Comment Template for the 8 Faith-Based NPRMs

(Update as of 2/12/2020 to add HUD NPRMs, changes highlighted in green)

1. Submitting Comments

a. There are eight NPRMs--each one is issued by a different agency. You must submit comments for each NPRM to each agency *individually*.

b. Comments are **due by 11:59pm ET on Tuesday, February 18, 2020**.

c. Comments should be submitted to the Department through the portals, linked below. The RIN should be included in your comments.

i. Department of Agriculture, RIN 0510-AA08

ii. Department of Education, RIN 1840-AD45

iii. Department of Justice , RIN 1105-AB58

iv. Department of Health and Human Services, RIN 0991-AC13

v. Department of Homeland Security, RIN 1601-AA93

vi. Department of Labor, RIN 1291-AA41

vii. Department of Veterans Affairs, RIN 2900-AQ75

viii. Agency for International Development, RIN 0412-AA99

ix. The Department of Housing and Development has not yet issued its NPRM (to be published 2/13/2020).

d. Numbers matter when it comes to comments, and the Department considers comments written with the same language as a single comment. We've provided you with some bullet points on key issues, but you should write your comment out in paragraphs and wherever possible you should use your own words and add unique arguments, examples, and perspectives to this template.

e. The Department of Education has two unique provisions regarding Title IX and student clubs. If you wish to add these topics to your comments, the template for the Title IX issue here (thanks to NWLC) and the student club issue here (thanks to American Atheists).

f. For questions about these NPRMs or this template, please contact Maggie Garrett (garrett@au.org) or Dena Sher (sher@au.org) of Americans United for Separation of Church and State.

g. Please share any comments you submit. We would appreciate knowing who commented and what each group said.

2. Examples of Programs Affected and Examples of the Harms the Could Be Caused by these Rules

a. A separate document with programs and harms can be found here. We will continue to update this document. Please share any examples you have with us, including program and a description of the potential harms.

3. **Introduction/Toplines**

   a. The proposed regulations are an attack on religious freedom. They will strip away religious freedom protections from people, often vulnerable and marginalized, who use government-funded social services.

   b. People in need should never be faced with the stark choice between accessing the services they need or retaining their religious freedom protections, identity, or other rights.

   c. These rules could lead to beneficiaries not getting the services they need. The people who will likely face the most harm are religious minorities and the nonreligious, women, and LGBTQ people.

   d. The proposed regulations put the interests of taxpayer-funded entities, some of which receive millions of dollars each year of government money, ahead of the needs and the religious freedom rights of people seeking critical services.

   e. Many faith-based organizations provide important social services for people in need and they have been partnering with the government for years, but that doesn't mean they should be allowed to take government funds and then place religious litmus tests on who they hire, who they serve, or which services they provide with those funds. Nor may they include religious content in their programs funded directly by the government.

      i. We are not suggesting they should not be allowed to be partners with the government, just that there needs to be clear safeguards in place to protect beneficiaries, especially against proselytizing and discrmination.

      ii. Faith-based organizations do not need these changes in order to partner with the government.

   f. These regulations threaten the social safety net and undermine the goals of social services programs.

4. **What the Regulations Do:**

   a. Remove the requirement that providers take reasonable steps to refer beneficiaries to alternative providers if requested.

      i. Agencies that do this: AG, ED, HHS, DHS, HUD, DOJ, DOL, VA (Not USAID, which never added these requirements in 2016)

   b. Strip the requirement that providers give beneficiaries written notice of their religious freedom rights.

      i. Agencies that do this: AG, ED, HHS, DHS, HUD, DOJ, DOL, VA (Not USAID, which never added these requirements in 2016)

   c. Expand the existing religious exemption that allows religious organizations to accept grants and discriminate in employment with taxpayer funds.

i. Agencies that do this: ED, HHS, HUD, DOL, VA, USAID (Not AG, DHS, or DOJ)

d. Expand the language related to religious exemptions, and add special notices to grant announcements and awards to inform faith-based organizations that they can seek additional religious exemptions from federal laws and regulations governing the programs.

i. Agencies that do this: AG, ED, HHS, DHS, HUD, DOJ, DOL, VA (not USAID)

e. Eliminate the safeguard that ensures people who obtain services through a voucher program (or "indirect aid") have at least one secular option to choose from. And add language stating that providers can require people in voucher programs to participate in religious activities.

i. Agencies that do this: AG, ED, HHS, DHS, HUD, DOJ, Labor, VA (Not USAID, which never added this definition in 2016 because it does not have indirect aid programs)

5. **The 30-day comment period does not provide the public a meaningful time to comment:**[1]

a. The law requires that the administration give the public a meaningful opportunity to comment. 30 days is not enough time for these regulations.

i. The APA requires that the public have a meaningful opportunity to comment ("…the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments…").[2] The failure to provide this opportunity renders any final rule procedurally invalid.

ii. Executive Order 13563 directs that comment periods ""should generally be at least 60 days."[3]

iii. Executive Order 12866 states that proposed rules "in most cases should include a comment period of not less than 60 days."[4]

iv. The Regulatory Timeline factsheet on Regulations.gov indicates: "Generally, agencies will allow 60 days for public comment. Sometimes they provide much longer periods."[5]

b. The administration issued 8 connected rules, all with a 30-day comment period, which means that those who have an interest in this area are being asked to comment on eight interconnected, but distinct rules in 30 days.

i. The White House explained in a call announcing these proposed regulations on January 16, the agencies themselves coordinated for "many months" to publish the proposed rules and explained that it is a complex task.

ii. HUD published its NPRM on February 13. It set a 60-day comment period.

c. The complexity and wide-ranging impacts of these rules demand at least a normal comment period.

[1] Does not apply to HUD.
[2] 5 U.S.C. § 553(c).
[3] Exec. Order 13563 §2(b) (Jan. 18, 2011) (emphasis added).
[4] Exec. Order 12866 (Sept. 30, 1993) (emphasis added).
[5] Regulatory Timeline, REGULATIONS.GOV, https://www.regulations.gov/docs/FactSheet_Regulatory_Timeline.pdf (accessed Jan. 24, 2020) (emphasis added).

i. In 2015, when these same agencies issued proposed rules to revise the same set of regulations, the comment period was the standard 60 days, which allowed the public and experts from all sides a meaningful opportunity to comment.

