-based organizations to comply with extraneous regulations imposes a burden on religion that cannot survive the heightened scrutiny.

38 C.F.R. §§ 50.2 and 50.3 provide examples of this burden on religion. Under § 50.2, only faith-based organizations must give written notice to beneficiaries of their rights, such as the referral policy.[6] Section 50.3, which describes the referral policy, forces religious organizations to provide beneficiaries with referrals to alternative providers, even if the religious

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[2] *Id*. 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.").
[3] *Trinity*, 137 S. Ct. at 2019.
[4] *Id.*
[5] 42 U.S.C.A. § 2000bb-1(a)-(b).
[6] 38 C.F.R. § 50.2.

organization disagrees with the alternative provider's policies and services.[7] 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.[8] The Court discussed how its "precedents are deeply skeptical of laws that distinguish among different speakers, allowing speech by some but not others."[9] "Speaker-based laws run the risk that the State has left unburdened those speakers whose messages are in accord with its own views."[10]

ADF supports the proposed changes to §§ 50.2 and 50.3. 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. Notably, as stated in the NPRM, these requirements are not even necessary for beneficiaries to identify other VA providers. The VA makes the identity of all their grant recipients publicly available. For that reason, it is unnecessary for a faith-based organization to make a referral to another recipient, as the VA could simply supply the information to beneficiaries seeking alternative providers.[11]

ADF supports these changes in the VA regulations. By deleting the discriminatory regulations, the VA'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 says that the government cannot exclude religious organizations from secular aid programs "when the aid is not being used for explicitly religious activities such as worship or proselytization."[12]

The new regulation adds § 50.2(e), which will ensure that any restrictions on the use of grant funds will be applied equally to faith-based and secular organizations. The new requirement 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

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[7] 38 C.F.R. § 50.3.
[8] *NIFLA v. Becerra*, 138 S. Ct. 2361, 2377 (2018).
[9] *Id*. at 2378 (quoting *Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 340 (2010)).
[10] *Id*. (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 580 (2011)).
[11] *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 730 (2014) ("HHS itself has demonstrated that it has at its disposal an approach that is less restrictive than requiring employers to fund contraceptive methods that violate their religious beliefs.").
[12] 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.

only faith-based organizations to give assurances and notices—a requirement that violates the Free Exercise Clause and, in turn, *Trinity Lutheran*.

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.[13] But conditioning the receipt of public benefits on a willingness to surrender religious beliefs penalizes the free exercise of religion.[14]

The current VA 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 Have the Right to Retain Their Autonomy, Right of Expression, and Religious Character

The proposed regulations also include more protections for religious organizations to operate according to their religious beliefs. This proposed regulation under 38 C.F.R. § 50.2 (c) 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.[15] The Court's opinions have repeatedly recognized "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."[16] 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."[17]

The sphere of religious autonomy is broad. It encompasses "questions of discipline, or of faith, or ecclesiastical rule, custom, or law."[18] It "prohibits civil courts from resolving church property disputes on the basis of religious doctrine and practice."[19] It extends to "matters of

[13] *Trinity*, 137 S. Ct. at 2022.
[14] *Id.*; *see McDaniel v. Paty*, 435 U.S. 618, 626 (1978).
[15] *See, e.g., Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *Braunfeld v. Brown*, 366 U.S. 599 (1961).
[16] *Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 116 (1952).
[17] *Egan v. Hamline United Methodist Church*, 679 N.W.2d 350, 358 (Minn. Ct. App. 2004).
[18] *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 565 U.S. 171, 185 (2012).
[19] *Jones v. Wolf*, 443 U.S. 595, 602 (1979).

church government,"[20] and "question[s] of membership … [and] the rights of members."[21] "[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."[22]

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."[23] "[R]eligiously affiliated schools, corporations, and hospitals"—any entity whose "religious mission is marked by clear or obvious religious characteristics"—is included in the First Amendment's protections for religious autonomy.[24]

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."[25] Courts have thus recognized a "constitutionally-protected interest of religious organizations in making religiously-motivated employment decisions."[26] 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."[27]

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] 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 inquiring leading to findings and conclusions.[28]

The new provision adds a statement guaranteeing the autonomy of faith-based organizations that receive federal funding. These new regulations will ensure that religious organizations are treated equally as they continue to act according to their religious identity and

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[20] *Little v. Wuerl*, 929 F.2d 944, 947 (3d Cir. 1991).
[21] *Bouldin v. Alexander*, 82 U.S. 131, 139 (1872).
[22] *Crowder v. S. Baptist Convention*, 828 F.2d 718, 722 (11th Cir. 1987).
[23] *Hollins v. Methodist Healthcare, Inc.*, 474 F.3d 223, 225 (6th Cir. 2007).
[24] *Id*. at 226 (quoting *Shaliehsabou v. Hebrew Home of Greater Wash, Inc.*, 363 F.3d 299, 309-310 (4th Cir. 2004)) (emphasis added).
[25] *Hosanna-Tabor*, 565 U.S. at 184.
[26] *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 623 (6th Cir. 2000).
[27] *Little*, 929 F.2d at 948.
[28] *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.").

character. And it will prevent impermissible government entanglement in the affairs of religious entities.

ADF applauds and supports the VA's proposed regulations.

Respectfully submitted,

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