ETHICS AND PUBLIC POLICY CENTER

July 15, 2022

EO 12866 Meeting
Partnerships With Faith-Based and Neighborhood Organizations
RIN: 1105-AB64
Comments by Rachel N. Morrison

Thank you for the opportunity to provide comments on OIRA's review of the proposed rule, "Partnerships With Faith-Based and Neighborhood Organizations" also called the "Nine Agency Rule" (since nine agencies are issuing the regulations).

My name is Rachel Morrison. I am an attorney and Fellow at the Ethics and Public Policy Center (EPPC), where I serve on EPPC's HHS Accountability Project and work on religious freedom and civil rights issues. I am a former attorney advisor at the Equal Employment Opportunity Commission (EEOC) and an expert on religious nondiscrimination and accommodation.

OMB cancelled a previous EO 12866 meeting I had scheduled for a different rule,[1] so I am glad you are willing to hear EPPC's input on this rule.

I want to commend the administration for partnering with faith-based organizations. Throughout the nation's history, faith-based organizations have been vital to providing services to those in need. Indeed, in Executive Order 14015, President Biden recognized that faith-based organizations are essential to the delivery of services in our nation's neighborhoods.

Today, there are six main points I want to share with OIRA and the nine agencies.

1. **The agencies must identify a need and show how the rule meets that need, especially for any proposed notice-and-referral requirement.**
    - For all rulemaking, agencies must identify a need and demonstrate how the rule meets that need. The agencies must also consider the alternative of not regulating, which I encourage the agencies to do here.
    - *Notice-and-Referral Requirement.* I am concerned that the agencies will seek to reimpose the notice-and-referral requirements on faith-based organizations. The 2020 rule removed the 2016 rule's notice-and-referral requirement that unfairly targeted faith-based organizations. The 2020 rule found that the 2016 "alternative provider notice-and-referral requirements were solutions in search of a problem because … there is no indication anyone sought a referral under those provisions, and there is no indication anyone has

[1] Rachel Morrison, *Biden and Becerra Kill Democratic Norms in Rush to Fund Big Abortion*, National Review, (Oct. 8, 2021), https://www.nationalreview.com/bench-memos/biden-and-becerra-kill-democratic-norms-in-rush-to-fund-big-abortion/.

1730 M Street N.W., Suite 910 Washington, D.C. 20036
tel. 202-682-1200 fax 202-408-0632
www.eppc.org

ever sought a referral under a separate HHS program where a statute mandates reporting of all referral requests." 85 Fed. Reg. 82037, 82043. The agencies concluded in the 2020 rule that based on their experience, "maintaining the referral requirements is not necessary to avoid harm to beneficiaries." *Id.* at 82044. Any deviation from this conclusion must be supported in fact.

- *Speculative Statements Do Not Demonstrate Need.* If the unfair notice-and-referral requirement is to be reproposed, the agencies must demonstrate there is a need for notice and referrals. Specifically, the agencies must show that beneficiaries are requesting referrals and that they are unable to determine other available provider options by other means. Speculative statements that it would be "beneficial" or "necessary to avoid harm" without concrete evidence are insufficient.

- *Encouraging Religious Discrimination.* Moreover, it is religious animus for the government to assume at the outset that beneficiaries would object to the religious character of a faith-based organization, especially when the services provided are not of a religious nature. Likewise, it is religious targeting for the government to require faith-based organizations (and only faith-based organizations) to notify beneficiaries that if they object to the religious character of the organization, there are other options. The notice-and-referral requirement under the 2016 rule targeted faith-based providers based on their religious character, treated faith-based organizations in a non-neutral way, and enabled and encouraged religious discrimination by beneficiaries against the faith-based providers. This was remedied in the 2020 rule and the agencies should not revert back to the 2016 rule. In the employment context, an employer cannot use customer preferences to discriminate against an employee on a protected basis. Similarly, under a notice-and-referral regime singling out faith-based providers, the government would be using beneficiaries' preferences to encourage and enable them to discriminate against whom they receive government benefits from.