6. **The proposed regulations undo the common-ground, consensus religious freedom protections put in place by President Obama:**

   a. The Obama administration inherited flawed policies that were created by the George W. Bush administration.

   b. The Obama administration amended the existing Bush administration regulations to add important religious freedom protections for people who use the programs, based on consensus of people who supported and opposed the Bush-era policies.

   c. The existing regulations were adopted in compliance with Obama Executive Order 13559, which set out several fundamental principles. These principles were were based on 12 unanimous recommendations made by the President's Advisory Council on Faith-Based and Neighborhood Partnerships ("Council")

      i. The Council comprised a diverse group, describing itself as follows: "As far as we know, this is the first time a governmental entity has convened individuals with serious differences on some church-state issues and asked them to seek common ground in this area."[6]

      ii. Its recommendations were "aimed at honoring our country's commitment to religious freedom."[7]

      iii. The Council stressed that "policies that enjoy broad support are more durable" and that the recommendations were designed to "improve social services delivery and strengthen religious liberty."[8]

   d. The diverse Council agreed that the Obama changes would "improve social services and strengthen religious liberty. They also would reduce litigation, enhance public understanding of these partnerships, and otherwise advance the common good."[9]

   e. There is no need for the Trump Administration to undo the vital religious freedom protections that were implemented just three years ago and that were a result of consensus among leaders on different sides of the issue. It is particularly disappointing that they are overturning the consensus agreements reached just a few years ago and creating polarizing and problematic new rules that put ideology above providing services to people in need.

   f. Nothing has changed since 2016 except the Supreme Court's decision in *Trinity Lutheran v. Comer* and that case does not justify these proposed changes.

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[6] President's Advisory Council on Faith-Based and Neighborhood Partnerships, A New Era of Partnerships: Report of Recommendations to the President 127 (2010), http://bit.ly/2A0yhXA. Members included: Nathan J. Diament, Director of Public Policy, Union of Orthodox Jewish Congregations of America; Dr. Frank Page, Vice-President of Evangelization, North American Mission Board, and Past President of the Southern Baptist Convention; Anthony R. Picarello, Jr., General Counsel, United States Conference of Catholic Bishops; The Reverend Larry J. Snyder, President and CEO, Catholic Charities USA; and Richard E. Stearns, President, World Vision United States.

[7] *Id.*at 119.

[8] *Id.* at 120.

[9] *Id.*

7. **The Proposed Rules Would Eliminate the Alternative Provider and Written Notice Requirements, Which Are Important Beneficiary Protections**

   a. The Alternative Provider Requirement

      i. Currently, the regulations ensure people who seek social services who are uncomfortable at a provider because of its religious character will be referred to an alternative provider.

      ii. The new regulations strike this alternative provider requirement, which has the potential to cause beneficiaries significant harm and could result in them receiving no government services at all.

      iii. Even though social service programs that receive direct aid are supposed to have secular content only, a person may feel uncomfortable and want an alternative provider, as in the following examples:

         1. A religious minority or nonreligious person forgoes services because the only program they know of is in a church adorned with Christian iconography;

         2. An LGBTQ homeless teen does not seek shelter because the religion of the faith-based provider condemns them for being gay;

         3. A single, pregnant mother does not seek services from a provider that disapproves of having children outside of marriage.

      iv. The Department is also proposing new provisions that say faith-based organizations could be exempt from program requirements, making it more likely that beneficiaries will need an alternative provider that will serve them.

      v. This is a departure from tradition and current practice. Congress included an alternative provider requirement in SAMHSA and TANF.[10] President Bush included this protection in his signature faith-based legislation,[11] and the Advisory Council unanimously recommend adding the alternative provider requirement.[12]

      vi. Providers (sophisticated enough to offer social services and navigate the grantmaking system) are more likely than beneficiaries to know of other providers. Removing the alternative provider requirement adds an additional, potentially insurmountable, hurdle for beneficiaries that could prevent them getting the help they need. This undermines the entire purpose of the program.

   b. How Each Agency Justifies Stripping the Alternative Provider Requirement

[10] 42 USC §290kk-1(f); 42 USC § 300x-65(e); 42 USC § 604a(e).
[11] CARE Act of 2002, H.R. 7, 107th Cong. § 201 (2001), *available at* https://www.congress.gov/bill/107th-congress/house-bill/7.
[12] Council Report at 141.

i. When originally recommending the alternative provider requirement, the Council recognized that it would likely impose monetary costs on providers, but nonetheless concluded that the government must offer this safeguard, "in order to provide adequate protection for the fundamental religious liberty rights of social service beneficiaries."[13]

ii. Each Agency ignores the rights of beneficiaries and the value of the protection, even as they acknowledge the de minimis costs of the alternative provider requirement and still seek to remove the protection.

1. **AG:** The Department has estimated that removing the existing beneficiary protection requirements "could be valued at roughly $58,600."[14] We believe that the Department has overstated the monetary cost to providers (especially given other agencies' estimates), but significantly undervalued the harm removing the protection will cause to beneficiaries.

