February 6, 2012

Economic Development Administration
Office of Chief Counsel
Suite D-100
U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, DC 20230

Re: Docket No. 110726429-1418-01: Comments on EDA's regulations

To Whom It May Concern:

We, the undersigned organizations, write to submit comments regarding the proposed rule titled: "Economic Development Administration Regulatory Revision" (hereinafter "Proposed Rule"), which was published in the Federal Register on December 7, 2011. We oppose the Proposed Rule in so far as it would "remove the content of current paragraph (c)(1)(ii) of §314.10, which provides that notwithstanding the release of the Federal Interest, Project Property may not be used for inherently religious activities prohibited by applicable Federal law."[1]

First, the provision that bars the federal funding of property that will be used for inherently religious activity is necessary under the Establishment Clause of the First Amendment of the U.S. Constitution. Even if the Administration takes the position that binding constitutional law does not bar the federal funding of structures used for inherently religious activities, it should reject the change because it is simply bad policy as violative of fundamental principles of religious liberty.

In addition, this rule change contradicts the asserted policies and the procedural framework established by Executive Order 13559 ("Executive Order"),[2] which President Obama issued to reform the Faith-Based Initiative and strengthen its constitutional footing. The Proposed Rule also defies the recommendations issued by the President's Advisory Council on Faith-based and Neighborhood Partnerships ("the Council").[3]

## The Proposed Rule Change

The Proposed Rule would strip language that currently prohibits entities from using property for inherently religious activities after the government releases its Federal Interest. The Rule notes that "EDA programs support the construction of economic development related Projects, such as a job training facility or business incubation center."[4] If this language is stripped from current regulations, recipients of Project Property would be able to transform these facilities into

[1] Economic Development Administration Regulatory Revision, 76 Fed. Reg. 76,492, 76,518 (proposed Dec. 7, 2011).
[2] Exec. Order No. 13,559, 75 Fed. Reg. 71,317 (Nov. 22. 2010) ("Executive Order").
[3] President's Advisory Council on Faith-based and Neighborhood Partnerships, *A New Era of Partnerships: Report of Recommendations to the President* (Mar. 2010) ("Council Recommendations").
[4] 76 Fed. Reg. at 76,518.

sanctuaries, seminaries, or houses of worship, even though the property was originally funded by the government.

**The Language That Currently Exists in Section 314.10 (c)(1)(ii) Is Required by the Establishment Clause.**

Tilton *and* Hunt *Demand that the Language Remain.*

As explained in the "Supplementary Information" section of the Proposed Rule itself, Section 314.10 (c)(1)(ii) was inserted into the regulations "to address the legal requirements of *Tilton v. Richardson*, (403 U.S. 672 (1971))."[5] And, because those legal requirements still apply, the protections must remain.

*Tilton* involved a challenge to the constitutionality of a federal law under which federal funds were used by secular and religious institutions of higher education for the construction of libraries and other campus buildings. Although the law allowed money to go to religious institutions, it also contained a provision that expressly forbade funds from being spent on buildings that would be used for worship or sectarian instruction. The Court upheld the program, but it *unanimously* held that the provision was constitutionally necessary and *unanimously* invalidated part of the statute that would have allowed religious schools to convert the federally-funded facilities for worship or sectarian instruction after twenty years had passed. The court explained: "If at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion."[6]

Two years later, the Supreme Court clearly reaffirmed the principle that the First Amendment prohibits the government from funding the construction or repair of buildings used for religious worship or instruction. In *Hunt v. McNair*,[7] the Supreme Court upheld the South Carolina Educational Facilities Authority Act, which established an "Educational Facilities Authority," through which educational facilities could borrow money for the construction and renovation of their facilities at favorable interest rates. The Act, however, required each lease agreement to contain a clause forbidding religious use in such facilities and allowing inspections to enforce that requirement.[8] The Court upheld the Act, including the condition that government-funded physical structures could never be used for religious worship or instruction.