- *Alternatives.* If such a notice-and-referral requirement is proposed based on demonstrated need as required by law, it should apply equally to *all* providers—religious and secular. Indeed, some beneficiaries may object to the secular nature of a given provider and may instead prefer a different secular provider or a provider that is faith-based. It would only be fair that those beneficiaries receive notice and referrals for other provider options. Another alternative the agencies should consider are ways the government itself can provide direct notice and referrals to beneficiaries without going through the providers.

2. The agencies must apply recent Supreme Court cases, which are particularly relevant to any redefinition of "indirect."

- Agency rulemaking must be in accord with law. There are several recent Supreme Court cases that the agencies must apply to this rulemaking.

- *Carson.* Building on *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. ___ (2017), and *Espinoza v. Montana Dept. of Revenue,* 140 S. Ct. 2246, 207 L. Ed. 2d 679 (2020), the Supreme Court in *Carson v. Makin*, No. 20-1088, slip op. 7-10 (U.S. Jun. 21, 2022), reiterated that the government cannot disadvantage faith-based organizations because of their religious character or exercise of religion. Of relevance for this rule, the Court explained that "'the definition of a particular program can always be manipulated

to subsume the challenged condition,' and to allow States to 'recast a condition on funding' in this manner would be to see 'the First Amendment. . . reduced to a simple semantic exercise.'" *Id.* at 12 (quoting *Agency for Int'l Dev. v. Alliance for Open Society Int'l, Inc.*, 570 U.S. 205, 215 (2013)). The agencies should avoid any unlawful recasting.

- *Kennedy.* In *Kennedy v. Bremerton School District*, No. 21-418, slip op. at 3 (U.S. Jun. 27, 2022), the Supreme Court clarified that it "long ago abandoned *Lemon* [*v. Kurtzman*, 403 U.S. 602 (1971)] and its endorsement test offshoot." Thus, the 2016 rule's excessive entanglement Establishment Clause concerns are no longer sufficient reasons to single out or limit participation by religious organizations. Building on *Fulton v. Philadelphia*, 593 U.S. (2021), *Kennedy* elaborated on what is considered "neutral." "A government policy will not qualify as neutral if it is 'specifically directed at ... religious practice.'" Slip op. at 17. Non-neutral laws with respect to religion are subject to strict scrutiny.
- *Indirect Funding Definition. Carson* and *Kennedy* are particularly relevant to any proposals related to the definition of "indirect" funding. Whether funding to a faith-based organization is indirect should not be contingent on whether secular organizations apply to be and are approved as providers under government programs. To so limit or restrict a faith-based organization because of its religious character or exercise would be to treat the organization different based on religion. In short, in a non-neutral way. A faith-based organization's rights should not be contingent on what secular organizations do or do not do with respect to a government program.

3. The agencies should consult EEOC's Religion Guidance for direction on the scope of Title VII's religious organization exemptions.

- The agencies should ensure that faith-based organizations have the full protections afforded to them under the religious organization exemptions found in Sections 702 and 703 of Title VII of the Civil Rights Act of 1964.
- *Title VII.* Section 702 states that "*[t]his subchapter shall not apply to* … [a qualifying religious organization] . . . with respect to the employment of individuals of a particular religion to perform work connected with the carrying on . . . of its activities" (emphasis added). Thus, even though religious organizations are generally subject to Title VII's nondiscrimination requirements on the basis of race, color, sex, national origin, those prohibitions are part of "this subchapter" and do not apply with respect to "the employment of individuals of a particular religion." Employment covers the full range of the employer-employee relationship. Religion is defined broadly in Title VII to include "all aspects of religious observance and practice, as well as belief." Thus, qualifying religious organizations are permitted to make employment decisions based on religion, which includes, beliefs, observes, and practices. Even though a certain employment decision could be recharacterized as discrimination based on another protected basis, such as sex, if the employment decision was based on the religious organization's religious beliefs, observances, or practices, Title VII does not apply.
- *Bostock.* Indeed, even in *Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020)—where the Supreme Court held that Title VII's prohibition against sex discrimination means an employer cannot make hiring and firing decisions based on an individual's homosexuality or transgender status—the Court recognized that Title VII's religious

organization exemption (in addition to the First Amendment's ministerial exception and the Religious Freedom Restoration Act (RFRA)), could apply in appropriate cases.

