

The Coalition Against Religious Discrimination

January 29, 2008

THE CARD COALITION URGES THE HELP COMMITTEE NOT TO ADVANCE SAMHSA UNTIL RELIGIOUS LIBERTY AND CIVIL RIGHTS CONCERNS ARE ADDRESSED

The Honorable Edward Kennedy
Chairman
Senate Committee on Health, Education,
Labor and Pensions
SR-317 Russell Senate Office Building
Washington, DC 20510-2101

The Honorable Michael B. Enzi
Ranking Member
Senate Committee on Health, Education,
Labor and Pensions
SR-379A Russell Senate Office Building
Washington, DC 20510-5004

Dear Chairman Kennedy and Ranking Member Enzi:

We, the undersigned religious, civil rights, educational, women's, advocacy, and other organizations are writing to urge that you not advance legislation reauthorizing the Substance Abuse and Mental Health Services Administration (SAMHSA) Act unless critical changes are made to the "charitable choice" provisions in current law that have undermined civil rights and religious liberty protections since 2000. The Coalition Against Religious Discrimination (CARD) was formed in the mid-1990s specifically to oppose insertion of charitable choice into authorizing legislation for programs such as SAMHSA, and has continued since that time to oppose efforts, such as the President's Faith-Based Initiative, that further entrench and expand charitable choice in federal programs.

Charitable choice is a highly controversial proposal that authorizes government-funded religious discrimination in employment, threatens local anti-discrimination laws, and undermines the critical religious liberty protections for both houses of worship and beneficiaries of government programs. The charitable choice provisions contained in SAMHSA were inserted in 2000 with little debate or scrutiny. Indeed, the haste with which Congress acted is demonstrated by the fact that SAMHSA contains two sets of charitable choice provisions that, in some instances, contradict each other. We urge the Committee to clarify the confusion and contradictions contained in current SAMHSA law by making key changes to the charitable choice provisions. The changes should protect against government-funded religious discrimination and the preemption of critically important local civil rights laws, as well as decrease the likelihood that SAMHSA funds will be used to harm religious liberty protections in violation of the First Amendment to the U.S. Constitution. The CARD Coalition stands ready to work with you to find simple ways to address these important concerns.

The Charitable Choice Provisions Permit Government-Funded Discrimination

Religious organizations have a longstanding and proud tradition of providing government-funded secular services that far predate charitable choice. Traditionally, religious organizations that have accepted government funds to provide such services have played by the same rules as other providers and have not engaged in employment decisions based on religion with respect to government-funded

positions. Thus, charitable choice is not necessary for government collaboration with faith-based groups. In fact, faith-based organizations have participated in SAMHSA programs even though the statute has long contained a non-discrimination provision that specifically prohibits religious discrimination in its federally funded programs. Charitable choice, however, allows religious organizations to take government funds *and* use those funds to discriminate in hiring a qualified individual based on nothing more than his or her religion or religious beliefs.

The Charitable Choice Provisions May Undermine Local Anti-Discrimination Laws

The SAMHSA charitable choice provisions seriously threaten the enforceability of local civil rights laws that provide more extensive coverage against employment discrimination than federal law. Even though SAMHSA explicitly states that it does not “modify or affect” state laws or regulations,¹ the Administration has suggested that its provisions may preempt any *local* civil rights law that does not permit faith-based organizations to select staff on the basis of religion or other protected categories. In promulgating the President’s Faith-based Initiative through agency regulations, the Administration indicated in 2003 that it would seek to use charitable choice provisions, such as those in SAMHSA, to trump local anti-discrimination laws.² Further, Carl Esbeck, one of the original authors of charitable choice and former Justice Department official, has argued that faith-based organizations do not have to comply with either *state or local* civil rights laws where “the employment practice is motivated by the [organization’s] sincerely held religious beliefs.” Mr. Esbeck reasoned that “the federal statutory guarantees in [charitable choice] that promise to protect the ‘religious character’ of [faith-based organizations] preempt contrary provisions in state and local laws.”³

The importance of this issue cannot be overstated, given that many of the programs to which the charitable choice provisions apply are carried out at the state and local level. In the 107th Congress, the President’s broad-based faith-based legislation (H.R. 7) stalled and eventually failed to be considered by the Senate in great part because of the concerns about preemption of hard-won state and local civil rights laws. The Senate has consistently refused to accede to any proposed rollbacks of important civil rights protections at any level. Congress should therefore take steps in reauthorizing SAMHSA to clarify that the charitable choice provisions do not preempt local anti-discrimination laws.