In *Committee for Public Education v. Nyquist*,[9] the Supreme Court also held that the Establishment Clause barred the funding of repairing buildings used for religious activity. The Court struck down New York's program of providing grants to nonpublic schools for the maintenance and repair of "school facilities and equipment to ensure health, welfare, and safety of enrolled students." The Court summarized its previous holdings as "simply recogniz[ing] that sectarian schools perform secular, educational functions as well as religious functions, and that some forms of aid may be channeled to the secular without providing direct aid to the sectarian.

[5] *Id.*
[6] 403 U.S. at 683.
[7] 413 U.S. 734 (1973).
[8] *Id.* at 744.
[9] 413 U.S. 756, 762 (1973).

But the channel is a narrow one."[10] The Court then held that "[i]f the State may not erect buildings in which religious activities are to take place, it may not maintain such buildings or renovate them when they fall into disrepair."[11]

The issue in *Tilton* and *Hunt*—whether the government could release property to a private entity if that property would be used for religious activity at any time in the future—is the very issue contemplated in this Proposed Rule. The situations are impossible to distinguish.[12] Thus, the rule of *Tilton* and *Hunt* apply and the restriction must remain in place.

Tilton *and* Hunt *Remain Good Law.*

The Proposed Rule justifies removing Section 314.10 (c)(1)(ii) by claiming that "the courts have made a number of distinctions to Establishment Clause jurisprudence"[13] since the *Tilton* line of cases. Even if the Court has made some distinctions in the Establishment Clause arena since these cases were decided, the rule set down by the Supreme Court in *Tilton*, *Hunt*, and *Nyquist* has never been formally overturned by the Court and remains controlling law.[14] Indeed, the controlling opinion in *Mitchell v. Helms*, reaffirmed *Tilton* as standing for the proposition that aid must contain a "secular content component."[15] Furthermore, Congress recently recognized the applicability of this Supreme Court jurisprudence when it limited green construction funding in the economic recovery bill to buildings in which secular activities take place.[16]

Two more recent federal court decisions also apply the rule of *Tilton*, *Hunt*, and *Nyquist*.[17] In the 2007 case, *Community House v. Boise*,[18] the Ninth Circuit applied *Tilton* to find that a publicly financed building may not be diverted to religious use. And, in 2001, the Seventh Circuit struck down cash grants to create telecommunications access for both public and private schools. The court relied on the fact that "there are no real restrictions on the use of the grant money by the religious schools; the money may be used as easily for maintenance of the school chapel or for the religious instruction classrooms or for connection time to view a religious website, instead of payment for the telecommunications links."[19]

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[10] *Id.* at 775.
[11] *Id.* at 777.
[12] Whatever might be the result in a program available to all applicants on an equal basis, the programs affected by this rule are discretionary and thus not arguably governed by cases such as *Zobrest v. Catalina Hills School District*, 509 U.S. 1 (1993)—in which all eligible applicants received available aid—but by *Tilton.*
[13] 76 Fed. Reg. at 76,518.
[14] "Although the Supreme Court has overturned a number of Establishment Clause decisions from the 1970s, the Court has never revisited the limits on financing of religious structures found in *Tilton* and *Nyquist*." Ira C. Lupu & Robert W. Tuttle, THE FAITH-BASED INITIATIVE AND THE CONSTITUTION, 55 DePaul L. Rev. 1, 99 (2005).
[15] *Mitchell v. Helms*, 530 U.S. 793, 819 (1999) (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 842 (1995)) (Thomas, J.,); *see also id*. at 856 (O'Connor, J., concurring) (describing *Tilton* as striking down the grant statute because it lacked a "secular content requirement").
[16] American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 14004(c)(3), 123 Stat. 115, 281-82 (2009).
[17] The Sixth Circuit case, *American Atheists v. City of Detroit Downtown Dev. Auth.*, 567 F. 3d 278 (6th Cir. 2009), is the only case that diverts from the full Supreme Court precedent of *Tilton, Hunt,* and *Nyquist.* Yet, even this case does not stand for the proposition that federal funds can fund the purchase or construction of buildings in which inherently religious activity takes place. Instead, it distinguishes *Tilton* and *Nyquist*, arguing that the grant program in Detroit was a "one-time grant limited to exterior cosmetic repairs" and "one-time surface-level improvements" and Detroit "did not construct the buildings by paying for them in full." *Id.* at 298-99.
[18] 490 F.3d 1041, 1059 (9th Cir. 2007).
[19] *FFRF v. Bugher*, 249 F.3d 606, 613 (7th Cir. 2001).

