To: Department of Education, RIN 1840-AD467
Department of Homeland Security, RIN 1601-AB02
Department of Agriculture, RIN 0510-AA008
Agency for International Development, RIN 0412-AB10
Department of Housing and Urban Development, RIN 2501-AD91
Department of Justice, RIN 1105-AB64
Department of Labor, RIN 1290-AA45
Department of Veterans Affairs, RIN 2900-AR23
Department of Health and Human Services, RIN 0991-AC13

From: United States Conference of Catholic Bishops
National Association of Evangelicals
Christian Legal Society
Thomas More Society
Council for Christian Colleges & Universities

Date: March 6, 2023

Re: Notice of Proposed Rulemaking, Partnerships with Faith-Based and Neighborhood Organizations, 88 Fed. Reg. 2395 (Jan. 13, 2023)

Filed via Federal eRulemaking Portal Regulations.gov

On behalf of the above-named organizations, we respectfully submit the following Comments on the Notice of Proposed Rulemaking, "Partnerships with Faith-Based and Neighborhood Organizations," published on January 13, 2023, by nine federal departments and agencies ("2023 NPRM" or simply "NPRM"), 88 Fed. Reg. 2395-2427.[1]

In these Comments, we focus on two major errors that underlie the proposed regulations. The first concerns the Title VII religious employer exemptions, which are discussed in Part I. The second concerns recent case law concerning the Free Exercise and Establishment Clauses and the law's bearing on government funding of social service providers without regard to their religious character, which is discussed in Part II. These errors pertain to fundamental aspects of the 2023 NPRM and thus to all nine sets of proposed regulations. Our Comments apply to each of the nine sets of regulations.

[1] In the 2023 NPRM, there are 13 pages of "Supplementary Information" (88 Fed. Reg. at 2395-2408), sometimes described as the Preamble, followed by the precise texts of the proposed rules across the nine agencies (*id.* at 2409-27).

PART I: THE TITLE VII RELIGIOUS EMPLOYER EXEMPTIONS

The Preamble of the 2023 NPRM suggests that the religious employer exemptions set forth in sections 702(a) and 703(e) of the Civil Rights Act of 1964 ("the religious employer exemptions") apply as a defense only to claims of religious discrimination. 88 Fed. Reg. 2395, 2402 (Jan. 13, 2023). The agencies have therefore deleted from the proposed regulations existing regulatory text to avoid suggesting that the exemptions apply to claims involving other protected classes. *Id.* The deletions include existing regulatory text stating that "An organization qualifying for [a religious] exemption may select its employees on the basis of their acceptance of or adherence to the religious tenets of the organization."

The deleted text should be retained. While it is true that religious employers in many scenarios remain subject to the Title VII prohibitions against discrimination, the plain text of the religious exemptions dictates that they apply as an affirmative defense to any claim that can be brought under Title VII. This includes instances in which adverse employment action is taken on the basis of an employee's conduct inconsistent with the employer's religious beliefs or practices. Equally important, the religious exemptions do more than simply preserve the right to hire one's co-religionists.

In Subpart A, we discuss Title VII's plain text and explain why it supports these conclusions. In Subpart B, we discuss additional support for these conclusions in case law and other authority. In Subpart C, we discuss contrary court decisions and explain why those decisions are being overread or are flawed.

A. The Plain, Unambiguous Text

Title VII has two overlapping exemptions that apply to religious employers. They are both affirmative defenses. Section 702(a) of the Civil Rights Act of 1964 (the "Act"), 42 U.S.C. § 2000e-1(a), provides:

> *This title [subchapter] shall not apply* to an employer with respect ... to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.[2] [Emphasis added.]

[2] Prior to its amendment in 1972, section 702(a) referred to the employment of individuals of a particular religion to perform work for an organization connected with the carrying on of the organization's "*religious* activities." [Emphasis added.] In 1972, Congress amended section 702 to drop the word "religious" before "activities." As a result, the current version of section 702(a) applies to *all* employees of a religious employer, not just those employees engaged in religious activities. *See*, *e.g.*, *Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987) (applying the section 702(a) exemption to a building custodian); *Kennedy v. St. Joseph's Ministries*, 657 F.3d 189, 192 (4th Cir. 2011) (noting that in 1972, Congress broadened section 702(a) "to include any activities of religious organizations, regardless of whether those activities are religious or secular in nature"); *Little v. Wuerl*, 929 F.2d 944, 950-51 (3d Cir. 1991) (noting that the

Section 703(e) of the Act, 42 U.S.C. § 2000e-2(e), provides:

> *Notwithstanding any other provision of this title [subchapter]* ... (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.[3] [Emphasis added.]

The phrase "*This title* shall not apply" in the first of these exemptions, and the phrase "Notwithstanding any other provision of *this title*" in the second, mean that when a religious employer makes an employment decision "with respect to the employment of individuals of a particular religion," then that employer is exempt from *all of Title VII*.[4] That is how an affirmative defense operates. This means that when the elements of the affirmative defense are present the religious employer is exempt even from a claim for retaliation, not just from a claim based on a protected class such as national origin. Use of the term "title" in the text of each exemption requires that result.

Importantly, section 701(j) of the Act, 42 U.S.C. § 2000e(j), states that "[f]or the purposes of *this title [subchapter]* … "[t]he term *'religion'* includes *all* aspects of religious *observance and practice*, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business" [emphasis added]. The explicit references to "observance" and "practice" make clear that "religion" includes conduct in conformance with religious mores, a conclusion reinforced by the use in

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current religious exemptions cover all employees, not just those engaged in religious activities); *Newbrough v. Bishop Heelan Catholic Sch.*, No. C13-4114, 2015 WL 759478 (N.D. Iowa Feb. 23, 2015) (applying the section 702(a) exemption to a religious school system's director of finance).

[3] As enacted by Congress, sections 702(a) and 703(e) of the Act use the word "title" (referring to all of Title VII) rather than "subchapter." Pub. L. 88-352, tit. VII, § 702, 78 Stat. 241 (July 2, 1964). The codifiers of the United States Code changed the word "title" to "subchapter" because Title VII of the Act comprises a single subchapter of the U.S. Code. *See* Carl H. Esbeck, *Federal Contractors, Title VII, and LGBT Employment Discrimination: Can Religious Organizations Continue to Staff on a Religious Basis?*, 4 OX. J. LAW & RELIGION 368, 375 n.26 (2015) (explaining these changes).

[4] Stephanie N. Phillips, *A Text-Based Interpretation of Title VII's Religious-Employer Exemption*, 20 TEX. REV. L. & POL. 295, 302 (2016) (noting that, under the text of the exemptions, when a religious employer makes an employment decision on the basis of an employee's "particular religion," "the employer is exempt from all of Title VII"); Esbeck at 375 (noting that the religious exemptions provide a "sweeping override of everything else in all of Title VII").

section 2000e(j) of the expansive terms "*all* aspects" and "includes."[5] Because the definition of "religion" expressly applies to the entire title, it applies to the religion of employers as well as that of employees seeking religious accommodations.[6]

The plain text of the religious employer exemptions reads as an affirmative defense. *See* Fed. Rule of Civ. Pro. 8(c) (even if the employer confesses, for purposes of a preliminary motion, that everything alleged in the complaint is true, the employer still wins because of this defense). To successfully invoke the affirmative defense the employer must show that two elements are present: it is a religious employer and there was a religious belief or practice that was the reason for the employer's employment decision adverse to the employee.