- *Other Considerations.* Of course, other nondiscrimination and relevant laws are not subject to Title VII's religious organization exemptions, which only apply to Title VII. Thus, there may be other ways a nondiscrimination requirement could be imposed, such as in the race context, that does not run afoul of Title VII, RFRA, or the Constitution.
- *EEOC Religion Guidance.* The agencies should consider and follow EEOC's recently updated Title VII religion guidance.[2] It would be inappropriate for other federal agencies to espouse different interpretations and applications of Title VII. For your refence, I've attached the EEOC Religion Guidance discussion on the scope of the religious organization exemptions.

4. The agencies cannot discriminate or encourage discrimination under guise of "equity."

- In accord with the push for equity in federal programs as directed by President Biden in Executive Order 13985, the agencies must be careful not to illegally discriminate or permit or encourage illegal discrimination by others. There has been a concerning trend by governments and others to illegally discriminate under the guise of equity. For example, under HHS's watch, multiple states' federally funded Covid-19 vaccine distributions used racial set asides to promote "equity" in blatant violation of Title VI and Section 1557 of the Affordable Care Act.[3] Such illegal discrimination should not be permitted or encouraged by the agencies in this rule.

5. The agencies must consider the rule's costs and transfers, especially those related to any religious accommodation regulations.

- The Nine Agency Rule involves federal financial assistance for providers and beneficiaries under programs run by nine agencies, which indicates it must be an economically significant rule that requires meaningful economic analysis under EO 12866 and OMB Circular A-4. EO 12866 states: "In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless, essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity), unless a statute requires another regulatory approach."

---

[2] EEOC, Compliance Manual: Religious Discrimination §12 (2021), https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination. EEOC's religion guidance was passed by the Commission after notice and public comment. While it is not legally binding on employers, it states the EEOC's positions and contains extensive footnotes to caselaw in support.

[3] *See* Complaint for Race, Color, and National Origin Discrimination in Violation of Section 1557 and Title VI by New Hampshire et al. in COVID-19 Vaccine Distribution, https://eppc.org/wp-content/uploads/2021/09/OCR-Complaint-for-Unlawful-Racial-Set-Asides-in-NH-COVID-Vaccine-Distribution_Redacted.pdf.

- *Religious Accommodations.* Under the First Amendment and RFRA, faith-based organizations may be entitled to religious accommodations for certain program requirements, including nondiscrimination requirements. In other regulations, the Biden administration has summarily acknowledged religious protections, but failed to explain how those protections would apply in practice, the process for obtaining a religious accommodation, or how an organization can appeal an alleged incorrect denial of an accommodation. In this rulemaking, the agencies should clearly explain the protections and process for faith-based organizations' legally required religious accommodations.
- *Costs.* Relatedly, in light of any proposed changes to the religious accommodation process, the agencies should consider the following costs:
    - The effect of the regulations on existing faith-based providers leaving each program under all nine agencies and new faith-based providers not joining in the future.
    - The availability of alternative providers to fill any gaps in service.
    - The harms to beneficiaries who are unable to receive services from a provider.
    - Any irreparable harm of the loss of First Amendment and religious free exercise rights, including by an incorrectly denied accommodation or lack of appeal process.
- *Transfers.* Transfers that must be considered include any distributional effects of federal funds transferring from faith-based providers that leave the program under the regulations to new providers.