2. **ED**: The Department said it "does not have adequate information available at this time to estimate" what, if any cost savings removal of the alternative provider requirement would go to providers.[15]

3. **DOJ:** The Department of Justice admits that it "does not expect the elimination of the referral and recordkeeping requirements to result in a cost savings,"[16] yet still seeks to remove this protection.[17]

4. **HHS:** The Department "estimates that the removal of the referral requirements would, at most, generate only de minimis benefits for faith-based social service providers."[18]

5. **DHS**: The Department found a "quantifiable cost savings of the removal of the notice and referral requirements, which the Department previously estimated as imposing a cost of no more than $200 per organization."[19]

6. **HUD:** The Department has estimated that removing the existing beneficiary protection requirements would result in a cost savings of approximately $50."[20]

7. **DOL:** The Department of Labor was "unable to quantify the cost of the referral requirement."[21]

8. **VA:** The Department noted that there could be "potential quantifiable cost savings" for providers by removing the referral, but did not offer a number.[22]

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[13] Council Report at 141.
[14] AG, 85 Fed. Reg. at 2903.
[15] ED, 85 Fed. Reg. at 3217-19.
[16] DOJ, 85 Fed. Reg at 2926. It does claim a non-quantifiable cost savings based on misinterpretations of *Trinity Lutheran v. Comer*, and RFRA, which we discuss below.
[17] The Department goes so far to claim beneficiaries will benefit from having this right stripped away because of the "increased capacity of faith-based social-service providers to provide services, both because these providers will be able to shift resources otherwise spent fulfilling the notice and referral requirements to provision of services." DOJ, 85 Fed. Reg. at 2927. The time and costs savings to any provider due to the removal of these protections are *de minimus* and will have no impact on the capacity of providers.
[18] HHS, 85 Fed. Reg. at 2984.
[19] DHS, 85 Fed. Reg. at 2894.
[20] HUD, 85 Fed. Reg. at [paperwork reduction act analysis. will update upon publication].
[21] DOL, 85 Fed. Reg. at 2935.
[22] VA, 85 Fed. Reg. at 2944.

c. **The Written Notice Requirement**

i. The existing regulations also require giving written notice to beneficiaries of their religious freedom rights, including that a provider cannot discriminate against beneficiaries based on their religion, force beneficiaries to participate in religious activities, and that beneficiaries have a right to seek an alternative provider (see above).

ii. The new regulations strip this requirement, leaving beneficiaries at risk.

iii. People using government-funded social services cannot exercise their rights if they aren't aware they have them. Refusing to inform beneficiaries of their rights leaves them vulnerable, not knowing providers must not subject them to discrimination, proselytization, or religious coercion in government-funded services.

iv. The Department is aware of the value of notice requirements: at the same time that it is proposing to remove notice for beneficiaries. HHS and DOL explain that they want to add these add notice requirements "to ensure that faith-based organizations are aware of their legal protections so that they will not fail to participate in government programs."[23]

v. If providers, capable of applying for and administering federal grants, deserve notice, so too do the vulnerable beneficiaries who use the programs.

d. **How Each Agency Justifies Stripping the Written Notice Requirement**

i. The agencies say removing the notice requirement will reduce administrative burdens and costs for providers. However, the harm removal causes for beneficiaries clearly outweighs these minor costs:

1. **AG:** The Department argues that there is "no need for additional notice procedures that create administrative burdens."[24]

2. **ED:** The Department does not identify a monetary cost saving associated with eliminating the notice requirement.

3. **DOJ:** The Department claims the notice requirement is a burden on providers and removal "will result in a cost savings of up to $200 per faith-based organization per year."[25]

4. **HHS:** The Department cites its previous estimate that the notice requirement could impose "a cost of no more than $100 per organization per year for the notices." It also, without evidence, cites "the apparent lack of any significant desire for such information among beneficiaries."[26]

5. **DHS:** The Department indicates that removing the requirement could result in a cost saving to providers of "a cost of no more than $200 per organization."[27]

[23] HHS, 85 Fed. Reg. at 2979; Labor, 85 Fed. Reg. at 2932.
[24] AG, 85 Fed. Reg. at 2900.
[25] DOJ, 85 Fe. Reg. at 2926.
[26] HHS, 85 Fed. Reg. at 2984.
[27] DHS, 85 Fed. Reg. at 2894.

6. **HUD:** The Department estimates that the notice requirement could impose a cost of less than $200 per organization per year.[28]

7. **Labor:** The Department indicates that removing the requirement could result in a cost saving to providers of "a cost of no more than $200 per organization."[29]

8. **VA:** The VA noted that there could be "potential quantifiable cost savings" for providers by removing the notice requirement, but did not offer a number. HHS and DOJ estimate the savings would be no more than $200 per year.noted "a quantifiable cost savings of the removal of the notice requirement, which the Department previously estimated as imposing a cost of no more than $200 per faith-based organization per year."[30]

e. ***Trinity Lutheran v. Comer* Does Not Require the Department to Remove these Critical Beneficiary Protections**

i. The Department mistakenly relies on *Trinity Lutheran Church of Columbia, Inc. v. Comer* [31] to argue the government can't require faith-based organizations to provide alternative providers or notice safeguards if it does not require the same of secular organizations.

ii. The holding of *Trinity Lutheran* is extraordinarily narrow, as the decision was limited to the specific facts of the case: "This case involves express discrimination based on religious identity with respect to playground resurfacing. We do not address religious uses of funding or other forms of discrimination."[32]

iii. *Trinity Lutheran* says only that the government cannot disqualify a religious entity from competing for a grant "solely because of its religious character."[33] The existing regulations already make clear that religious organizations can compete for grants that fund social service programs.[34]

iv. *Trinity Lutheran* does not bar the government from requiring faith-based providers operating under a grant to follow appropriate religious freedom safeguards. The safeguards do not categorically exclude religious organizations from applying for and receiving grants.

v. Even if asking faith-based organizations to satisfy these basic religious freedom safeguards somehow violated this principle, the provisions would only violate the Free Exercise Clause if they also failed to meet strict scrutiny,[35] and they do not: the safeguards further "a compelling government interest" and are narrowly tailored.

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[28] HUD, 85 Fed. Reg. at [paperwork reduction act analysis. will update upon publication]
[29] DOL, 85 Fed. Reg. at 2935.
[30] *See* HHS, 85 Fed. Reg. at 2984; DOJ, 85 Fed. Reg. at 2926.
[31] 137 S. Ct. 2012 (2017).
[32] *Id.* at 2024 n.3 (2017) (Chief Justice Roberts delivered the opinion of the Court, except as to footnote 3. Justices Kennedy, Alito and Kagan joined the opinion in full, and Justices Thomas and Gorsuch joined except as to footnote 3.).
[33] *Id.* at 2021.
[34] USDA, 7 CFR 16.3(a); ED, 2 CFR 3474.15(b)(1); 34 CFR 75.52(a)(1); 34 CFR 76.52(a)(1); HHS, 45 CFR 87.3(a); DHS, 6 CFR 19.3(a); HUD, 24 CFR 5.109(c); DOJ, 28 CFR 38.4(a); DOL, 29 CFR 2.32(a); VA, 38 CFR 61.64(a); 38 CFR 62.62(a); USAID, 22 CFR 205.1(a).
[35] *Trinity Lutheran v. Comer*, 137 S. Ct. 2012, 2024, 2024 n.4 (2017).