Read together, the plain text of the religious employer exemptions and the definition of religion leads to two important consequences. First, religious employers have a freedom under the statute to employ not just their co-religionists—that is, applicants or employees who say they are of the same religion as the employer--but persons *whose beliefs and conduct are consistent with the employer's own religious beliefs*. 42 U.S.C. § 2000e ("religion" includes "*all* aspects of religious *observance and practice*, as well as beliefs") (emphasis added). Second, when religious employers exercise this right, none of the rest of Title VII applies. *See* 42 U.S.C. § 2000e-1(a) ("*This title* [subchapter] *shall not apply* …") (emphasis added); 42 U.S.C. § 2000e-2(e) (Notwithstanding *any other provision of this title* [subchapter] … it *shall not* be an unlawful employment practice…") (emphasis added).

These consequences not only follow from the very words of the statute, as demonstrated above, but they are supported by case law and other authority, to which we now turn.

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[5] Use of the term "includes" in a federal statute is an indication that what follows is "illustrative, not exhaustive." *Christopher v. SmithKline Beecham Corp*., 567 U.S. 142, 162 (2012). Thus, the meaning of the term "religion" in section 2000e is not exhausted by the definitional phrase that follows the word "includes."

[6] At least one court, while conceding that the definition of religion in section 701 applies to both exemptions, has suggested in the same breath that the definition of religion "seems intended" only to broaden the prohibition against religious *discrimination*, not the scope of the religious *exemptions*. *Little v. Wuerl*, 929 F.2d at 950. This suggestion is inconsistent with the text of section 701. Title VII has only *one* definition of religion—the one set out in section 701—and that definition *by its express terms* applies to all of Title VII. Had it intended the definition of "religion" in section 701 to apply only to the use of that term in the prohibition against discrimination on the basis of religion, Congress would have defined the term for purposes of the sections in which that prohibition is set out instead of the entire title. *See Larsen v. Kirkham*, 499 F. Supp. 960, 966 (D. Utah 1980) (correctly noting that the definition of "religion" in section 701 applies to the section 703(e) religious exemption), *aff'd*, 1982 WL 20024 (10th Cir. 1982), *cert. denied*, 464 U.S. 849 (1983); Esbeck at 377 n.32 ("If Congress had intended the definition [of religion] to not apply to 702(a) and 703(e)(2), it would have been very easy to have said so.").

B. Case Law and Other Authority

1. The religious exemptions are not limited to employment preferences for one's co-religionists.

Although sections 702(a) and 703(e) allow a religious employer to give employment preference to co-religionists, they do much more. *Larsen v. Kirkham*, *supra*, is illustrative. In that case, the plaintiff argued that section 703(e) only permitted a school affiliated with the LDS Church to hire its co-religionists but did not permit the school to discriminate among various applicants who were all Mormons. The district court forcefully rejected that argument:

> [The] notion that the religious school exemption permits no more than a religious school's preference for those ostensibly affiliated with the religion operating it ignores both reason and policy…. [I]t is inconceivable that the exemptions would purport to free religious schools to employ those who best promote their religious mission, yet shackle them to a legislative determination that all nominal members are equally suited to the task. In short, nothing in the language, history or purpose of the exemption supports such an invasion of the province of a religion to decide whom it will regard as its members, or who will best propagate its doctrine. That is an internal matter exempt from sovereign interference.

499 F. Supp. at 966.

The district court in *Larsen* also noted a church autonomy flaw with the co-religionist argument. For a civil magistrate to decide who is or is not a co-religionist in good standing with his or her church is a religious question. And for the government (including a civil court) to resolve such a religious question is violative of the church autonomy doctrine. *See Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049, 2068-69 (2020).

That the Title VII religious exemptions are not limited in their application to an employment preference for one's co-religionists is also supported by *Killinger v. Samford Univ.*, 113 F.3d 196 (11th Cir. 1997). In that case, a Baptist university terminated a Baptist professor whose theological views differed from those of the dean of the university's divinity school. The court said that section 702(a) "allows religious institutions to employ only persons whose beliefs are consistent with the employer's when the work is connected with carrying out the institution's activities." *Id*. at 200. Thus, the university could decide to employ only professors whose theological views were in sync with those of the dean. There is "no requirement that a religious educational institution engage in a strict policy of religious discrimination—such as always preferring Baptists in employment decisions—to be entitled to the exemption." *Id*. at 199-200.[7]

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[7] For additional authority, *see Maguire v. Marquette Univ*., 627 F. Supp. 1499 (E.D. Wis. 1986) (Title VII exemptions shielded a Catholic university from employment discrimination claims brought by a Catholic teacher who it declined to hire because she disagreed with Church teaching on abortion), *aff'd in part on other grounds*,

More broadly, the section 702(a) and 703(e) exemptions create, as to Title VII, a freedom on the part of religious employers to have religion-based employee conduct standards. Given the definition of religion in section 701(j) and the broad sweep of those exemptions signaled by the reference to "this title," such standards can be applied to any employee, whether or not he or she shares the employer's religious affiliation.

The leading case on the application of the Title VII exemptions to employee conduct is *Little v. Wuerl*, 929 F.2d 944 (3d Cir. 1991). In that case, a Catholic elementary school declined to renew the contract of a tenured non-Catholic teacher, Susan Little, after she entered into a second marriage without annulment of her first marriage. Little sued for religious discrimination under Title VII. The question therefore was not whether the Title VII exemptions allowed a Catholic school to hire only Catholics—the school had hired her "with full awareness that she was a Protestant." *Id*. at 945. Rather, the question was whether a Catholic school, after knowingly hiring a Protestant teacher, could fire her "because her *conduct* does not conform to Catholic mores." *Id*. (emphasis added). The Third Circuit held that allowing such a claim by an employee would raise serious Free Exercise and Establishment Clause questions, and it read the Title VII religious exemptions to bar the claim.[8]

The Third Circuit noted that an evaluation of whether Little's conduct made her unfit for the religious employer's mission was not suited to resolution by a civil court:

> [I]nquiry into the employer's religious mission is not only likely, but inevitable, because the specific claim is that the employee's beliefs *or practices* make her unfit to advance that mission [emphasis added]. It is difficult to imagine an area of the employment relationship *less* fit for scrutiny by the secular courts [emphasis in original]. Even if the employer ultimately prevails, the process of review itself might be excessive entanglement.

Id. at 949. The church autonomy problem of judicial entanglement with religious questions

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vacated in part, 814 F.2d 1213 (7th Cir. 1987); *Wirth v. College of the Ozarks*, 26 F. Supp.2d 1185, 1188 (W.D. Mo. 1998) (claim that a non-denominational Christian college fired a Catholic professor because of his non-Christian faith was barred by the Title VII exemptions even though Catholicism is a Christian faith), *aff'd*, 208 F.3d 219 (8th Cir. 2000), *cert. denied*, 531 U.S. 1079 (2001); *O'Connor v. Roman Catholic Church of Diocese of Phoenix*, No. CV 05-1309 PHX-SMM, 2007 WL 1526736 (D. Ariz. May 23, 2007) (Title VII religious exemption barred a Catholic employee's retaliation claim against a Catholic diocese where undisputed evidence showed that the employee was fired because she had married outside the Catholic Church).

[8] *Little* follows the approach to statutory construction required by *N.L.R.B. v. Catholic Bishop*, 440 U.S. 490 (1979). Under *Catholic Bishop*, "an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." *Id*. at 500. *Catholic Bishop* calls for a two-tiered analysis. First, a court must determine whether the proposed interpretation of a statute would "give rise to a serious constitutional question." *Id*. at 501. If it would, then the court must determine whether Congress "clearly expressed" an intent that the statute be so construed. *Id*. Absent such a clearly expressed intent, the statute should be construed to avoid the constitutional question.

exists whether or not the employee plays a direct role in the employer's religious activities. *Id*. at 951. The Third Circuit placed particular emphasis on the impermissibility of a civil court, in the context of a religious employer, evaluating employee *conduct*:

> … Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals *faithful to their [i.e., the organization's] doctrinal practices*, whether or not every individual plays a direct role in the organization's "religious activities." Against this background and with sensitivity to the constitutional concerns that would be raised by a contrary interpretation, we read the exemption broadly. We conclude that the permission to employ persons "of a particular religion" includes permission to employ only persons whose beliefs *and conduct* are consistent with the employer's religious precepts. Thus, it does not violate Title VII's prohibition of religious discrimination for a parochial school to discharge a Catholic or a non-Catholic teacher who has publicly engaged in *conduct regarded by the school as inconsistent with its religious principles.*

Id. at 951 (emphasis added).