Thus, current law prohibits federal funds from being used towards the construction, maintenance, and rehabilitation of houses of worship and other structures in which explicitly religious activities will take place. The changes made by the Proposed Rule, therefore, cannot survive constitutional scrutiny and must be rejected.

*The Office of Legal Counsel Opinion on the Old North Church Does Not Justify Removing the Language.*

In 2003, the Office of Legal Counsel ("OLC") issued an opinion asserting that funds allocated to preserve historic structures under the Save America's Treasures program could be utilized to preserve historic houses of worship such as the Old North Church. In doing so, the OLC opinion claimed that *Tilton*'s holding is extraordinarily narrow. OLC justified this diminishment of the holding of *Tilton* based on severe doubts as to the continued viability of the case. This treatment of *Tilton* is inappropriate for several reasons.

First and most fundamentally, it is not the business of the Office of Legal Counsel—and, by extension, the Department of Commerce—to set aside as "narrow," standing Supreme Court precedent based on speculation as to what the Court may do in the future.[20] Moreover, in undertaking this analysis, the OLC opinion relied upon cases that are wholly irrelevant, predominantly relying upon free speech forum cases that the Supreme Court has squarely held are inapposite to federal aid cases.[21]

Second, regardless of whether it is constitutional to expend government funds in order to provide historic preservation assistance to religious properties, basic respect for the rulings of our highest court mandates that it is the deviation from a rule that should be viewed as narrowly possible, rather than the other way around.

Finally, this situation, in any event, falls within what the OLC called *Tilton*'s "narrow" holding—making the current regulatory provisions constitutionally necessary, even under the OLC opinion's own terms. *Tilton*, like the situation before us, involved restrictions on property in which the government has released the Federal Interest—making gratuitous the entire exercise of casting *Tilton* into a narrow corner.

In short, whatever the merits of OLC's conclusion that the Old North Church could constitutionally receive public funds for the purpose of historic preservation, the opinion erred in ignoring admonishments from the Supreme Court to apply holdings of cases directly on point and not to deem precedent immaterial. Supreme Court precedent, rather than the OLC opinion, therefore, should be followed.

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[20] As a unanimous Supreme Court stated, even if a precedent's continued viability appears unlikely (as EDA asserts is the case here), "it is this Court's prerogative alone to overrule one of its precedents." *State Oil v. Khan*, 522 U.S. 3, 20 (1997).

[21] In *Locke v. Davey*, 540 U.S. 712, 720 n.3 (2004), the Supreme Court explained that the free speech line of case law does not apply to federal aid cases. The Court explained: "Davey, relying on *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), contends that the Promise Scholarship Program is an unconstitutional viewpoint restriction on speech. But the Promise Scholarship Program is not a forum for speech. . . . Our cases dealing with speech forums are simply inapplicable."

**The Proposed Rule Violates Fundamental Principles of Religious Freedom**.

Even if the Administration takes the position that current Establishment Clause case law does not bar the federal funding of structures used for inherently religious activities, it should reject this Proposed Rule for policy reasons.

One of the basic principles of the Establishment Clause is that taxpayers should not be forced to fund religion—even if the religion funded coincides with the beliefs of the taxpayer. This funding bar is not hostile to religion, but instead protects the autonomy of religious institutions and the religious conscience of the taxpayer. Using taxpayer funds to build, construct, or repair structures that can ultimately be used for inherently religious activities—including structures that can ultimately be used as sanctuaries and houses of worship—violates this principle.

**This Proposed Rule Runs Counter to the Principles Established by the President's Executive Order, the Recommendations Issued by the Council, and the President's Framework for Reform.**

The signers of these comments are organizations that have advocated for the reform of the Faith-Based Initiative since its creation by the Bush Administration. Whether or not we supported the formation of the Council, we engaged with the Council because President Obama declared it would be the venue to consider and recommend such reforms.[22] After the Council reported its recommendations, the President issued an Executive Order setting forth "fundamental principles" for reforms, which were inspired by the Council's recommendations. The Executive Order also established an Interagency Working Group to implement these principles in a uniform and consistent way. We expected, therefore, that uniform regulatory changes would be proposed by the Working Group rather than in piecemeal by various agencies.