1. Both the written notice and the alternative provider requirements further the compelling interest of protecting the religious freedom rights of people using Department-funded programs. These protections also further the compelling interest of getting that beneficiaries the services they need.

2. The notice and alternative provider safeguards are also narrowly tailored. It is difficult to argue that a simple written notification requirement that the providers can copy and paste from an example provided in the existing regulations, and that the agency says has minimal costs (see above).[36]

f. **The Religious Freedom Restoration Act Does Not Require the Department to Remove the Alternative Provider Requirement**

i. The preamble wrongly claims that RFRA prevents the government from imposing the alternative provider requirement because it "could in certain circumstances raise concerns under RFRA."[37]

ii. RFRA asks whether the law places a "substantial burden" on religious exercise. If yes, the government regulation must "further a compelling government interest" by using the "least restrictive means." Minimal burdens do not trigger RFRA protection[38] and even substantial burdens on religious exercise must be permitted where the countervailing interest is significant.

iii. The Department's own RFRA analysis doesn't even assert with confidence there is a violation: It claims only that requiring faith-based organizations to comply with the alternative provider requirement "*could* impose such a burden" … "*[a]nd it is far from clear* that" the alternative provider "requirement would meet the strict scrutiny that RFRA requires of laws that substantially burden religious practice."[39]

iv. A policy that requires a government-funded entity to take reasonable steps to refer a beneficiary to another provider is not a "substantial burden" on government-funded providers.[40] Faith-based organizations voluntarily partner with the government and if they

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[36] *See, e.g.*, HHS, 85 Fed. Reg. at 2984 (estimating cost at no more than $100 per provider, per year); DHS, 85 Fed Reg. at 2894 (estimating cost at no more than $200 per provider, per year); DOJ, 85 Fed. Reg. at 2926 (same); DOL, Fed. Reg. at 2935 (same).

[37] **AG:** "could in certain circumstances raise concerns under RFRA," 85 Fed. Reg. at 2900.
ED: "could in certain circumstances raise concerns under RFRA," 85 Fed. Reg. at 3206.
HUD: "could in certain circumstances raise concerns under RFRA," 85 Fed. Reg. at [will update upon publication].
HHS: "could in certain circumstances raise implications under RFRA," 85 Fed. Reg. at 2976.
DHS: "could in certain circumstances raise concerns under RFRA," 85 Fed. Reg. at 2891.
DOJ: "could in certain circumstances raise concerns under RFRA," 85 Fed. Reg. at 2923.
DOL: "could in certain circumstances raise implications under RFRA," 85 Fed. Reg. at 2931.
VA: "could in certain circumstances raise concerns under RFRA," 85 Fed. Reg. at 2940.

[38] *See Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) (interpreting parallel statute, Religious Land Use and Institutionalized Persons Act (RLUIPA)); *see also Goehring v. Brophy*, 94 F.3d 1294, 1299 n.5 (9th Cir. 1996) (Even if a plaintiff's beliefs "are sincerely held, it does not logically follow . . . that any governmental action at odds with these beliefs constitutes a substantial burden on their right to free exercise of religion.").

[39] AG, 85 Fed. Reg. at 2899; ED, 85 Fed. Reg. at 3194; HUD, 85 Fed. Reg. at [will update upon publication]; DOJ, 85 Fed. Reg. at 2923; DHS, 85 Fed. Reg. at 2891; HHS, 85 Fed. Reg. at 2976-77; DOL, 85 Fed. Reg. at 2931; and VA, 85 Fed. Reg. 2940.

[40] *See Locke v. Davey*, 540 U.S. 712 (2004) (distinguishing between coercive actions that substantially burden free exercise and a condition on funding that was "a relatively minor burden").

do not want to fulfill responsibilities under a grant that are clearly tied to program objectives, they can decline the funding.

v. Even if the alternative provider did impose a "substantial burden" on a faith-based organization's religious exercise, the government clearly has a compelling interest in protecting the religious freedom rights of the beneficiaries and in ensuring those who most need services are provided them.

8. **The Proposed Rules Expand Religious Exemptions and Pave the Way for Discrimination in Government-Funded Programs**

a. The Department adds language throughout the regulations that expand or add new religious exemptions for faith-based providers. The Department falsely claims the changes are required by *Trinity Lutheran* and to add clarity. But, the vagueness of the language and number of references to exemptions only create confusion.

These changes include:

i. Modifying the requirement to perform "program requirements"

1. The proposed rules would make the requirement that providers "carry out eligible activities in accordance with all program requirements" subject to religious accommodations.[41]

2. The language suggests that providers do not have to meet program requirements and perhaps even that providers may refuse to provide services otherwise required by a grant award.

ii. Changing "religious character" to "religious exercise"

1. The Departments change the prohibition on discriminating against or disqualifying faith-based organizations based on their "religious character," to a

