

# The Coalition Against Religious Discrimination

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August 3, 2022

The Honorable Tom Vilsack  
Secretary of Agriculture  
U.S. Department of Agriculture  
1400 Independence Avenue, SW  
Washington, DC 20250

The Honorable Miguel Cardona  
Secretary of Education  
U.S. Department of Education  
400 Maryland Avenue, SW  
Washington, DC 20202

The Honorable Xavier Becerra  
Secretary of Health and Human Services  
U.S. Department of Health and Human Services  
200 Independence Avenue, SW  
Washington, DC 20201

The Honorable Alejandro Mayorkas  
Secretary of Homeland Security  
Department of Homeland Security  
2707 Martin Luther King Jr Ave, SE  
Washington, DC 20528

The Honorable Marcia L. Fudge  
Secretary of Housing and Urban Development  
Department of Housing and Urban Development  
451 7th Street, SW,  
Washington, DC 20410

The Honorable Merrick Garland  
Attorney General  
U.S. Department of Justice  
950 Pennsylvania Avenue, NW  
Washington, DC 20530

The Honorable Martin J. Walsh  
Secretary of Labor  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

The Honorable Denis R. McDonough  
Secretary of Veterans Affairs  
U.S. Department of Veterans Affairs  
810 Vermont Avenue, NW  
Washington, DC 20420

The Honorable Samantha Power  
Administrator  
U.S. Agency for International Development  
1300 Pennsylvania Avenue, NW  
Washington, D.C. 20004

Dear Secretaries Vilsack, Cardona, Becerra, Mayorkas, Fudge, Walsh, and McDonough, Attorney General Garland, and Administrator Power:

The Coalition Against Religious Discrimination (CARD) writes to thank you for your commitment to promulgating new regulations on Partnerships with Faith-Based and Neighborhood Organizations. As you continue to engage in the process, we would like to highlight some of the issues we believe must be addressed.

We appreciate the important steps already taken by the Biden administration, including the signing of Executive Order 14015, which emphasizes that partnerships must “preserv[e] our fundamental constitutional commitments guaranteeing the equal protection of the laws and the free exercise of religion and forbidding the establishment of religion.”

We hope the new regulations will put this principle into practice by both protecting the religious freedom of program participants and furthering the government's compelling interest in providing effective and equitable programming.

### **The Coalition Against Religious Discrimination**

CARD is a broad and diverse group of leading religious, religious freedom, civil rights, labor, LGBTQ rights, reproductive rights, and secular organizations that formed in the 1990s to monitor legislative and regulatory changes affecting government partnerships with religious and other nonprofit social service providers, and, in particular, to oppose government-funded religious discrimination. We have long advocated for strengthening the constitutional and legal safeguards integral to the rules governing these partnerships, and we have been actively involved in the process that has led to each iteration of the applicable regulations.

We appreciate the important role religiously affiliated institutions historically have played in addressing many of our nation's most pressing social needs, as a complement to government-funded programs. Faith-based organizations, like secular organizations, however, should not be allowed to take government funds and then place religious litmus tests on whom they hire, whom they serve, or which of the required services they will provide.

In 2016, CARD welcomed the Obama administration regulations that strengthened religious freedom safeguards for participants in federally funded social service programs, which were based on consensus policy recommendations. To our great disappointment—and despite strong opposition from a wide range of organizations—the Trump administration stripped these religious freedom protections from the regulations and made other changes that undermine the rights of those whom social service programs are meant to serve. These regulations eliminate notice and alternative provider requirements, expand religious exemptions for providers, and redefine “indirect aid.” The Trump administration put the interests of taxpayer-funded entities, some of which receive millions of dollars each year in government money, ahead of the needs of people, often vulnerable and marginalized, seeking critical social services. The Trump administration rules make it harder for people to get the services they need and undermine the effectiveness of government-funded programs.

Accordingly, we urge the Biden administration to restore critical protections for program participants and to make certain that the regulations adhere to longstanding religious freedom principles. This will ensure faith-based organizations cannot take government funds and then pressure people they serve to participate in religious activities, place religious litmus tests on whom they serve, or refuse to provide services required under the program. We recommend the following changes to current regulations as essential to accomplish this goal.