Other courts have similarly concluded that the Title VII religious exemptions apply to employee conduct to which an employer has a religious objection. *Kennedy v. St. Joseph's Ministries*, 657 F.3d at 194 ("Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices…. [P]ermission to employ persons 'of a particular religion' includes permission to employ only persons whose beliefs and conduct are consistent with the employer's religious precepts."); *Hall v. Baptist Mem. Health Care Corp.*, 215 F.3d 618, 624 (6th Cir. 2000) (the Title VII exemptions have "been interpreted to include the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer"); *see also Henry v. Red Hill Evangelical Lutheran Church of Tustin*, 201 Cal. App. 4th 1041, 1052 (Cal. App. 2011) (citing *Kennedy* and *Hall* with approval for the proposition that the decision to employ persons "of a particular religion" under the Title VII exemptions includes the decision to terminate an employee whose conduct is inconsistent with the religious beliefs of the employer); *Saeemodarae v. Mercy Health Serv.*, 456 F. Supp. 2d 1021, 1039-40 (N.D. Iowa 2006) (Title VII exemptions allow religious employer to terminate employee whose conduct is inconsistent with religious beliefs of the employer); *Newbrough*, 2015 WL 759478, *12-13 (citing *Little* and *Saeemodarae* for the same proposition).

The U.S. Department of Justice likewise has recognized that the Title VII religious exemptions apply to conduct and encompass more than a mere right to hire co-religionists. Memorandum from the Attorney General to All Executive Departments and Agencies, *Federal Law Protections for Religious Liberty* (Oct. 6, 2017), at 6, https://www.justice.gov/opa/press-release/file/1001891/download, 82 Fed. Reg. 49668, 49670 (Oct. 26, 2017), which states:

> Under that exemption [702(a)], religious organizations may choose to employ

> only persons whose beliefs *and conduct* are consistent with the organizations' religious precepts. For example, a Lutheran secondary school may choose to employ only practicing Lutherans, only practicing Christians, or *only those willing to adhere to a code of conduct* consistent with the precepts of the Lutheran community sponsoring the school. [Emphasis added.]

2. <u>The religious exemptions are an affirmative defense to Title VII claims when the religious employer's employment decision is based on religious reasons.</u>

Little, to be sure, involved a Title VII claim of *religious* discrimination, but the Title VII exemptions also shield religious employers from all *other* Title VII claims. The elements of the affirmative defense, of course, must be present.

At least four decisions—two from federal circuit courts and two from federal district courts—have applied the Title VII exemptions as a defense to a Title VII claim of sex discrimination when the religious employer asserted a theological or doctrinal basis for its challenged employment decision. *See Curay-Cramer v. Ursuline Academy of Wilmington, Del.*, 450 F.3d 130 (3d Cir. 2006); *E.E.O.C. v. Miss. Coll.*, 626 F.2d 477 (5th Cir. 1980); *Maguire v. Marquette Univ*., 627 F. Supp. 1499 (E.D. Wis. 1986), *aff'd in part on other grounds*, *vacated in part*, 814 F.2d 1213 (7th Cir. 1987); *Bear Creek Baptist Church v. E.E.O.C.*, 571 F. Supp. 3d 571 (N.D. Tex. 2021).

In the first of these decisions, *Curay-Cramer*, a Catholic school fired a teacher after she signed her name to a pro-choice advertisement in a local newspaper. The teacher sued for sex discrimination under Title VII. The Third Circuit concluded that the adjudication of the teacher's claim that the school treated her more harshly than male colleagues who she claimed had also violated Church teaching would raise serious constitutional questions because it would require the court to evaluate the relative seriousness of various violations of Church teaching. The court drew upon *Little*:

> While it is true that the plaintiff in *Little* styled her allegation as one of religious discrimination whereas Curay-Cramer's third Count alleges gender discrimination, we do not believe the difference is significant in terms of whether serious constitutional questions are raised by applying Title VII.

450 F.3d at 139.

Under the doctrine of constitutional avoidance, the court held that Title VII did not apply to these facts. *Id*. at 141 (concluding that "the existence of [section 703(e)(2)] and our interpretation of its scope prevent us from finding a clear expression of an affirmative intention on the part of Congress to have Title VII apply").

In the second decision, *Mississippi College*, Patricia Summers alleged that a Baptist college's failure to hire her for a full-time teaching position in the college's psychology

department was a result of sex and race discrimination. The Fifth Circuit held that if the college presented convincing evidence that it preferred a Baptist candidate over Summers (the person the college hired was Baptist, while Summers was not), then the Title VII religious' exemption "would preclude any investigation by the EEOC to determine whether the College used the preference policy as a guise to hide some other form of discrimination." 626 F.2d at 486.

In short, the Title VII exemption would bar investigation of Summers' sex and race discrimination claims if the college had religious reasons for its decision not to hire her. The court elaborated:

> … [Section] 702 may bar investigation of [Summers'] individual claim [for sex and race discrimination]. The district court did not make clear whether the individual employment decision complained of by Summers was based on the applicant's religion.
>
> Thus, we cannot determine whether the exemption of § 702 applies. If the district court determines on remand that the College applied its policy of preferring Baptists over non-Baptists in granting the faculty position to Bailey rather than Summers, *then § 702 exempts that decision from the application of Title VII* ….

Id. at 485-86 (emphasis added).

In the third decision, *Maguire*, Marquette University refused to hire Marjorie Maguire as a theology professor because she opposed Catholic teaching on abortion. The district court concluded that the Title VII exemption barred her claim. 627 F. Supp. at 1506-07.[9]

Finally, the most recent of the four cases to speak to the issue is *Bear Creek Baptist Church v. E.E.O.C.*, 571 F. Supp. 3d 571 (N.D. Tex. 2021). A church and Christian-owned business that did not wish to employ those who engaged in homosexual or transgender conduct brought a class action against the Equal Employment Opportunity Commission seeking a declaration that they were exempt under section 702(a) from a claim for sex discrimination if their reasons were based on their religion. The district court said that it must begin with the text of section 702(a). The text does not say that religious employers were totally exempt from Title VII's prohibitions on discrimination on the basis of race, color, religion, sex, or national origin. If it did, "the text would simply say it does not apply to religious employers." *Id.* at 590. However, what the plain text does say is that this "title [subchapter] shall not apply to" . . . a religious employer when acting on a religious belief or practice. Accordingly, by its terms the 702(a) exemption is not limited to causes of action where the employee claims to be discriminated against on the basis of religion. *Id.* Not only is this the plain reading of the text, but this

[9] The court of appeals affirmed on other grounds, finding that Maguire had failed to establish a prima facie case of sex discrimination because, by her own admission, her beliefs about abortion, not her sex, were the but-for cause of the university's decision not to hire her. 814 F.2d at 1217-18.

understanding of the religious employer's exemption is consistent with a parallel reading of an exemption covering "an employer with respect to the employment of aliens outside any State." The latter exemption is also part of section 702(a) and without fail it has been construed as applying to aliens when they sue for discrimination with respect to any of the protected classes. Accordingly, if section 702(a) were somehow limited to claims of religious discrimination, "one would expect the alien exemption to have a parallel limitation (i.e., limited to claims of race or national-origin discrimination)." But it does not. "Without such limitations, the exemption for religious employers must be read equally broadly." *Id.* (internal quotations omitted).