[41] **AG: None**
ED: "subject to any required or appropriate religious accommodation" 85 Fed. Reg. at 3220, 3222, 3224 (to be codified at 2 CFR pt. 3474.15(b)(3), 34 CFR pts. 75.52 (a)(3), 76.52(a)(3)).
HHS: "except where modified or exempted by any required or appropriate religious accommodations" 85 Fed. Reg. at 2986 (to be codified at 45 CFR pt. 87.3(e)).
DHS: "subject to any religious accommodations appropriate under the Constitution or other provisions of Federal law" 85 Fed. Reg. at 2896 (to be codified at 6 CFR pts. 19.(3)(e),19.4(c)) ("any religious accommodations appropriate under the Constitution or other provisions of Federal lawThe other provisions of federal law cited are those, "including but not limited to 42 U.S.C. 2000bb et seq., 42 U.S.C. 238n, 42 U.S.C. 18113, 42 U.S.C. 2000e– 1(a) and 2000e–2(e), 42 U.S.C. 12113(d), and the Weldon Amendment.").
HUD: "subject to any required or appropriate accommodation, particularly under the Religious Freedom Restoration Act" 85 Fed. Reg. at [will update upon publication] (to be codified at 24 CFR pt. 5.109(h)).
DOJ: "subject to any religious accommodations appropriate under the Constitution or other provisions of Federal law" 85 Fed. Reg. at 2928 (to be codified at 28 CFR pt. 38.5(a)) (The other provisions of federal law cited are those "including but not limited to 42 U.S.C. 2000bb et seq., 42 U.S.C. 238n, 42 U.S.C. 18113, 42 U.S.C. 2000e-1(a) and 2000e-2(e), 42 U.S.C. 12113(d), and the Weldon Amendment.")
DOL: None
VA: "subject to any required or appropriate religious accommodation" 85 Fed. Reg. at 2946 (to be codified at 38 CFR pt. 50.2(e)).
USAID: None

prohibition on discriminating against or disqualifying based on their "religious exercise."[42] Despite the fact that *Trinity Lutheran* repeatedly uses the term "religious character,"[43] the proposed regulations change "religious character" to "religious exercise." Using language different than *Trinity Lutheran* creates confusion rather than clarity.

2. The Department also adds a definition of "religious exercise" that mirrors the definition in RFRA. The contexts of RFRA and these regulations are very different.

    a. Under RFRA, the exercise of religion prompts the question of whether that exercise is substantially burdened, and if so, the court would apply strict scrutiny.

    b. The provisions in the regulations lack that limiting language. Here, it falsely suggests that a provider can get religious exemptions anytime wish to exercise religion, even when not required by *Trinity Lutheran* or RFRA.

iii. Modifying "on the same basis"

1. The existing regulations state that "faith-based organizations are eligible, on the same basis as any other organization,"[44] to participate in grant programs. The Department seeks to modify this language, by adding the clause: "considering any reasonable accommodation."[45]

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[42] **AG:** 85 Fed. Reg. at 2905 (to be codified at 7 CFR pts. 16.3(a) & 16.3(d)(3)).
ED: 85 Fed. Reg. at 3220-21, 3224 (to be codified at 2 CFR pt. 3474.15(b)(2), 34 CFR pts. 75.52 (a)(2), 76.52(a)(2)) (change in language for bar on discrimination). *See* 85 Fed. Reg. at 3220-21, 3222, 3224 (to be codified at 34 CFR pts. 3474.15(b)(4), 75.52(a)(4); 76.52(a)(4)) (adding new provisions barring disqualification based on "religious exercise").
HHS: 85 Fed. Reg. at 2986, 2921 (to be codified at 45 CFR pts. 87.3(a) & 87.3(e)).
DHS: *See* 85 Fed. Reg. at 2896 (to be codified at 6 CFR pts. 19.3(a); 19.3(b); & 19.4(c)) (adding "exercise" to "religious motivation, character, affiliation").
HUD: *See* 85 Fed. Reg. at [will update upon publication] (24 CFR pts. 5.109(c)) & 5.109(h)) (adding "exercise" to "religious character, affiliation, or lack thereof" for provision on discrimination and adding a new provision barring disqualification based on "religious exercise").
DOL: 85 Fed. Reg. at 2933, 2937 (to be codified at 29 CFR pts. 2.32(a) & 2.32(c)).
DOJ: 85 Fed. Reg. at 2925, 2928 (to be codified at 28 CFR pts. 38.4(a) & 38.5(d)).
VA: *See* 85 Fed. Reg. at 2946, 2947 (to be codified at 38 CFR 50.2(a) &50.2(e)) (adding new provisions barring discrimination or disqualification based on "religious exercise").
USAID: 85 Fed. Reg. at 2920, 2921 (to be codified at 22 CFR pts. 205.1(a) & 205.1(f)).

[43] *Trinity Lutheran*, 137 S. Ct. at 2021 ("The Department's policy expressly discriminates against otherwise eligible recipients by disqualifying them from a public benefit solely because of their religious *character*.") (emphasis added); *id.* at 2015 (Trinity Lutheran "is asserting a right to participate in a government benefit program without having to disavow its religious *character*.") (emphasis added); *id.* at 2022 (Trinity Lutheran "asserts a right to participate in a government benefit program without having to disavow its religious *character*.") (emphasis added); *id.* at 2024 ("[T]his case expressly requires *Trinity Lutheran* to renounce its religious *character*…") (emphasis added); *id.* at 2024 (Trinity Lutheran was denied a "benefit solely because of its religious *character*.") (emphasis added).

[44] AG, 7 CFR 16.3(a); ED, 2 CFR 3474.15(b)(2), 34 CFR 75.52(a)(1), 34 CFR 76.52(a)(2); HHS, 45 CFR 87.3(a); DHS, 6 CFR 19.3(b); HUD, 24 CFR 5.109(c); DOJ, 28 CFR 38.4(e); DOL, 29 CFR 2.32(c); USAID, 22 CFR 205.1(a). But NOT VA.

[45] **AG:** "considering a religious accommodation" 85 Fed. Reg. at 2905 (to be codified at 7 CFR pt. 16.3(a))).

2. *Trinity Lutheran* only requires that faith-based organizations be eligible for grants, not that they be provided exemptions.

3. This language doesn't creata a level playing field, it gives faith-based organizations advantages.

b. There is no corresponding language to protect the religious freedom rights of beneficiaries or ensuring they maintain access to services.

c. There is no acknowledgment of the constitutional limits on the government's ability to grant these exemptions. The Establishment Clause prohibits the government from granting religious exemptions that cause harm to others: "At some point, accommodation may devolve into [something] unlawful."[46] Any exemption the government grants "must be measured so that it does not override other significant interests"[47] or "impose unjustified burdens on other[s]."[48]

d. These proposed changes put the interests of faith-based providers above those of program beneficiaries, whose own religious freedom rights and access to needed program services will be put at risk.