### **Ensure All Program Participants Receive Notice of their Religious Freedom Rights**

Giving participants notice of their rights is critical to protecting their religious freedom. Failure to inform program participants leaves them vulnerable and unaware that they have a right to receive services free from discrimination, proselytization, and religious coercion—participants can't exercise their rights if they don't understand them.

Thus new regulations should require all providers—both secular and faith-based—to give participants effective notice, in writing and in plain language, of their religious freedom rights.<sup>1</sup>

### **Restore Program Participants’ Right to Request an Alternative Provider**

Ensuring participants can request an alternative provider is also essential to protecting their religious freedom. Without this protection, people seeking social services may be deterred or unable to receive services because of the provider’s religious conduct, activities, or setting. Even though all social services that are directly funded should have only secular content, a person might nonetheless be deterred from continuing with a provider or program and want an alternative provider. For example, someone who follows a minority religion or is nonreligious might forgo social services if the only program they know of is located in a church adorned with Christian iconography, art, and messages because they feel deeply uncomfortable or pressured to participate in religious activities.<sup>2</sup> Forcing program participants, who often are in a vulnerable position, to find an alternative provider on their own is likely to prevent them from getting help at all.

The new regulations should allow program participants to request an alternative provider in these situations, or in situations where they have filed a complaint about a violation of their rights. The responsibility for implementing the alternative provider requirement should shift from the provider, where it fell under the Obama regulations, to the government. The new regulations should require the government to undertake reasonable efforts to identify and refer the program participant to an alternative provider that provides at least the same services, is geographically convenient for the program participant, and to which the participant has no objection.<sup>3</sup> And like in the Obama regulations, information about the alternative provider process should be included in the written notice of rights that must be given to participants.

### **Revise the Definition of “Indirect Aid” and Add Protections for People Who Use Vouchers**

Because people retain fewer religious freedom protections in voucher programs, agencies should use vouchers only sparingly and must ensure that voucher programs abide by constitutional requirements. In particular, where people can choose to use a voucher, there must be a secular option available. Without the ability to make a genuine choice from among multiple options, at least some of which are secular, people could be forced to get services from a religious organization that includes religious activities in the program.

Thus, the new regulations must revise the definition of “indirect aid” to require appropriate secular options to meet the constitutional standard.<sup>4</sup>

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<sup>1</sup> The written notice should align with the notices from the Obama regulations, which restated rights set forth in Executive Order 13559. *E.g.*, 28 C.F.R. § 38.6(c) & pt. 38 Appendix A (2016). The notice should be standardized across agencies and should include information about the complaint process and how to file a complaint.

<sup>2</sup> Similarly, LGBTQ individuals may avoid receiving services from religious organizations that actively campaign against their equality.

<sup>3</sup> This definition comes from the Obama regulations (*e.g.*, 28 C.F.R. § 38.6(d)(3) (2016)) and should be restored.

<sup>4</sup> To ensure that participants have a true menu of options that would each serve their needs, the regulations should specify that the provider must offer services similar in substance and quality, be within a reasonable

The new regulations should also make clear that nondiscrimination protections apply to participants in indirect aid programs, as set forth in Executive Order 13559.<sup>5</sup> No program participant, including those using a voucher, should be denied access to a federally funded social service program because they do not practice the “right” religion.

### **Remove References to Religious Exemptions that Harm Program Participants**

Exemptions for service providers are likely to undermine the effectiveness of taxpayer-funded services and come at a cost that likely will be borne by program participants. This is especially true when exemptions could lead to participants being denied services.

