

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: Prof. William Wagner

Date: March 13, 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

INTRODUCTION

My name is William Wagner and I hold the academic rank of Distinguished Professor Emeritus (Law). I served on the faculty at the University of Florida and Western Michigan University Cooley Law School, where I taught Constitutional Law and Ethics. I currently hold the Faith and Freedom Center Distinguished Chair at Spring Arbor University. Before joining academia, I served as a federal judge in the United States Courts, as Senior Assistant United States Attorney in the Department of Justice, and as a Legal Counsel in the United States Senate. I am also the Founder and President Emeritus of the Great Lakes Justice Center.

I respectfully submit the following Comments on the Notice of Proposed Rulemaking, “Partnerships with Faith-Based and Neighborhood Organizations,” published on January 13, 2023, by the nine federal departments and agencies to whom this comment is addressed (“2023 NPRM” or simply “NPRM”), 88 Fed. Reg. 2395-2427.¹¹ I fully support and adopt the legal analysis dated March 6, 2023 filed by the United States Conference of Catholic Bishops, the National Association of Evangelicals, the Christian Legal Society, the Thomas More Society, and the Council for Christian Colleges as it pertains to the proposed NPRM rules. These proposed rules create three primary instances of concern:

¹ The 2023 NPRM provides 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).

GOOD GOVERNANCE AND THE CONSTITUTIONAL SEPARATION OF POWERS

First, concerns over good governance and the constitutional separation of powers arise when one considers the history of current rules and substance of the proposed changes. The Constitution of the United States vests limited powers in three branches of government, to wit, a representative legislature that crafts policy, a judiciary that resolves cases and controversies under such policy, and an executive branch that executes policy. The proposed rule changes for current consideration originated with the politically-accountable representative legislature in the 1964 Civil Rights Act, Title VII, which saw substantial Congressional reform under the Civil Rights Act of 1991 and the Lily Ledbetter Fair Pay Act of 2009.² Since 1791 when it was ratified and adopted, the First Amendment, along with more recent congressional acts and government action, have been reviewed and interpreted by the judicial branch, developing a body of case law that further guides, governs, and limits the execution of such policy. It is not for executive branch of government to amend or alter the policy they are tasked with enforcing. Importantly, federal rules, such as the NPRM proposals now under consideration by nine federal departments and agencies, lack jurisdictional authority to repromulgate and deviate from policies set forth by the other branches of government. For example, when the legislature sets a standard of a broad “affirmative defense” and religious accommodation for religious organizations, the executive branch lacks the authority to unilaterally create a standard of more narrow accommodation, especially when such government action intends to chill the free exercise of religion. Any such action by unelected officials violates the most basic precepts of good governance under our representative, constitutional system and undermines the authority and legitimacy of the other branches of government.

TITLE VII AFFIRMATIVE DEFENSE & RELIGIOUS EMPLOYER ACCOMMODATION

Second, significant concerns exist concerning the impact of the NPRM on religious employers under Title VII’s religious accommodation. The current rule now consistently defends the right of religious organization to “select employees on the basis of their acceptance of or adherence to the religious tenets of the organization,” without regard for other provisions of the title.³ Rather than upholding this broad protection for religious free exercise, the 2023 NPRM preamble of the 2023 NPRM deletes this rule and narrowly construes the accommodation set forth in sections 702(a) and 703(e) of the Civil Rights Act of 1964 as a defense *only* to claims of religious discrimination. This is a radical departure from

² <https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964>

³ In 1972, Congress amended Title VII, Sec.702(a) to apply to *all* employees of a religious employer, not just those employees engaged in religious activities. Section 703(e) of the Act, 42 U.S.C. § 2000e-2(e) details a description of religious employers affected by this exemption and broadly protects their rights to selectively hire likeminded religious individuals as employees, stating, “Notwithstanding any other provision of this title... (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.”

the plan text of Title VII itself, which offers Title VII accommodation to religious organizations and provides an affirmative defense against all forms of retaliation.⁴

RECENT FIRST AMENDMENT JURISPRUDENCE RESPECTING FEDERAL FUNDING OF SOCIAL SERVICES WITHOUT REGARD TO THE RELIGIOUS MOTIVE OF PROVIDERS

A third point of concern is the skewed and incomplete historical narrative of federal funding of religious-based social services, which is woefully uninformed of recent years of judicial decisions and important standards of neutrality. The 2023 NPRM's Supplementary Information neglects to observe the U.S. Supreme Court's turn from a jurisprudence of separationism to equality, concerning the treatment of religious organizations seeking or receiving federal funding to carry out social service programs. In a host of cases from 2017 to 2022, the Court has upheld a standard of free-exercise neutrality, requiring equal funding and opportunity be extended to religious organizations without consideration of the religious nature of their work, and most importantly, without requiring onerous separation of funding use.⁵ In other words, programs that are inherently and openly religious, but who deliver social service products that meet the standards of the funding program as set forth by Congress, must be given treatment equal with secular programing. The 2023 NPRM proposed rule changes ignore this standard and allow nine federal agencies to resuscitate several archaic policies that unduly burden and unnecessarily complicate compliance for religious organizations participating directly or indirectly in federal funding programs. Because the nine agencies involved have singled out only religious organizations with such disparate treatment, if adopted, the 2023 NPRM may well constitute a *prima facie* violation of the Free Exercise Clause of the First Amendment. Specifically, NPRM language pertaining to "Single-Service Provider Areas" unduly burden ordinary operations and efficient use of space and resources, while "Rights of the Beneficiary" that make beneficiary participating in religious-based activities voluntary dilute the efficacy of programing and work against the stated goals of the Office of Faith-Based and Neighborhood Partnerships.⁶ While the government may prohibit discrimination against beneficiaries seeking admission to a program, once a beneficiary has been admitted to a program and has voluntarily agreed to participate in that program, it is not for the beneficiary to demand substantive changes to the

⁴ *Id.* Additionally, see Title VII, Section 701(j) of the Act, 42 U.S.C. § 2000e(j). See also, Section 702(a) of the Civil Rights Act of 1964 (the "Act"), 42 U.S.C. § 2000e-1(a), states: "This title 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."

⁵ See legal analysis dated March 6, 2023 filed by the United States Conference of Catholic Bishops, the National Association of Evangelicals, the Christian Legal Society, the Thomas More Society, and the Council for Christian Colleges on the 2023 NPRM for a more complete listing of relevant case law.

⁶ Office of Faith-Based and Neighborhood Partnerships; See Executive Order 14015, which states that, "it is central to the Agencies' missions that federally funded services and programs, such as those listed above, reach the widest possible eligible population." Whether in rehab clinics, scholastic environments, or parenting classes, religious programs like chapel services or Bible study have proven critical to achieving remission or learning constructive habits that affect whole-person health and wellbeing.

very nature or scope of the program. Rather, in the rare case of an objection to a religious service provider, the government has a duty to refer such a beneficiary with other, non-objectionable provider. This protects the First Amendment rights of providers and beneficiaries alike, while facilitating equal neutrality to all service providers.

CONCLUSION

In summary, the proposed changes to 2023 NPRM pose significant threats to good governance and the constitutional separation of powers, disregard Title VII religious employer accommodation, and place disparately complex burdens of compliance on religious social service providers. Ultimately, this triumvirate of challenges would constitute a *prima facie* violation of the Free Exercise Clause of the First Amendment. These rules should not be adopted unless they are first amended to fully embody adopted law, current judicial clarification, and constitutional protections of religious liberty and free exercise.

Thank you for your thoughtful consideration on this important matter.

Respectfully submitted,



//s William Wagner

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