9. **Several Proposed Rules Expand the Exemption that Allows Taxpayer-Funded Employment Discrimination**

a. The current regulations allow taxpayer-funded faith-based employers to discriminate in employment. This should be eliminated.

i. Under Title VII of the Civil Rights Act of 1964, as amended, religiously affiliated employers, using their own funds, may prefer co-religionists in employment.

ED: "considering any permissible accommodation" 85 Fed. Reg. at 3220, 3221, 3224 (to be codified at 2 CFR pt. 3474.15(b)(3), 34 CFR pts. 75.15(b)(3), 75.52(a)(3), 76.52(a)(3)).
HHS: "except where modified or exempted by any required or appropriate religious accommodations" 85 Fed. Reg. at 2986 (to be codified at 45 CFR pt. 87.3(a)).
DHS: "subject to any religious accommodations appropriate under the Constitution or other provisions of federal law" 85 Fed. Reg. at 2896 (to be codified at 6 CFR pt. 19.4(c)) (The provisions of federal law cited are those "including but not limited to 42 U.S.C. 2000bb et seq., 42 U.S.C. 238n, 42 U.S.C. 18113, 42 U.S.C. 2000e-1(a) and 2000e-2(e), 42 U.S.C. 12113(d), and the Weldon Amendment reasonable religious accommodation").
HUD: "considering any permissible accommodations, particularly under the Religious Freedom Restoration Act" 85 Fed. Reg. at [will update upon publication].
DOJ: "subject to any religious accommodations appropriate under the Constitution or other provisions of Federal law" 85 Fed. Reg. at 2928 (to be codified at 28 CFR pt. 38.4(a)) (The provisions of federal law cited are those "including but not limited to 42 U.S.C. 2000bb et seq., 42 U.S.C. 238n, 42 U.S.C. 18113, 42 U.S.C. 2000e–1(a) and 2000e–2(e), 42 U.S.C. 12113(d), and the Weldon Amendment").
DOL: "considering any reasonable accommodation" 85 Fed. Reg. at 2936 (to be codified at 29 CFR pt. 2.32(a)).
VA: "considering any permissible accommodation" 85 Fed. Reg. at 2946 (to be codified at 38 CFR pt. 50.2(a)).
USAID: "and considering any reasonable accommodation, as is consistent with federal law, the Attorney General's Memorandum of October 6, 2018 (Federal Law Protections for Religious Liberty), and the Religion Clauses of the First Amendment to the U.S. Constitution" 85 Fed. Reg. at 2920 (to be codified at 22 CFR pt. 205.1(a)).
[46] *Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327, 334-35 (1986) (internal quotation marks omitted). Of course, in some instances exemptions may be constitutionally permissible but unwise public policy.
[47] *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005); *see also Estate of Thornton v. Caldor, Inc.* 472 U.S. 703, 709-10 (1985) ("unyielding weighting" of religious interests of those taking exemption "over all other interest" violates Constitution).
[48] *Cutter*, 544 U.S. at 726. *See also Texas Monthly, Inc. v. Bullock*, 480 U.S. 1, 18 n. 8 (1989) (religious accommodations may not impose "substantial burdens on nonbeneficiaries").

ii. The existing regulations wrongly extend the Title VII exemption to government funded jobs. This policy has been highly controversial since it was adopted.

iii. Permitting providers to use the Title VII religious exemption to discriminate in government-funded jobs is bad policy.

1. No one should be disqualified from a taxpayer-funded job because they are the "wrong" religion.

2. The justification for the Title VII exemption—to maintain the autonomy of religious organizations and independence from the government—disappears when the organizations solicit government grants.

3. The government should not award funds to organizations that discriminate against qualified applicants for taxpayer-funded jobs because they cannot meet a religious litmus test.

iv. Policies allowing religious employment discrimination in taxpayer-funded jobs raises constitutional concerns.

1. "[T]he Constitution prohibits the state from aiding discrimination."[49]

2. The Establishment Clause bars government promotion or advancement of religion and government funding for the jobs transforms the Title VII religious exemption into an unconstitutional advancement of religion.[50]

b. Several of the proposed regulations expand the Title VII exemption. These changes should be rejected.

i. **ED:** "An organization qualifying for such exemption may select its employees on the basis of their acceptance of or adherence to the religious tenets of the organization."[51]

ii. **HHS:** "An organization qualifying for such exemption may select its employees on the basis of their acceptance of or adherence to the religious tenets of the organization."[52]

1. The proposed language also incorporates the exemption in the Americans with Disabilities Act (ADA), 42 U.S.C. § 12113. The ADA exemption provides that religious organizations may not only give "preference in employment to individuals of a particular religion" but may also "require that all applicants and employees conform to the religious tenets of such organization."

iii. **HUD:** A faith-based organization may select its "employees on the basis of their acceptance of or adherence to the religious tenets of the organization."[53]

iv. **DOL: "**An organization qualifying for such exemption may make its employment decisions on the basis of their acceptance of or adherence to the religious requirements

[49] *E.g., Norwood*, 413 U.S. at 465-66.
[50] *Amos,* 483 U.S. 327, 337 (1987).
[51] ED, 85 Fed. Reg. at 3221, 3222, 3225 (to be codified at 2 CFR pt. 3474.15(g); 34 CFR pts. 75.52(g), 76.52(g)).
[52] HHS, 85 Fed. Reg. at 2986 (to be codified at 45 CFR pt. 87.3(f)).
[53] HUD, 85 Fed. Reg. at [will update upon publication] (to be codified at 24 CFR pt. 5.109(d)(2)).

or standards of the organization, but not on the basis of any other protected characteristic."[54]

v. **VA:** "An organization qualifying for such exemption may select its employees on the basis of their acceptance of or adherence to the religious tenets of the organization."[55]

vi. **USAID:** "An organization that qualifies for such exemption may select its employees on the basis of their acceptance of, and/or adherence to, the religious tenets of the organization."[56]

c. The Title VII exemption is narrow. Religious employers may consider religion—and only religion—in their employment practices. The Title VII exemption "does not confer upon religious organizations a license to make those [employment] decisions" on the basis of race, national origin, or sex.[57]

d. These proposed rules fail to make clear that religious employers do not get a license to discriminate on grounds other than religion, even when motivated by religion.[58] [NOTE: This does not apply to DOL.]

e. Under the new rules, a faith-based employer might claim that the religious exemption allows them to fire or refuse to hire someone who is LGBTQ, a person who uses birth control, or a woman who is pregnant and unmarried, because the employer finds that those employees do not practice their religion the "right" way.