6. The Rule should have a meaningful public comment period.

- Under EO 12866, for most rules, the public should receive at least 60 days for meaningful comment. The Administrative Procedure Act suggests less than 30-days is highly suspect and problematic.
- There has been a concerning trend by this administration of providing the public less than 30 days for comment from publication of the notification of proposed rulemaking in the federal register. For example, the Centers for Medicare & Medicaid Services published a 145-page, triple-columned notice of proposed rulemaking on January 5 with a public comment deadline on January 27, a mere 22 days to provide input on a complex, major, and economically significant proposed rule. That deadline was outrageously short.
- I urge the agencies to provide a minimum of 60 days (counted from publication in the federal register not public inspection of the NPRM) to allow the public time to provide meaningful input on this rule as required by law. Any shorter would suggest that the agencies have prejudged the rule and are not interested in the public's input. Surely, fairness and equity suggest the public should have a reasonable amount of time to consider and comment on the proposed rule, especially for a rule that is certainly to be economically significant.

Conclusion

I urge OIRA to ensure that the statutory and regulatory process is upheld and that the Nine Agency Rule has sufficient legal and economic analysis that is rational, reasoned, and sufficiently supported by actual need, and not political, rushed, or prejudged.

Attachment

Excerpt from EEOC, Compliance Manual: Religious Discrimination §12 (2021), https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination

SECTION 12: RELIGIOUS DISCRIMINATION

….

12-I COVERAGE

….

C. Exceptions

1. Religious Organizations

….

Scope of Religious Organization Exemption. Section 702(a) states, "[t]his subchapter shall not apply 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 . . . of its activities."[64] Religious organizations are subject to the Title VII prohibitions against discrimination on the basis of race, color, sex, national origin (as well as the anti-discrimination provisions of the other EEO laws such as the ADEA, ADA, and GINA), and may not engage in related retaliation.[65] However, sections 702(a) and 703(e)(2)[66] allow a qualifying religious organization to assert as a defense to a Title VII claim of discrimination or retaliation that it made the challenged employment decision on the basis of religion.[67] The definition of "religion" found in section 701(j) is applicable to the use of the term in sections

---

[64] 42 U.S.C. § 2000e-1(a). The Supreme Court, in dicta in a case focused on religious discrimination, has characterized section 702 by stating it "exempts religious organizations from Title VII's prohibition against discrimination on the basis of religion." Amos, 483 U.S. at 329. Section 703(e)(2) states, "it shall not be an unlawful employment practice" for certain schools, colleges, universities, or other educational institutions "to hire or employ employees of a particular religion." 42 U.S.C. § 2000e-2(e)(2).

[65] *See Kennedy v. St. Joseph's Ministries, Inc.*, 657 F.3d 189, 192 (4th Cir. 2011) (holding that exemption "does not exempt religious organizations from Title VII's provisions barring discrimination on the basis of race, gender, or national origin"); *Boyd v. Harding Acad. of Memphis, Inc.*, 88 F.3d 410, 413 (6th Cir. 1996) (stating that the exemption "does not … exempt religious educational institutions with respect to all discrimination"); *DeMarco v. Holy Cross High Sch.*, 4 F.3d 166, 173 (2d Cir. 1993) ("religious institutions that otherwise qualify as 'employer[s]' are subject to Title VII provisions relating to discrimination based on race, gender and national origin"); *Rayburn v. Gen. Conf. of Seventh-day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985) ("While the language of § 702 makes clear that religious institutions may base relevant hiring decisions upon religious preferences, Title VII does not confer upon religious organizations a license to make those same decisions on the basis of race, sex, or national origin."); *cf. Garcia*, 918 F.3d at 1004-5 (holding that Title VII retaliation and hostile work environment claims related to religious discrimination were barred by religious organization exception, but adjudicating disability discrimination claim on the merits).

[66] 42 U.S.C. § 2000e-2(e) ("Notwithstanding any other provision of [Title VII], it shall not be an unlawful employment practice for [certain religious educational organizations] . . . to hire and employ employees of a particular religion . . . .").