The Title VII religious exemptions likewise shield religious employers from retaliation claims. *Kennedy*, 657 F.3d at 193-94 ("[T]he 'subchapter' referred to in [section 702(a)] includes both § 2000e-2(a)(1), which covers harassment and discriminatory discharge claims, and § 2000e-3(a), which covers retaliation claims…. Thus, [plaintiff's] three claims—discharge, harassment, and retaliation—all arise from the 'subchapter' covered by the religious organization exemption, and they all arise from her 'employment' by [the defendant]."); *Curay-Cramer*, *supra* (religious exemptions barred retaliation claim against religious employer); *Saeemodarae*, 456 F. Supp.2d at 1041 (Section 702(a) exemption barred employee's retaliation claim against religious employer), citing *Lown v. Salvation Army, Inc.*, 393 F. Supp.2d 223, 254 (S.D.N.Y. 2005) ("Plaintiff's Title VII retaliation claim must be dismissed because the broad language of Section 702(a) provides that '[t]his subchapter shall not apply … to a religious… institution … with respect to the employment of individuals of a particular religion' … Title VII's anti-retaliation provision … is contained in the same subchapter as Section 702. Accordingly, it does not apply here."); *see also Garcia v. Salvation Army*, 918 F.3d 997, 1004 (9th Cir. 2019) (section 702(a) barred retaliation claim against religious employer).

In a case decided just last year, Circuit Judge Frank Easterbrook, concurring, noted that when religious employer exemptions apply, they shield the employer from *all* claims under Title VII, not just claims of religious discrimination. *Starkey v. Roman Catholic Archdiocese of Indianapolis*, 41 F.4th 931 (7th Cir. 2022). Judge Easterbrook observes that some courts have mistakenly interpreted section 702(a) to apply only to claims of discrimination based on religion. He notes, as we do, that religious organizations are not categorically exempt from Title VII. But he emphasizes, with a certain incredulousness, that more courts were not picking up on this straightforward textual point, that "when the [adverse employment] decision is founded on the employer's religious belief, then *all of Title VII drops out*." *Id*. at 946 (emphasis added).

The Preamble (88 Fed. Reg. at 2402 n.9) cites *Kennedy* and *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166 (2d Cir. 1993), for the proposition that the religious employer exemptions do not shield employers from claims of discrimination on bases other than religion. Neither case supports that proposition. *Kennedy* held that the Title VII religious employer exemptions shielded a religious employer from claims of religious discrimination, harassment based on religion, and retaliation. 657 F.3d at 191, 196. The court of appeals ruled entirely for the employer and no other claim was presented. *Id*. *DeMarco* was a case brought under the Age Discrimination in Employment Act, not Title VII. 4 F.3d at 168. The Preamble also cites (88 Fed. Reg. at 2402 n.9) *Cline v. Catholic Diocese of Toledo*, 657 F.3d 201 (4th Cir. 2011), a case

involving a claim of pregnancy discrimination under Title VII. That decision is incorrect because it overlooks the plain language of the statute ("This title shall not apply to an employer…"), but even *Cline* correctly acknowledges that a religiously grounded policy forbidding premarital sexual relations does not violate Title VII. 657 F.3d at 658.

C. <u>Contrary Arguments</u>

Contrary arguments exist but, in our view, rest on misunderstandings. The most common error involves neglecting the plain text of Title VII or reading into the statute conditions or requirements that simply are not found there.

1. <u>The Co-Religionist Theory</u>

Some courts have stated that the Title VII exemptions only enshrine a right to employ one's co-religionists. *E.g.*, *Boyd v. Harding Academy of Memphis*, 88 F.3d 410, 413 (6th Cir. 1996) (stating that section 702(a) "merely indicates that [religious] institutions may choose to employ members of their own religion"); *E.E.O.C. v. Pacific Press Pub. Ass'n*, 676 F.2d 1272, 1276 (9th Cir. 1982) ("Title VII provides only a limited exemption enabling [a religious employer] to discriminate in favor of co-religionists.").

This assertion, made without careful attention to the language of the statute, is debunked by the plain text of Title VII—the religious exemptions and the definition of religion--and case law, discussed in Subparts A and B above, respectively.

2. <u>The Religious-Discrimination Theory</u>

Some courts assert, based on the "plain language" of Title VII, that the religious exemptions only bar religious discrimination claims. *E.g.*, *Starkey v. Roman Catholic Archdiocese of Indianapolis, Inc.*, 496 F. Supp.3d 1195, 1202 (S.D. Ind. Oct. 21, 2020) (stating that "[t]he plain language of Title VII indicates that the [section 702(a)] exception applies to one specific reason for an employment decision—one based upon religious preference."), *rev'd on other grounds*, 41 F.3d 931 (7th Cir. 2022). These courts focus on the phrase "particular religion" in isolation, without taking into account the statutory definition of religion or Congress's use of the phrases "*This title* shall not apply" and "Notwithstanding *any other provision of this title*" in sections 702(a) and 703(e), respectively.

In considering what sorts of claims are barred by the religious exemptions, these courts fail to consider, or to consider carefully, the relevant statutory text in their analysis. *Herx v. Diocese of Fort Wayne-South Bend Inc.*, 48 F. Supp.3d 1168 (N.D. Ind. 2014), is illustrative. In that case, the district court considered whether the Title VII exemptions barred a sex discrimination claim against a Catholic school brought by a teacher who, in violation of Church teaching, had undergone in vitro fertilization. In its opinion, the court says nothing about the statutory definition of "religion." The court does *quote* the text of the exemptions (*id*. at 1174)

but then fails to *discuss* the very text where it plainly says the exemptions apply to all Title VII claims (*id.* at 1175-76), relying instead on certain anomalous cases. *Id*. at 1175-76 (beginning by saying that "The court doesn't read the case law the same way the Diocese does," and then discussing those cases without reference to the text of the statute).

We do not claim that the religious employer exemptions create a categorical immunity from suit. If they did, a religious employer would not be liable under Title VII under any circumstances. Rather, sections 702(a) and 703(e) are affirmative defenses. *See* Fed. R. Civ. Proc. 8(c) (an affirmative defense is characterized by "confession but avoidance"). From the fact that Title VII does not create a *categorical* exemption for religious employers, some courts illogically conclude that Title VII does not exempt the religious employer from discrimination claims in the specific case under review. This involves the logical fallacy of arguing that a trait, if not universally present, must be universally absent, as when one argues that because it does not rain *every* Wednesday, it does not rain on *any* Wednesday. While a particular legal defense cannot be asserted in *every* case within a particular universe of cases, it does not follow that the same defense cannot be asserted in *any* case within that universe. Yet some courts continue to make this basic error when considering whether the Title VII exemptions apply. *See*, *e.g*., *Boyd*, 88 F.3d at 413 (stating that section 702(a) does not "exempt religious educational institutions with respect to *all* discrimination," as if this answered the question whether the exemptions applied in the case under review) [emphasis added].

It is clear that Title VII does not categorically immunize religious employers from liability under Title VII. If Congress had intended a categorical exemption for religious employers, it would have enacted an immunity clause stating that Title VII does not apply to religious organizations. But from the absence of such a total or complete immunity, it does not follow that the exemptions Congress actually enacted do not apply in a specific case, nor does it mean the exemptions may *only* be invoked as a defense to claims of *religious* discrimination. No such limitation is expressed anywhere in the plain text of Title VII—not in the exemptions themselves, nor in the definition of religion, nor anywhere else in Title VII. Esbeck at 374-80 (underscoring this point); Phillips at 298-315 (same). Most importantly, the beginning text of the religious exemptions combined with the definition of "religion" in Title VII explicitly and unambiguously *contradict* the claim that the religious exemptions in Title VII are so limited, as explained in Subpart A, above. And since the plain text is the primary guide to the meaning of Title VII, a point emphasized in *Bostock*,[10] it is the text of the statute that must govern.[11]

[10] *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020) ("When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.").