10. **The Proposed Rules Undermine Important Safeguards for Beneficiaries in Voucher Programs**

a. The proposed rules redefine "indirect aid" to eliminate the current requirement that the beneficiary must have the option of a secular provider.

i. The proposed rules eliminate the requirement In *Zelman v. Simmons-Harris*,[59] the Supreme Court held that a private school voucher program did not violate the Establishment Clause. The Court concluded that the vouchers could fund religious education because the government is not directing the funds to the religious programs; instead the beneficiary has exercised a meaningful choice of whether to receive services from a religious or secular provider.

1. Voucher/"indirect aid" programs that offer true genuine and independent private choices for beneficiaries break the chain between government financial support and concerns about government impermissibly funding religious education.

ii. This proposed change ignores the constitutional requirement that voucher programs must include a secular option.

1. It is a serious misreading of *Zelman v Simmons-Harris* to assert that the availability of secular providers was unimportant to the decision.

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[54] DOL, 85 Fed. Reg. at 2937 (to be codified at 29 CFR pt. 2.37).
[55] VA, 85 Fed. Reg. at 2947 (to be codified at 38 CFR pt. 50.2(f)).
[56] USAID, "may select its employees on the basis of their acceptance of, and/or adherence to, the religious tenets of the organization" 85 Fed. Reg. at 2921 (to be codified at 22 CFR pt. 205.1(g)).
[57] Rayburn, 772 F.2d at 1166, cert. denied, 478 U.S. 1020 (1986).
[58] *Ganzy v. Allen Christian Sch.*, 995 F. Supp 340, 250 (E.D.N.Y. 1998); *see also, e.g.*, *Hamilton v. Southland Christian Sch.*, 680 F.3d 1316 (11th Cir. 2012); *Fremont*, 781 F.2d at 1367 (9th Cir. 1986).
[59] 536 U.S. 639 (2002).

a. The *Zelman* Court upheld a voucher program because it provided beneficiaries genuine and independent choices "among options public and private, secular and religious. The program is therefore a program of true private choice."[60]

b. In *Zelman*, the Court repeatedly focused on the true genuine and independent choices of private individuals which led to government vouchers being spent at religious schools.

c. The voucher program in *Zelman* had 6 options, only one of which was religious. Having 5 public or nonreligious options ("may remain in public school as before, remain in public school with publicly funded tutoring aid, … obtain a scholarship and choose a nonreligious private school, enroll in a community school, or enroll in a magnet school") is the reason the Supreme Court found that the program provided "genuine opportunities."

d. *Zelman* said the Establishment Clause "question must be answered by evaluating all options Ohio provides Cleveland schoolchildren, only one of which is to obtain a program scholarship and then choose a religious school."[61]

2. The *Zelman* Court was unconcerned with the fact that beneficiaries disproportionately chose the single religious option because they had 5 public or secular options as well. To claim that *Zelman* justifies the possibility of a single religious provider as the only option for a public voucher is absurd.

iii. By definition, the inability to reject a religious provider in favor of a secular option means that there was no genuine and independent choice of that religious provider.

iv. If there is no requirement for an "indirect aid" program to have at least one adequate secular provider for beneficiaries, then the government is in effect adding a religious test to government services.

v. Without requiring a secular option, people in need could be left with no choice and forced into a program that includes explicitly religious content and program requirements.

vi. No one should be forced to participate in a religious program, attend worship, or pray in order to get vital services. Yet when people who have to use a voucher to get services have no secular option to choose from, this may be their reality.

b. To make the new definition of "indirect" aid worse, the Department proposes allowing organizations that accept "indirect" aid to require beneficiaries to participate in religious activities.[62]

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[60] *Zelman*, 536 U.S. at 662.
[61] *Zelman*, 536 U.S. at 656.
[62] **AG:** 85 Fed. Reg. at 2906 (to be codified at 7 CFR pt. 16.4(a)).
ED: 85 Fed. Reg. at 3221, 3222, 3225 (to be codified at pts. 2 CFR 3474.15(f); 34 CFR 75.52(e) & 76.52(e)).
HHS: 85 Fed. Reg. at 2986 (to be codified at 45 CFR pt. 87.3(d)).
DHS: 85 Fed. Reg. at 2896 (to be codified at 6 CFR pt. 19.5).
HUD: 85 Fed. Reg. at [will update upon publication] (to be codified at 24 CFR pt. 5.109(g)).
DOJ: 85 Fed. Reg. at 2928 (to be codified at 28 CFR pt. 38.5(c)).
DOL: 85 Fed. Reg. at 2937 (to be codified at 29 CFR pt. 2.33(a)).

i. This conflicts with the beneficiary nondiscrimination protections in Executive Order 13559 and the very subsection where the Department proposes to add this provision. All providers (in "direct" and "indirect" programs) are prohibited from discriminating against beneficiaries because of their "refusal to attend or participate in a religious practice."

ii. This provision would make it even more likely that beneficiaries could be coerced into participating in religious activities.

c. In addition, the proposed rules put forth by ED, HHS, and DHS would define "Federal financial assistance,"[63] which, as a result, would strip nondiscrimination protections from beneficiaries in "indirect" programs.

i. Although Executive Order 13559 prohibits discrimination against beneficiaries in both "direct" and "indirect" programs,[64] several of the Department's proposed definitions would limit the nondiscrimination provision to "direct" aid only.[65]

ii. No beneficiary should be turned away from a government-funded program based on religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.