The new regulations should remove unnecessary references to religious exemptions, which are not required under laws governing religious freedom. They create more confusion rather than clarity. We acknowledge that the agencies are bound by the Free Exercise Clause and the Religious Freedom Restoration Act (RFRA), and they may decide to cite them in the regulations. But any such citation should also include a reference to the Establishment Clause and an explanation that, among other protections, it prohibits the government from granting religious exemptions that cause harm to others.<sup>6</sup>

### **Adopt a Thorough Process for Complaints and Robust Procedures for Monitoring, Enforcement, and Training**

#### *Complaint and Referral Process*

Protections for program participants lack meaning if the government does not enforce them. Accordingly, agencies should create a robust complaint process for program participants who allege that their religious freedom rights have been violated. The written notice provided under the new regulations should be standardized across agencies and should give sufficient, clear information that would enable a program participant to file a complaint.

At the same time, agencies should designate one central place—an Office for Civil Rights or its equivalent—to accept and record complaints and delegate authority to it to investigate and report on the complaints. Agencies should also develop a process to quickly refer the program participant to an alternative provider at the time a complaint is made. Ensuring that participants who need services can get them is critical, and therefore, if someone’s rights have been violated at one provider, they should be given help to find another.

#### *Monitoring, Enforcement, and Training*

Agencies should clarify how they will meet their obligation to monitor and enforce constitutional, statutory, and regulatory requirements. First, agencies should invest in training of program staff, Office for Civil Rights or an agency’s equivalent staff, and providers. Training ensures that

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geographic proximity to the other options, and have the capacity to accept additional clients. These criteria are the same as what an organization must offer in order to qualify as an alternative provider.

<sup>5</sup> Nothing in the Supreme Court’s recent decision in *Carson v. Makin* stands in the way of applying general and neutral nondiscrimination protections to indirect aid programs.

<sup>6</sup> Any exemption that the government grants “must be measured so that it does not override other significant interests” or “impose unjustified burdens on other[s].” *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005).

services are delivered as equitably, efficiently, and effectively as possible, program participants are served, and religious freedom principles are upheld. Second, agencies should uniformly adopt robust monitoring and enforcement provisions that designate a specific office for enforcement and establish specific processes for monitoring compliance. Finally, to understand whether the safeguards in the regulations are sufficient and how to improve grant outcomes and delivery of services, agencies should implement data collections and similar tools.

### **Clarify the Requirements for Funding Decisions**

The new regulations should add clarity to the provisions on funding decisions to aid applicants for funding and agency officials. Currently, the regulations state that funding decisions must be free from political interference and made on the basis of merit, not religion or religious belief. We suggest adding language stating that merit-based funding decisions must include objective consideration of whether an organization will serve all program participants and perform all services that are necessary to fulfill the program's objectives.

### **End Federally Funded Employment Discrimination**

Effective government partnership with faith-based groups does not require the sanctioning of federally funded discrimination. Government-funded employers should not be allowed to impose a religious test on their applicants or employees—no one should be disqualified from a taxpayer-funded job because they are the “wrong” religion.

The new regulations should eliminate completely the provisions that allow federally funded social service providers to discriminate in employment using grant funds.

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We look forward to working with you as you move forward on new regulations that protect religious freedom and equality for all.

Sincerely,

ADL (Anti-Defamation League)  
African American Ministers In Action  
American Atheists  
American Civil Liberties Union  
American Humanist Association  
Americans United for Separation of Church and State  
B'nai B'rith International  
Baptist Joint Committee for Religious Liberty  
Bend the Arc: Jewish Action  
Catholics for Choice  
Center for Inquiry (CFI)  
Center for Reproductive Rights  
Central Conference of American Rabbis  
Council for Global Equality

Family Equality  
Freedom From Religion Foundation  
Human Rights Campaign  
Interfaith Alliance  
Jewish Women International  
Lambda Legal  
MAZON: A Jewish Response to Hunger  
Methodist Federation for Social Action  
Metropolitan Community Churches, Global Justice Institute  
Muslims for Progressive Values  
National Center for Lesbian Rights  
National Council of Jewish Women  
National Education Association  
National LGBTQ Task Force  
Network of Jewish Human Service Agencies  
People For the American Way  
Planned Parenthood Federation of America  
SAGE  
Secular Policy Institute  
SPLC Action Fund  
The Secular Coalition for America  
Union for Reform Judaism  
United Church of Christ, Justice and Local Church Ministries  
Women of Reform Judaism