[11] Some courts seem to make the reverse argument, i.e., that if the religious exemptions can sometimes apply to claims of discrimination on bases other than religion, then those exemptions will always apply, rendering Title VII a dead letter as to religious organizations altogether. *E.g*., *Starkey*, 496 F. Supp.3d at 1203 ("The exemption under Section 702 should not be read to swallow Title VII's rules."). This is incorrect. The fact that the exemptions apply in some cases does not mean that they apply in all cases. In the matter at hand, both elements of the affirmative defense have to be present for the exemption to apply.

Some courts rely on legislative history for the proposition that religious employers "remain subject to the provisions of Title VII with regard to race, color, sex or national origin." *Rayburn v. Gen. Conf. of Seventh-Day Adventists*, 772 F.2d 1164, 1167 (4th Cir. 1985) (quoting Section-by-Section Analysis of H.R. 1746, the Equal Employment Opportunity Act of 1972, 92 Cong. Rec. S. 3461 (1972)); *Pacific Press*, 676 F.2d at 1276-77 (same); *Starkey*, at *5 (same). But this is a misreading of that congressional report. It is correct that religious employers are generally subject to all of Title VII, but, as noted above, such employers are sometimes relieved of liability by the exemptions acting as affirmative defenses. If the employer is religious and if the employer had a religious reason for the employment decision adverse to the plaintiff, then the defenses apply and the claim must be dismissed. Of course, if statutory text and legislative history were to give different answers to a question about the meaning of a statute, then legislative history must yield to statutory text. *Bostock*, 140 S. Ct. at 1737 (indicating that the express terms of a statute control over extratextual considerations).

Conclusion to Part I

The 2023 NPRM must be altered to reflect that the section 702(a) and 703(e) exemptions do far more than simply protect the liberty of a religious employer to prefer its co-religionists. These sections may be raised by a religious employer as an affirmative defense to any claim brought under Title VII—not just claims of *religious* discrimination—when that employer bases its adverse employment decision on its religious convictions.

PART II: RECENT DEVELOPMENTS IN THE FIRST AMENDMENT RESPECTING FEDERAL FUNDS TO SOCIAL SERVICE PROGRAMS WITHOUT REGARD TO THE RELIGIOUS CHARACTER OF THE PROVIDERS

The 2023 NPRM's Supplementary Information or Preamble begins with a partial history of the faith-based initiative. The account picks up the story in December 2002 when President George W. Bush issued an Executive Order extending the 1996 "Charitable Choice" rules[12] to the entire realm of federal social service programs across multiple federal agencies. The historical account ends with the institution of the Office of Faith-Based and Neighborhood Partnerships early in the Biden administration. *Id.* at 2395-97. The Supplementary Information turns to a discussion of the rights of the beneficiaries of federal social service programs (*id.* at 2398-99), and then takes up the constitutional and statutory rights and duties of faith-based social service providers within such programs (*id.* at 2399-2401).

[12] The first "Charitable Choice" provision was enacted in August 1996 as part of the comprehensive welfare reform sought by President William J. Clinton. It appeared as section 104 of the Personal Responsibility and Work Opportunity Reconciliation Act, P.L. 104-193, 42 U.S.C. § 604a, and covered a program known as Temporary Assistance for Needy Families (TANF). A more complete history appears at Carl H. Esbeck & Stanley Carlson-Thies, *Happy Birthday Charitable Choice, 20 Years of Success*, http://cpjustice.org/happy-birthday-charitable-choice-20-years -of-success/ (Aug. 22, 2016).

A. Historical Backdrop

An examination of the entire 27-year history of efforts to create a level playing field in federal funding helps one to see the evolution of the regulations as they attempt to keep abreast of changes in the Supreme Court's interpretation of the Establishment and Free Exercise Clauses. We will call the set of changing regulations the "faith-based regulations." A complete examination would begin with the restriction on direct funding of inherently religious activities that was part of the TANF (Temporary Assistance for Needy Families) Charitable Choice legislation in the 1996 welfare reform law.[13] The "inherently religious" restriction came from *Bowen v. Kendrick*, 487 U.S. 589 (1988). *Bowen* was the rare case that actually involved social service funding, as opposed to funding of K-12 schools. The Court in *Bowen* upheld the underlying legislation "on its face" (*id.* at 600-18), but deferred examination of the program "as applied" (*id.* at 618-22). One of the directives of the legislation was that there would be no direct funding of inherently religious activity such as worship and proselytizing. *Id.* at 605-18, 621-22.

Next were the 2003-04 regulatory requirements adopted by the Bush administration. These built on the executive order of December 2002. The First Amendment restrictions on religious providers when the program aid was via direct funding were drawn from Justice O'Connor's controlling opinion in *Mitchell v. Helms*, 530 U.S. 793, 836 (2000) (O'Connor, J. concurring in the judgment).[14] Only Justice Breyer joined Justice O'Connor's opinion. Providers were to separate, by time or location, their explicitly religious activities from the government-funded program. This restriction was retained during the Obama administration. But the four-justice plurality opinion in *Mitchell v. Helms*, 530 U.S. 793 (2000), written by Justice Thomas, had already articulated what essentially is the rule of neutrality that *Trinity Lutheran* adopted 17 years later. The only difference is that when *Mitchell* was decided the rule was permissive, in the view of the plurality, as a matter of the Establishment Clause. Today, of course, the rule of neutrality is mandatory as a matter of the Free Exercise Clause. We say more about this below.

Currently in force are the version of the regulations promulgated by the Trump administration, known as the "2020 Rule,"[15] which dropped some of these restraints but retained others. And, finally, we reach the rules proposed in the 2023 NPRM.

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[13] 42 U.S.C. § 604a(j).

[14] *See* Carl H. Esbeck, Senior Counsel to the Deputy Attorney General, U.S. DEPARTMENT OF JUSTICE, HEARING BEFORE THE SUBCOMMITTEE ON THE CONSTITUTION OF THE COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES, 170th Cong. 1st Sess., 6, 13-18 (June 7, 2001). The formal statement of Mr. Esbeck is reprinted at https://scholarship.law.nd.edu/ndjlepp/vol16/iss2/13/.

[15] 88 Fed. Reg. at 2397 defines the "2020 Rule" as those regulations promulgated by the Trump administration. These are the same nine-agency regulations found in the current Code of Federal Regulations.

B. The Turn from Separationism to Equality

In the foregoing historical development, we can identify elements of the Obama-era "2016 Rule"[16] and the Trump-era 2020 Rule that are artifacts of the then-valid but no longer current interpretation of the Religion Clauses of the First Amendment. In a series of five recent cases, the U.S. Supreme Court's treatment of the Religion Clauses has progressed in material ways that fail to be reflected in the 2023 NPRM.

The turning point came in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017), requiring that an applicant to a state grant program could not be denied equal participation in a direct funding program because it was a church. The free-exercise requirement of neutral treatment preempted conflicting Blaine Amendments that have been part of many state constitutions since shortly after the Civil War (*id.* at 2017-18, 2024) and which were intended to prohibit government financial assistance to churches and other religious entities.[17] The follow-on cases to *Trinity Lutheran* are *Espinoza v. Montana Dept. of Revenue*, 140 S. Ct. 2246 (2020), holding that free-exercise neutrality requires aid to K-12 schools, including religious schools, via state income tax credits; *Fulton v. City of Philadelphia, Penn.*, 141 S. Ct. 1868 (2021), finding that free-exercise neutrality requires the extension of a regulatory accommodation to a funded, faith-based foster care placement agency; *Kennedy v. Bremerton School Dist.*, 142 S. Ct. 2407 (2022), finding that with respect to the actions of a football coach in public school engaging in private prayer, the Court aligns the Establishment Clause to fit the neutrality requirements of Free Exercise and Free Speech Clauses; and *Carson v. Makin*, 142 S. Ct. 1987 (2022), requiring state aid be provided to public and private high school students, including students attending "sectarian" schools, to conform to the principle of free-exercise neutrality.