11. Administrative Procedure Act and Other Procedural Flaws

a. The proposed changes are "arbitrary and capricious" in violation of the APA. The APA requires that there must be some "reasoned explanation" for the changes to the current policy demonstrating the "rational connection between the facts found and the choices made."[66] Moreover, the agency cannot "ignore an important aspect of the problem" or use explanations that are "counter to the evidence."[67]

i. **No reasoned explanation given for changes.** When promulgating a rule under the APA, an agency "must examine the relevant data and articulate a satisfactory explanation."[68]

1. One example you could use is the elimination of the alternative provider requirement.

a. For example, HHS has not provided a "reasoned explanation" for eliminating the alternative provider requirement, which is a change to

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VA: 85 Fed. Reg. at 2947 (to be codified at 38 CFR pt. 50.2(d)).

[63] **ED:** "Federal financial assistance" 85 Fed. Reg. at 3222 & 3225 (to be codified at 34 CFR pts. 75.52(c)(3)(iii) & 76.52(c)(3)(iii)).
HHS: "Federal financial assistance" 85 Fed. Reg. at 2985 (to be codified at proposed 45 CFR pt. 87.1(d)).
DHS: alter its definition of "financial assistance" 85 Fed. Reg. at 2896 (to be codified at 6 CFR pt. 19.2)).

[64] Exec. Order 13,279, 67 Fed. Reg. 77,141 (2002), as amended by Exec. Order No. 13,559, 75 Fed. Reg. 71,317 (2010) at §2(d). *See also* Federal Agency Final Regulations Implementing Executive Order 13559: Fundamental Principles and Policymaking Criteria for Partnerships With Faith-based and Other Neighborhood Organizations, 81 Fed. Reg. 19355, 19360-61 (Apr. 4, 2016) ("[S]ection 2(d) of the Executive order does not limit these nondiscrimination obligations to direct aid programs."). It is worth noting that in *Zelman*, all participating private schools agreed not to discriminate on the basis of race, religion, or ethnic background. *Zelman*, 536 U.S. at 643.

[65] CITES (ED, HHS, DHS).

[66] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

[67] *Id.*

[68] *Id.*

current policy.[69] HHS states that requiring faith-based organizations to comply with the referral requirement "could impose . . . a burden," but provides no account of organizations reporting the requirement to be burdensome.[70]

2. There are additional examples you could point to—please refer to the analysis in the template above.

ii. **Important aspect of the problem, costs to beneficiaries, ignored.**

1. One example you could use is the elimination of the alternative provider requirement.

    a. For example, HHS's explanation ignores an important aspect of the problem: the need for beneficiaries of social service programs to access services that respect their personal beliefs and identities. The proposed rule centers the need to provide a "non-quantifiable benefit" of religious liberty to faith-based organizations that receive federal funding, while ignoring the costs that will be borne by beneficiaries of social services programs who must seek out an alternative provider on their own. This could prove to be an insurmountable hurdle and they could forego a needed service altogether.[71]

2. There are additional examples you could point to—please refer to the analysis in the template above.

iii. **Explanation lacks evidence of burden on providers.**

1. One example you could use is the elimination of the alternative provider requirement.

    a. For example, HHS defends the decision to remove the referral requirement by pointing to the speculative possibility that it "could impose" a burden on providers.[72] However, HHS also claims to not be aware "of any instance in which a beneficiary has actually sought an alternative provider."[73] Without evidence of alternate provider referrals, the claimed imposition on providers is pure conjecture. Similarly, HHS claims to have determined that "the benefits of the proposed rule justify its cost," but offers no evidence illustrating how common or costly the practice of providing referrals is.[74] HHS claims the rule "would eliminate minor costs" borne by organizations complying with the current regulations, but offers no evidence of those minor costs, just an estimate of no more than $100 per organization, per year.[75]

2. There are additional examples you could point to—please refer to the analysis in the template above.

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[69] *See F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).
[70] Ensuring Equal Treatment of Faith-Based Organizations, 85 FR 2974, 2977 (Jan. 17, 2020).
[71] *Id.* at 2983.
[72] *Id.* at 2977.
[73] *Id.*
[74] *Id.* at 2983.
[75] *Id.*

b. **The regulations fail to perform a "Family Policy Making Assessment" as required by Section 654 of the Treasury and General Government Appropriations Act of 1999 (5 U.S.C. § 601 note)**[76] Under this statute, agencies must "assess the impact of proposed agency actions on family well-being."[77] This analysis must include whether "the action strengthens or erodes the stability or safety of the family and, particularly, the marital commitment," whether "the action helps the family perform its functions," and whether "the action increases or decreases disposable income or poverty of families and children. The Agencies failed to conduct any such analysis or provide any such certification for these proposed rules. In light of the evidence discussed above, it is obvious that these proposed rules will have impacts on family well-being, and the agencies ignore this important aspect of the problem.

c. **The regulations wrongly claim an exemption from the Unfunded Mandates Reform Act of 1995.**[78] The UMRA generally requires agencies to analyze how a proposed regulation will affect state and local governments and the private sector and to identify the estimated costs and benefits for the proposed rule. There are some exceptions to this UMRA requirement, including that it does not apply when proposed rules establish or enforce "statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability."[79] The agencies are claiming this exemption, but they justify the proposed rules by frequently citing to a Supreme Court case (*Trinity Lutheran*) and RFRA. Neither of those are "statutory rights that prohibit discrimination." RFRA is a statute that allows a person to seek an exemption from a government action if the action substantially burdens their religious exercise. The assessment is done on a case-by-case basis and the government may justify the burden if the action is tailored to further a compelling interest. RFRA does not create a categorical right that bars discrimination. The agencies cannot rely on this exception to the UMRA.

12. **Additional Issues in ONLY the Department of Education's Proposed Rule**

a. Title IX: See template from NWLC linked here

b. Religious Student Groups at Public Universities linked here

[76] 105th Cong. Rec. S9256 (daily ed. July, 29, 1998) (Abraham (Others) Amendment No. 3362) (passing the requirement as an amendment to the Treasury and General Appropriations Act of 1999).
[77] *Id*.
[78] Does not apply to HUD. HUD states that the proposed rule "does not impose a federal mandate . . . within the meaning of UMRA."
[79] 2 U.S.C. § 1503(2).