[67] Courts take varying approaches regarding the causation standard and proof frameworks to be applied in assessing this defense. *See Kennedy*, 657 F.3d 189 at 193-94 (holding that plaintiff's claims of discharge, harassment, and retaliation based on religion were covered by section 702(a) religious exemption and thus barred); *Curay-Cramer v. Ursuline Acad. of Wilmington, Del., Inc.*, 450 F.3d 130, 141 (3d Cir. 2006) ("Thus, we will not apply Title VII to [plaintiff's sex discrimination] claim because Congress has not demonstrated a clear expression of an affirmative intention that we do so in situations where it is impossible to avoid inquiry into a religious employer's religious mission or the plausibility of its religious justification for an employment decision."); *DeMarco*, 4 F.3d at 170-71 ("[T]he [McDonnell Douglas] inquiry is directed toward determining whether the articulated purpose is the actual purpose for the challenged employment-related action."); *EEOC v. Miss. Coll.*, 626 F.2d 477, 485 (5th Cir. 1980) (holding race and sex discrimination claims barred by section 702 exemption where religious employer presents "convincing evidence" that employment practice was based on the employee's religion).

702(a) and 703(e)(2), although the provision of the definition regarding reasonable accommodations is not relevant.[68]

Courts have held that the religious organization's assertion that the challenged employment decision was made on the basis of religion is subject to a pretext inquiry where the employee has the burden to prove pretext.[69] Courts also have held that any inquiry into the pretext of a religious organization's rationale for its decision must be limited to "sincerity" and cannot be used to challenge the validity or plausibility of the underlying religious doctrine.[70] For example, one court has held that a religious organization could not justify denying insurance benefits only to married women by asserting a religiously based view that only men could be the head of a household when evidence of practice inconsistent with such a belief established "conclusive[ly]" that the employer's religious justification was "pretext" for sex discrimination.[71]

In *EEOC v. Mississippi College*, the court held that if a religious institution presents "convincing evidence" that the challenged employment practice resulted from discrimination on the basis of religion, section 702 "deprives the EEOC of jurisdiction to investigate further to determine whether the religious discrimination was a pretext for some other form of discrimination."[72] Despite the court's use of "jurisdiction" here, it has been held in light of the Supreme Court's decision in *Arbaugh v. Y & H Corp.*, that Title VII's religious organization exemptions are not jurisdictional.[73]

---

[68] "For the purposes of this subchapter … [t]he term "religion" includes all aspects of religious observance and practice, as well as belief." 42 U.S.C. § 2000e(j).

[69] *See Curay-Cramer*, 450 F.3d at 141 (distinguishing the case "from one in which a plaintiff avers that truly comparable employees were treated differently following substantially similar conduct"); *DeMarco*, 4 F.3d at 171 (stating pretext inquiry "focuses on . . . whether the rule applied to the plaintiff has been applied uniformly"); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1368 n.1 (9th Cir. 1986) (finding that Title VII's exemption did not apply when the religious employer's practice and justification were "conclusive[ly]" a pretext for sex discrimination).

[70] *See Curay-Cramer*, 450 F.3d at 141 ("[T]he existence of [section 702(a)] and our interpretation of its scope prevent us from finding a clear expression of an affirmative intention on the part of Congress to have Title VII apply when its application would involve the court in evaluating violations of [Catholic] Church doctrine."); *DeMarco*, 4 F.3d at 170-71 ("The district court reasoned that, where employers proffered religious reasons for challenged employment actions, application of the McDonnell Douglas test would require 'recurrent inquiry as to the value or truthfulness of church doctrine,' thus giving rise to constitutional concerns. However, in applying the McDonnell Douglas test to determine whether an employer's putative purpose is a pretext, a fact-finder need not, and indeed should not, evaluate whether a defendant's stated purpose is unwise or unreasonable. Rather, the inquiry is directed toward determining whether the articulated purpose is the actual purpose for the challenged employment-related action." (citations omitted)); *cf. Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 725 (2014) (in determining whether an agency rule contravened a closely held corporation's rights under the Religious Freedom Restoration Act, "it is not for the Court to say that . . . religious beliefs are mistaken or unreasonable"; rather the Court's "'narrow function . . . is to determine' whether the plaintiffs' asserted religious belief reflects 'an honest conviction'").