As a rule, the Court's prior line of cases from two and more decades ago were about the extent to which funding of religious organizations was *permitted* by the Establishment Clause.[18] The new array of cases from 2017 to the present is about what government funding or other accommodation of religious organizations is *required* by the Free Exercise Clause. As to the latter, the Supreme Court now demands an exacting rule of equal treatment—that is, neutrality as between religious and nonreligious applicants for and recipients of a benefit or grant. The losing party in this series of cases sought refuge in the now-obsolete reading of the Establishment Clause as prohibiting most government aid for religious entities and activities. Significantly, that older reading was already so diminished that states attorneys did not even argue the federal Establishment Clause. Rather, they resorted to more separationist notions in

[16] *Id.* at 2396 defines the "2016 Rule" as those regulations promulgated by the Obama administration.

[17] This also occurred with Montana's Blaine Amendment in *Espinoza*, 140 S. Ct. at 2252-53, 2255-56, 2258-61.

[18] *See, e.g., Sch. Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373 (1985); *Bowen v. Kendrick*, 487 U.S. 589 (1988); *Agostini v. Felton*, 521 U.S. 203 (1997); *Mitchell v. Helms*, 530 U.S. 793 (2000) (plurality opinion); and *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

state law. But the current Supreme Court rejected these separationist concerns as preempted.[19] As the Court in *Kennedy* explains, the Establishment Clause is not in tension with the Free Exercise Clause (and Free Speech Clause).[20] Rather, such constitutional strictures are in harmony when a rule of funding equality is applied to religious and secular organizations. 142 S. Ct. at 2426. There is no conflict between the Religion Clauses, with one clause somehow cancelling out the other.

This series of decisions since 2017 renders erroneous the application of restrictive conditions on the participation of religious organizations in government funding programs. Yet many of the restrictive, nonequal artifacts from the Bush, Obama, and Trump regulations are slated in the 2023 NPRM to be retained. Moreover, the discussion of these recent free-exercise cases in the Supplementary Information falls short of the post-*Trinity Lutheran* developments by the High Court when it comes to (a) neutrality in government funding of social service programs and (b) dialing back exaggerated notions of the Establishment Clause. The Departments' reliance on cases like *Zelman v. Simmons-Harris* (*see* 88 Fed. Reg. at 2399-2401), now over two decades old, results in what are now irrelevant distinctions under current case law, such as whether the form of the aid is direct or indirect, or requiring agency policing as to whether a religious provider's program includes explicitly religious elements.

The Court has moved on from the intricacies of these older cases (e.g., *Bowen*, *Mitchell*, *Zelman*) that were decided under the shadow of asking what the Establishment Clause *allows*. Again, by a 6-3 majority, the starting point now is with what the Free Exercise Clause *requires* by way of neutral treatment of religious and nonreligious providers. The Court in *Kennedy* elaborated on what is considered "neutral." "A government policy will not qualify as neutral if it is specifically directed at . . . religious practice." 142 S. Ct at 2422 (internal quotation omitted). In selecting providers for its program, the government must treat religious and secular organizations the same. When that is achieved, the Establishment Clause rests in harmony with the equal treatment demanded by the Free Exercise Clause. *Id.* at 2426 (Establishment Clause is not at odds with the Free Exercise Clause).

To call out some of these artifacts that are still present in the 2023 NPRM, we first turn to February 2009 when the Obama administration formed an Advisory Council on Faith-Based and Neighborhood Partnerships. Based on recommendations from the Council, in November 2010 the following legal guidelines, among others, were adopted:

- Stating that the Federal Government has an obligation to monitor and enforce all standards regarding the relationship between religion and government in ways

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[19]*See Carson,* 142 S. Ct. at 1997-98, 2000-01 (neutrality in state funding of religious schools overrides interests in being more separationist than required by Establishment Clause); *Espinoza*, 140 S. Ct. at 2253, 2258-59 (neutrality in state funding of religious schools overrides separationists' concerns in state Blaine Amendment); and *Trinity Lutheran*, 137 S. Ct. at 2019 n.1, 2024 (neutrality in state funding of church overrides separationists' concerns in state Blaine Amendment).

[20] 142 S. Ct. at 2426 (putting to rest the notion of a "tension between the clauses").

that avoid excessive entanglement between religious bodies and governmental entities.[21]

- Providing further clarifications concerning certain requirements, including under Executive Order 13279, that organizations engaging in explicitly religious activity must (i) perform such activities and offer such services outside of programs that are supported with direct Federal financial assistance, (ii) separate these activities in time or location from programs supported with direct Federal financial assistance, and (iii) ensure that participation in any such activities must be voluntary for the beneficiaries of the social service program supported with Federal financial assistance.

88 Fed. Reg. at 2396. The overt religious restrictions in these guidelines were all derived from separationist/excessive entanglement case law then in place, but no longer.

In promulgating the 2020 Rule that modified the Obama regulations, the Trump administration both *eliminated* and *added* a series of requirements to the faith-based regulations. Yet, despite the Trump-era changes, there still remained elements of the earlier legacy of constitutional interpretation now overruled by *Trinity Lutheran*, *Espinoza*, *Fulton*, *Kennedy*, and *Carson*. This in-and-out sorting included:

- Eliminating a requirement that faith-based providers receiving direct Federal financial assistance provide notice to beneficiaries and prospective beneficiaries of certain protections, including protection from discrimination on the basis of religion;

- Eliminating requirements that, if a beneficiary objected to the religious character of a faith-based provider, the provider would undertake reasonable efforts to identify and refer the beneficiary to an alternative provider, and that providers inform beneficiaries of this alternative provider requirement in the notice to them;

- Eliminating a requirement that beneficiaries of indirect Federal financial assistance (such as vouchers, certificates, or other Government funded means that the beneficiaries might be able to use to obtain services at providers of their choosing) must have at least one adequate secular option for the use of the indirect assistance;

[21] The admonition to avoid "excessive entanglement" between government and religious organizations comes from the third prong of the *Lemon* test. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). That usually meant to avoid "administrative entanglement," but there were a few iterations—notwithstanding the free speech right to engage in political action—where this was taken to mean avoid "political entanglement." The *Lemon* test has long since fallen out of use by the Supreme Court, and in *Kennedy*, 142 S. Ct. at 2420-21, 2427-28, 2428 n.4, lower courts were instructed by the High Court to stop using the three-prong test, along with its off-shoot, the "no endorsement" test.

. . .

- Adding a requirement that notices or announcements of award opportunities and notices of awards or contracts include language regarding . . . providers' obligations not to use direct financial assistance for any explicitly religious activities and not to discriminate against prospective or current program beneficiaries on the basis of religion.

. . .

88 Fed. Reg. at 2397.

The rules quoted in the two blocks of bullet points, above, incorporate distinctions perhaps necessary during the era of the Bush, Obama, and Trump administrations. But the more recent case law is that those distinctions are no longer permitted under the Supreme Court's current reading of the Free Exercise Clause, a reading that does not tolerate singling out religion for intentional burdens added as the price of a grantee's equal participate in a social service program.

C. Shortcomings in the Preamble's Legal Analysis

The recent Free Exercise Clause cases are, of course, briefly discussed in the Supplemental Information (*id.* at 2399-2401), but inadequately so. This failure to fully account for the new developments in the Supreme Court has led the nine agencies to unnecessarily complicate the 2023 NPRM, such as by retaining distinctions like direct/indirect funding and permitting a beneficiary to opt out of those aspects of a social service provider's program that are religious. Indeed, in some instances the failure to adjust to the Court's changes have the 2023 NPRM proposing rules that expressly single out religion and hence religious providers for discriminatory treatment, a *prima facie* violation of the Free Exercise Clause. Accordingly, if some of the proposed 2023 regulations that continue to impose on religious providers unique regulatory duties, such as to separate, by time or location, religious aspects of its program, they will be facially subject to strict scrutiny. Resorting to the Establishment Clause will be of no avail, and the overt religious discrimination will be struck down.