The Charitable Choice Provisions Undermine Religious Liberty

In addition to eroding the longstanding principle that civil rights obligations flow with government funding, charitable choice undermines critical religious liberty protections under the First Amendment to the U.S. Constitution. As a policy, charitable choice fundamentally alters how the federal government contracts with faith-based organizations for the provision of social services. Before charitable choice, religious organizations had already been among the main providers of services with federal SAMHSA dollars. Charitable choice, however, permits public funds to flow *directly* to houses of worship without the establishment of a separate, religiously affiliated 501(c)(3) organization. Direct government funding of houses of worship represents a radical erosion of First Amendment principles, endangering the autonomy of religious bodies by allowing government intrusion directly into the activities of houses of worship.

¹ 42 U.S.C. § 290kk-1(e).

² Charitable Choice Provisions & Regulations, 60 Fed. Reg. 56436 (Sept. 30, 2003).

³ Carl Esbeck, *Isn’t Charitable Choice Government-Funded Discrimination*, [http://www.cpjjustice.org/stories/storyreader\\$375](http://www.cpjjustice.org/stories/storyreader$375).

Despite the provisions in charitable choice that purport to protect the religious autonomy of institutions that receive tax money, the government must and will regulate the programs that it funds. To the extent these programs are undifferentiated from houses of worship, the inevitable result will be government oversight, accounting, and monitoring falling squarely on such institutions. The charitable choice provisions threaten to excessively entangle church and state and erode the autonomy of our nation's religious institutions. The Supreme Court has recognized that excessive church-state entanglement is a serious constitutional danger. In addition, Justice O'Connor has warned that there are special establishment clause dangers when money is given directly to religious entities, as these direct grants "fall[] precariously close to the original object of the Establishment Clause's prohibition."⁴

Finally, the CARD Coalition remains deeply concerned that the protections against proselytizing in charitable choice do not adequately protect beneficiaries and thus do not meet constitutional standards.⁵ Although charitable choice provides that no funds should be expended for "sectarian worship, instruction or proselytization," *it fails to bar proselytizing of government beneficiaries in the program by volunteers or privately paid employees of the institution*. For example, a person suffering from substance abuse who seeks help through a government program could be subject to proselytizing or coerced into worship under the language, as long as the employee engaging in the activity is paid with private funds. The President himself has said: "If faith is the integral part of a program being successful, the government ought to say 'hallelujah.'"⁶

Charitable choice undermines fundamental civil rights, religious liberty, and the ability of local governments to enforce their own laws. Accordingly, the CARD Coalition urges you to address these critical concerns before advancing the SAMHSA reauthorization through the legislative process.

Respectfully,

African American Ministers in Action
American Civil Liberties Union
American Federation of State, County, and Municipal Employees (AFSCME)
American Humanist Association
American Jewish Committee
Americans United for Separation of Church and State
Anti-Defamation League
Baptist Joint Committee for Religious Liberty
Center for Inquiry
Disciples Justice Action Network (Disciples of Christ)
Equal Partners in Faith
Human Rights Campaign
Jewish Council for Public Affairs
Legal Momentum
National Association for the Advancement of Colored People (NAACP)

⁴ *Mitchell v. Helms*, 530 U.S. 793, 856 (2000) (O'Connor, J. concurring).

⁵ Accordingly, in the 107th Congress, the House Judiciary Committee agreed that the charitable choice language on proselytization in the President's broad-based faith-based bill (H.R. 7), which mirrored the language in SAMHSA, failed to meet constitutional standards. The Committee thus modified the President's faith-based bill (H.R. 7) in an attempt to meet constitutional requirements.

⁶ George W. Bush, Remarks at "So Others May Eat" Event, Nov. 20, 2001, www.whitehouse.gov/news/releases/2001/11/200111120-5.htm.

National Community Action Foundation
National Council of Jewish Women
National Education Association
National Gay and Lesbian Task Force
OMB Watch
People For the American Way
Protestant Justice Action
Secular Coalition for America
The Interfaith Alliance
Union for Reform Judaism
Unitarian Universalist Association of Congregations
Women of Reform Judaism

cc: Members of the Senate Committee on Health, Education, Labor and Pensions