[71] *Fremont Christian Sch.*, 781 F.2d at 1367 n.1; *see also Miss. Coll.*, 626 F.2d at 486 (if evidence disclosed that the college "in fact" did not consider its religious preference policy in determining which applicant to hire, section 702 did not bar EEOC investigation into applicant's sex discrimination claim).

[72] *Fremont Christian Sch.*, 781 F.2d at 1366 (quoting Miss. Coll., 626 F.2d at 485).

[73] *See Garcia v. Salvation Army*, 918 F.3d 997, 1007 (9th Cir. 2019) (holding that Title VII's religious organizations exemption is not jurisdictional and can be waived if not timely raised in litigation). "Because Congress did not rank the religious exemption as jurisdictional, this Court will 'treat the restriction as nonjurisdictional in character.'" *Smith v. Angel Food Ministries, Inc.*, 611 F. Supp. 2d 1346, 1351 (M.D. Ga. 2009) (quoting Arbaugh, 546 U.S. 500, 515 (2006)).

The religious organization exemption is not limited to jobs involved in the specifically religious activities of the organization.[74] Rather, "the explicit exemptions to Title VII . . . enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices, whether or not every individual plays a direct role in the organization's 'religious activities.'"[75] In addition, the exemption allows religious organizations to prefer to employ individuals who share their religion, defined not by the self-identified religious affiliation of the employee, but broadly by the employer's religious observances, practices, and beliefs.[76] Consistent with applicable EEO laws, the prerogative of a religious organization to employ individuals "'of a particular religion' . . . has been interpreted to include the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer."[77] Some courts have held that the religious organization exemption can still be established notwithstanding actions such as holding oneself out as an equal employment opportunity employer or hiring someone of a different religion for a position.[78]

[74] *See Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987) (addressing the issue of whether the § 702 exemption to the secular nonprofit activities of religious organizations violates the Establishment Clause of the First Amendment, the Court held that "as applied to the nonprofit activities of religious employers, § 702 is rationally related to the legitimate purpose of alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions"); *Kennedy v. St. Joseph's Ministries, Inc.*, 657 F.3d 189, 192 (4th Cir. 2011) ("The revised [religious organization exemption] provision, adopted in 1972, broadens the exemption to include any activities of religious organizations, regardless of whether those activities are religious or secular in nature.").

[75] *Little v. Wuerl*, 929 F.2d 944, 951 (3d Cir. 1991) (holding religious organization exemption barred religious discrimination claim by parochial school teacher who was discharged for failing to follow church canonical procedures with respect to annulment of a first marriage before remarrying).

[76] *See* 42 U.S.C. § 2000e(j) (defining religion to include "all aspects of religious observance and practice, as well as belief"); *see also Little*, 929 F.2d at 951 (concluding that "the permission to employ persons 'of a particular religion' includes permission to employ only persons whose beliefs and conduct are consistent with the employer's religious precepts").

[77] *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 624 (6th Cir. 2000); *see, e.g.*, *Killinger v. Samford Univ.*, 113 F.3d 196, 200 (11th Cir. 1997) (holding that under religious organization exemption School of Divinity need not employ professor who did not adhere to the theology advanced by its leadership); *Little*, 929 F.2d at 951 (holding that religious organization exemption barred religious discrimination claim challenging parochial school's termination of teacher who had failed to validate her second marriage by first seeking an annulment of her previous marriage through the canonical procedures of the Catholic church).

[78] *See Hall*, 215 F.3d at 625 (finding that Title VII's religious organization exemption was not waived by the employer's receipt of federal funding or holding itself out as an equal employment opportunity employer); *Little*, 929 F.3d at 951 (finding that Title VII's religious organization exemption was not waived by Catholic school knowingly hiring a Lutheran teacher); *see also Garcia v. Salvation Army*, 918 F.3d 997, 1007 (9th Cir. 2019) (holding that Title VII's religious organization exemption is not jurisdictional and can be waived).