We were disappointed, therefore, to discover that this Proposed Rule—like the proposed regulations recently issued by USAID[23] and the interim rule proposed by the Department of Housing and Urban Development[24]—was proposed completely outside the President's reform process.

Furthermore, considering that the Council urged the Administration to "strengthen constitutional and legal footing" of partnerships and identified deficiencies in the current regulations,[25] and the Administration's statements of support for the principle of church-state separation,[26] we were surprised to see the Administration offer yet another proposed rule that would strip church-state protections from current regulations. We are especially surprised by the Administration's

[22] To our knowledge, the only reform issue that was removed from the purview of the Council is the issue of federally funded religious discrimination.
[23] Participation by Religious Organizations in USAID Programs, 76 Fed. Reg. 16,712 (proposed Mar. 25, 2011).
[24] Homeless Emergency Assistance and Rapid Transition to Housing: Emergency Solutions Grants Program and Consolidated Plan Conforming Amendments,76 Fed. Reg. 76,954 (proposed Dec. 5, 2011).
[25] Council Recommendations at 127-29.
[26] *E.g.*, Joshua DuBois, blog post, "Upholding Our Law and Our Values" (Aug. 1, 2011), <http://www.whitehouse.gov/blog/2011/08/01/upholding-our-laws-and-our-values>.

actions given that the current language was maintained by the Bush Administration.[27] Although that Administration had undertaken efforts to strip what we viewed as necessary religious freedom protections from government partnerships with faith-based organizations, it still recognized the legal necessity of this language.

*Process conflicts*

Adoption of the Interim Rule would violate the process requirements provided by Section 3 of the Executive Order. The Executive Order created a Working Group to "review and evaluate existing agency regulations, guidance documents, and policies that have implications for faith-based and other neighborhood organizations."[28] The Working Group has not yet completed this process or submitted the report required by the Executive Order.[29] Adopting a Proposed Rule outside the Working Group process ignores the command of the President, while creating duplicate work and contradictory rules.

The Executive Order stressed the need to adopt consistent rules throughout the agencies. Indeed, one of the goals of the Working Group is "to promote uniformity in agencies' policies that have implications for faith-based and other neighborhoods organizations and in related guidance."[30] Nonetheless, the Department of Commerce has proposed this rule completely outside the Working Group structure.

Accordingly, this Proposed Rule should be rejected and consideration of any rule should be incorporated into the ongoing Working Group structure.[31]

**Conclusion**

Adoption of the Proposed Rule would violate the Constitution. In addition, it would violate Administration policy and the process for reform mandated by the President's Executive Order. Accordingly we ask you to reject this Proposed Rule.

Sincerely,

African American Ministers In Action
American Association of University Women (AAUW)
American Civil Liberties Union (ACLU)
American Humanist Association
American Jewish Committee
Americans for Religious Liberty
Americans United for Separation of Church and State
Anti-Defamation League

[27] The Bush Administration issued an Interim Final Rule in October 2008 that made changes to Part 314 of this regulation, but did not delete this constitutionally necessary language. Revisions to the EDA Regulations, 73 Fed. Reg. 62,858 (proposed Oct. 22, 2008).
[28] Executive Order, Section 1(c) (setting forth new Sec. 3(a)).
[29] *Id.* (setting forth new Sec. 3(b)).
[30] *Id.* (setting forth new Sec. 3).
[31] The Department of Commerce will have input into the report issued by the working group, as the Executive Order specifically mandates that a senior official from the Department be a member of the Working Group.

Baptist Joint Committee for Religious Liberty
Center for Inquiry
Commission on Social Action of Reform Judaism
Council for Secular Humanism
Disciples Justice Action Network
Equal Partners in Faith
Hindu American Foundation
Institute for Science and Human Values
Interfaith Alliance
Jewish Council for Public Affairs
National Council of Jewish Women
People For the American Way
Secular Coalition for America
Women of Reform Judaism