The good news is that once the Free Exercise Clause's equal-treatment principles are taken into account, the reformulated regulations will be far simpler in content and easier to administer. In other words, the rules will go from high maintenance to low maintenance. The beginning principle must be: Government programs that provide funding to social service providers are to do so without regard to the religious character of the provider. The only question to be asked by the government of all applicants is: Can the applicant do the job described in the underlying legislation? Can the applicant deliver the government's program services as set out in the Request for Proposals ("RFP")?

Congress has spending power authority to design welfare programs to meet the social service needs of beneficiaries as defined in the implementing legislation. In such programs, all

providers should be equally eligible to compete for grants and contracts; none are excluded because of their religious character. So long as a faith-based provider delivers the program services, the government is not to be concerned whether the religious provider includes features or aspects that are deemed religious. That is what it means to be neutral as required by the Free Exercise Clause. Faith-based providers will necessarily have religious perspectives integrated into their program to one degree or another. But that is not unique. It is also inevitable that secular providers will have their own ideological perspectives woven into their programs in varying degree. All types of providers are to be treated the same. The government gets full value for its funding when the provider delivers the goods and services as described by Congress in the program design. Once admitted into the program, a beneficiary is expected to participate in the whole of the provider's program.[22] This is necessary for the program, be it secular or religious, to succeed. And this is so whether the funding is direct or indirect.

The direct/indirect distinction had a noteworthy run, but it is a device no longer needed to avoid transgressing the Establishment Clause. A focus on the "indirect" nature of the aid started with *Mueller v. Allen*, 463 U.S. 388 (1983), which upheld a state income tax deduction to defray the educational costs borne by parents of school-age children. Since public schools were free, however, those costs fell primarily on parents enrolling their children in private schools, including private religious schools. The aid was in a sense to the parents who freely choose where to enroll their child. It was these private actors, not the government, who directed the aid to a religious school rather than a secular school. For private school advocates, the distinction was useful to circumnavigate the Court's general opposition to aid to religious schools.

Following *Mueller*, additional indirect-aid cases were upheld notwithstanding the older, no-funding regime.[23] That took care of satisfying the Establishment Clause, as then understood. But once the Free Exercise Clause was brought forward to require equal treatment in *Trinity Lutheran* and its progeny, the indirect-funding device was no longer needed by the Court to navigate around the older, no-aid Establishment Clause cases. Rather, if the Free Exercise Clause requires equal treatment of religion, as it now does, the Establishment Clause has to be understood as in alignment with the Free Exercise Clause. As this took place, it also meant the

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[22] As a matter of discretion, Congress has spending power to impose such a rule when it comes to a provider's admission of beneficiaries to a program. The same would go for similar basis of discrimination, such as race or national origin. *Cf.* Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. Or Congress could delegate in the underlying social service legislation such authority to an agency. But it has never generally done so. And no agency has authority to unilaterally adopt such a nondiscrimination rule, nor can the President unilaterally issue an executive order imposing such a rule. Either measure would be violative of the Administrative Procedure Act. The Preamble suggests that such a nondiscrimination rule, imposed unilaterally, concerning beneficiaries is valid because it has been around since December 2002. *See* 88 Fed. Reg. at 2398-99. But continuing violations of the APA are not validated by the passage of time.

[23] The indirect funding cases to follow *Mueller* were *Witters v. Washington Dep't of Serv. for the Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); and *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

need for the direct/indirect distinction fell away. The harmonizing of the two clauses, as confirmed in *Kennedy*,[24] erased any doubt that the bounds of the Establishment Clause were now properly understood, and the direct/indirect distinction was not available to frustrate the rule of equality in *Trinity Lutheran*, *Espinoza*, *Fulton,* and *Carson*.

Any doubt that past inflated notions of the Establishment Clause have receded as religious neutrality has advanced is erased by the Court's increasing confinement of *Locke v. Davey*, 540 U.S. 712 (2004), which upheld, out of separationist concerns, a state constitutional prohibition on a neutral scholarship program when the student aid went to training for clergy. *Locke* is not even an Establishment Clause case, but it did represent establishmentarian concerns—albeit at the state level. *Locke* is repeatedly narrowed and distinguished in *Carson*, 142 S. Ct. at 2001-02; *Espinoza*, 140 S. Ct. at 2257-58; and *Trinity Lutheran*, 137 S. Ct. at 2023-24.

Exaggerated notions of the Establishment Clause have proven hard to stamp out, albeit bordering on legal malpractice. Consider, for example, the recent case of *Shurtleff v. Boston*, 142 S. Ct. 1583 (2022). Counsel for the City of Boston cited the Establishment Clause as justification for excluding speech of religious viewpoint from a limited public forum. Boston's argument was rejected by a 9-0 Court. This has been the law going back at least 40 years to *Widmar v. Vincent*, 454 U.S. 263 (1981). *See also* the *Kennedy* Court finding it necessary to instruct lower courts to stop using the three-prong *Lemon* test.[25]

D. No Discrimination Against Religious Providers

In *Trinity Lutheran*, equal treatment was required of the state toward the church. As the Supplementary Information notes, *Carson v. Makin* was an indirect funding case.[26] But the rationale of *Carson* did not turn on the funding being indirect. The State of Maine's fatal error, rather, was to treat "sectarian" schools differently from all other schools. 142 S. Ct. at 1996-98. The Court would not have reached a different result if the form of aid had been direct. Consider *Trinity Lutheran*, which was a direct funding case.[27] A state need not fund private education, but "once a State decides to do so, it cannot disqualify some private schools solely because they are religious." *Id.* at 2000 (quoting *Espinoza*, 140 S. Ct. at 2261). Once it was decided that

[24] *See supra* note 20 and accompanying text.

[25] *See supra* note 21.

[26] *See* 88 Fed. Reg. at 2401 n.8. The 2023 NPRM is mistaken that *Carson* would not prohibit expressly religious restrictions on funding such as one finds in the older cases of *Bowen v. Kendrick*, 487 U.S. 589, 621-22 (1988), and *Mitchell v Helms*, 530 U.S. 793, 840-41 (2000) (O'Connor., J., concurring in the judgment). These expressly religious restrictions are artifacts of earlier cases now disapproved by the free-exercise rule of neutrality found in *Trinity Lutheran*, *Espinoza*, *Fulton*, and *Carson*.

[27] To make too much of *Carson* being an indirect funding case is to put *Carson* at odds with *Trinity Lutheran*. Clearly the 6-3 majority in *Carson* envisioned its holding as following from *Trinity Lutheran*.

private schools could participate, then "Maine's 'nonsectarian' requirement for its otherwise generally available tuition assistance payments" was not neutral with respect to religion and thus subject to strict scrutiny. *Carson*, 142 S. Ct. at 2002.

There can no longer be regulations that single out religious providers if they engage in explicitly religious activities. And there can no longer be regulations that single out religious providers by directing them to separate, by time or location, the more religious aspects of their treatment program from lesser religious programming. Building on *Employment Division of Ore. v. Smith*, 494 U.S. 872, 878 (1990), the Court in *Kennedy v. Bremerton School District* elaborated on what is considered neutral. "A government policy will not qualify as neutral if it is 'specifically directed at . . . religious practice.'" 142 S. Ct. at 2422. All providers are to be treated neutrally; no odious discrimination because the religious are religious.[28] What is required of all providers, including religious providers, is to deliver the goods and services required by the program in the underlying legislation. The government, in turn, gets full secular value for its money when that is accomplished.

E. <u>Rights of the Beneficiary</u>

Beneficiaries have First Amendment rights, and those rights should be set out in the regulations. Again, the principles are straightforward. A beneficiary may object for religious reasons to receiving services from a faith-based provider to which he or she is assigned. The government has a First Amendment duty to reassign the beneficiary to a provider to which there is no religious objection. Because the First Amendment obligates the government, not the private sector, the duty of referral is on the government. And, of course, beneficiaries ought to be timely notified, in writing, of this right to lodge a religious objection and be reassigned. Although the governmental duty is the same whether the aid is direct or indirect, when the form of the aid is indirect the problem of picking a different provider is usually remedied on the front end by the beneficiary just taking his or her voucher elsewhere.

The foregoing is all that is required by the Free Exercise and Establishment Clauses as now understood by the U.S. Supreme Court.[29] The rules are far simpler than in the recent past.

F. <u>Single-Provider Service Areas</u>

The new model requires additional attention only in that unusual circumstance where the government is funding just one social service grantee in each geographic area. What to do if

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[28] The rule of neutrality is required by the Free Exercise Clause. The doctrine of church autonomy may also be implicated in cases where the government funds providers who are religiously affiliated but not those who are sectarian. The government is not competent to make those religious distinctions. *Carson*, 142 S. Ct. at 2001 ("Any attempt to give effect to such a distinction by scrutinizing whether and how a religious school pursues the educational mission would also raise serious concerns about state entanglement with religion . . . .").

[29] On the right of a beneficiary not to be discriminated against on the basis of religion in admission to a program, *see supra* note 22.

the selected grantee—chosen on a neutral basis—turns out to be faith-based? Then there's a problem if a beneficiary has a religious objection. In such a case, again, a referral is the beneficiary's First Amendment remedy, so that cannot be compromised.

Such occurrences are going to have to be worked out case by case. But it is not as if the government does not have options that it can fall back on to meet its constitutional duty. For example, one straightforward solution would be for the government to secure a one-off contract in the private sector for services that meet the program needs of the one protester. Or perhaps the one provider would be willing—just this once—to voluntarily treat differently this beneficiary, assuming this can be done without harming the balance of the provider's faith-based program.

There has been a right of referral, vested in beneficiaries, going back to Charitable Choice as adopted in 1996. This was the "choice" in Charitable Choice. Since 1996, there are no recorded instances where a beneficiary requested such a referral. While it is not unreasonable to anticipate that there could be some requests for referrals, there is no reason to think the number of such requests would be unmanageable. Consider, for instance, that critics of the Religious Freedom Restoration Act predicted that it would flood the courts with claims, which proved to be false. And in any event, it is the arrangement that the First Amendment requires.

We would also point out that a beneficiary's right to reassignment to a different provider is because of a religious objection—not any objection. Moreover, a beneficiary might object narrowly to a Protestant provider but not a Catholic provider. Or a beneficiary might object narrowly to a Christian provider but not an Islamic provider. In other words, some situations will resolve themselves without resort to securing a secular provider.

G. Needed Revisions to the Nine-Agency Proposed Rules

Rather than pick through each of the Nine-Agency proposed rules (88 Fed. Reg. at 2408-27), we will use a few of the rules proposed by the U.S. Department of Education (*id.* at 2409-11) to illustrate revisions needed to bring the 2023 NPRM in line with the Free Exercise Clause.

> **Proposed § 75.52 Eligibility of faith-based organizations for a grant and nondiscrimination against those organizations.** (a)(1) A faith-based organization is eligible to apply for and to receive a grant under a program of the Department on the same basis as any other private organization.
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> . . .
>
> (3) . . . All organizations that receive grants under a Department program, including organizations with religious character, motives, or affiliation, must carry out eligible activities in accordance with all program requirements, including those prohibiting the use of direct financial assistance to engage in explicitly religious activities, subject to any accommodations that are granted to organizations on a case-by-case basis in accordance with the Constitution and laws of the United States, including Federal civil rights laws. . . .

. . .

88 Fed. Reg. at 2409-10.

As explained above, proposed rule 75.52(3)'s prohibition on providers "engag[ing] in explicitly religious activities" is neither required by the Establishment Clause nor permitted by the Free Exercise Clause. The rule facially targets religion. All providers, secular and religious, necessarily value some ideological perspective in their programs. All providers must be treated the same. The government's interest is whether a provider is delivering the program goods and services as set forth in the congressional enabling legislation. If so, full secular value is received.

The 2023 NPRM for the Department of Education also states:

> **Proposed § 75.712 Beneficiary protections: Written notice.** (a) An organization providing social services to beneficiaries under a Department program supported by direct Federal financial assistance must give written notice to a beneficiary or prospective beneficiary of certain protections. Such notice must be given in the manner and form prescribed by the Department. This notice must state that—
>
> (1) The organization may not discriminate against a beneficiary or prospective beneficiary on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice;
>
> (2) The organization may not require a beneficiary or prospective beneficiary to attend or participate in any explicitly religious activities that are offered by the organization, and any participation by a beneficiary in such activities must be purely voluntary;
>
> (3) The organization must separate in time or location any privately funded explicitly religious activities from activities supported by direct Federal financial assistance; and . . .

Id. at 2410.

As explained above, the rules no longer differ when the aid is direct as opposed to indirect; the provider receiving direct aid now has the same ability under the First Amendment to integrate religion into its program as the provider receiving indirect aid.

As acknowledged above, beneficiaries should be given timely, written notice of their First Amendment rights. But those rights are not those set out by the form of notice required by the Department.

As acknowledged above, the government may prohibit religious discrimination in the admission of beneficiaries.[30] Once admitted, however, the beneficiary must participate fully in the provider's program, whether secular or religious. Not only is full and willing participation likely necessary for success (e.g., think drug rehabilitation), but in this regard religious providers are to be treated the same as secular providers. The proposed rule here singles out and targets "explicitly religious activities."

As explained above, beneficiaries have a right, rooted in the Establishment and Free Exercise Clauses, to object to an assignment to a religious provider. While such objections are rare, when lodged the government has the duty to refer the beneficiary to an alternative, non-objectionable provider.

As can be seen based on the proposed regulations of the Department of Education set out above, the Nine Agencies draw upon older rules from turn-of-the-century cases. They are no longer the law. The Department's rules are also unnecessarily complex with multiple variables, and hence hard to apply and wasteful to administer. This discourages participation by faith-based providers.

The good news is that the Free Exercise Clause regime of neutral treatment, drawing on *Trinity Lutheran*, *Espinoza*, *Fulton*, *Kennedy*, and *Carson*, is both simple and easy to administer, and it is *de rigueur* of recent Supreme Court decisions.

Conclusion to Part II

With respect to government funding of social service programs, the Supreme Court's recent array of cases (*Trinity Lutheran, Espinoza, Fulton, Carson*) require that private-sector providers of social services be selected without regard to their religious character. Indeed, the rule of neutrality runs not merely to initial selection, but all the way through the program's administration. This rule of equality is not in tension or conflict with the Establishment Clause (*Kennedy*). Rather, the two clauses are in harmony when religious providers and their practices are not singled-out for burdens because of their religious beliefs or practices. Whether a social service provider be secular or religious, the government gets full value when it requires of all providers the delivery of the goods and services as specified in the underlying social service program.

The beneficiaries of these programs have a right, under the First Amendment, to be reassigned should they be sent to a provider to which they have a religious objection. And these beneficiaries should, of course, be timely informed, in writing, of this limited remedy.

Thank you for your attention to these Comments.

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[30] On the right of a beneficiary not to be discriminated against on the basis of religion in admission to a program, *see supra* note 22.

Respectfully submitted,

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