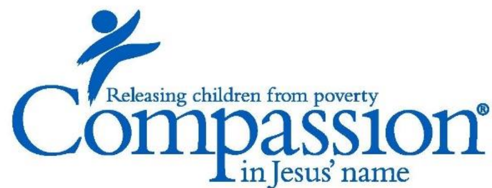
NAE | National Association of Evangelicals

Thomas More SOCIETY



To: U.S. Department of State

Docket Number DOS-2023-0015
Regulation Identifier Number [RIN] 1400-AF66
Action: Notice of Proposed Rulemaking
—and—
Docket Number DOS-2023-0014
Regulation Identifier Number [RIN] 1400-AF65
Action: Notice of Proposed Rulemaking

From: National Association of Evangelicals, Post Office Box 23269, Washington, DC 20026
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Date: Friday, March 15, 2024

Re: Nondiscrimination in Foreign Assistance –and—
Acquisition Regulation: Nondiscrimination in Foreign Assistance

**Submitted electronically via Federal Rulemaking Portal: https://www.regulations.gov*
**Format: PDF*

On behalf of the above-named organizations, we submit the following Comments in response to the Notice of Proposed Rulemaking [“NPRM”] concerning the Department of State’s Nondiscrimination in Foreign Assistance and the NPRM concerning the Department of State’s Acquisition Regulation: Nondiscrimination in Foreign Assistance. The two NPRMs were first published January 19, 2024, and appeared at 89 Fed. Reg. 3583 and 89 Fed. Reg. 3625, respectively, that same day.

PART I. WHO ARE WE: VISION AND MISSION

The **National Association of Evangelicals** ["NAE"] is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves forty member denominations, as well as numerous evangelical associations, missions, social-service charities, refugee and humanitarian aid agencies, colleges, seminaries, and independent churches. NAE serves as the collective voice of evangelical churches, as well as other church-related and independent religious ministries. It believes that religious freedom is both a God-given right and a limitation on civil government, as recognized in the First Amendment and our nation's legal heritage, and that the dispersion and checks of governmental authority as reflected in our Constitution's separation of powers are vital means of preventing abuse of authority first delegated to the government by its citizens.

NAE has members and a subsidiary serving refugees and providing international humanitarian aid. International Christian humanitarian work long predates the founding of the U.S. Agency for International Development ["USAID"] in 1961 and even the launching of the State Department's Marshall Plan in 1947. Most of the early hospitals and schools in Africa were founded and supported by evangelical and Catholic missionaries. Today, numerous Christian humanitarian agencies partner with the State Department and related agencies to provide life-saving aid in response to natural disasters, wars, famines, and public health crises, and to promote democracy and human rights. Many of these agencies are members of NAE. Whether the source of funding is public or private, the assistance is offered without discrimination, to people of all faiths and none. Many additional religious organizations carry out relief programs funded entirely by private contributions.

In 1978, NAE formed a network of faith-based humanitarian agencies. That organization of providers, now known as the Accord Network, operates independently while remaining an affiliate of the NAE.

Compassion International, Inc., is a faith-based organization headquartered in Colorado Springs, Colorado. It collaborates with over 8600 local churches in 29 countries to deliver holistic, contextually appropriate programing for 2.3 million children and youth living in economic poverty. With the support of more than 1.7 million contributors, Compassion ensures that these children and youth, often along with their parents or guardians, are financially, emotionally, and socially supported as they meet challenges and strive to achieve their full potential.

The **Thomas More Society** ["TMS"] is a national public interest law firm dedicated to restoring respect in the law for freedom of speech, religious liberty, and the protection of human life. A 501(c)(3) nonprofit incorporated in Illinois with offices in Chicago and Omaha, TMS pursues its purposes through civic education, litigation, and related activities. In this effort, TMS has represented many individuals and organizations in federal and state courts and filed numerous *amicus curiae* briefs with the aim of protecting the rights of individuals and

organizations to communicate their political and social views, as well as to faithfully practice their religion, as guaranteed by the U.S. Constitution.

PART II. REQUIRED CLARIFICATIONS

The first published NPRM, RIN 1400-AF66, is largely about U.S. Department of State ["DoS"] grants and cooperative agreements. When the final rule is promulgated, it will be codified at 2 CFR part 602. The second published NPRM, RIN 1400-AF65, is largely about DoS contracts and acquisitions. When the final rule is promulgated, it will be codified at 48 CFR parts 625 and 652.

The NPRMs propose to impose nondiscrimination requirements with respect to the treatment of beneficiaries of grants and contracts. They also propose to impose nondiscrimination requirements with respect to employment by the recipients of grants or contracts—provided that the employee in question "is … engaged directly in the performance of this award and whose work will be subsidized in whole or in part by Federal foreign assistance funds under this award . . . ." *See* 2 CFR 602.20(b)(2) and 602.40(a)(2); 48 CFR 652.225-72(a)(2).

A. The initial matter needing clarification pertains to the prohibited bases of discrimination. The classes protected by the proposed regulations are legion: "race, ethnicity, color, religion, sex, gender, sexual orientation, gender identity or expression, sex characteristics, pregnancy, national origin, disability, age, genetic information, indigeneity, marital status, parental status, political affiliation, or veteran's status." 2 CFR 602.20(a) and 602.40(a); 48 CFR 625.7101 and 652.225-72(a). For grants and cooperative agreements, to this long list the new "award term" adds a vague and limitless catchall basis of discrimination: "or any factor not expressly stated in the award." 2 CFR 602.20(b) and 602.40(a).

Several of these terms lack definition within the regulations. The most obvious are: "ethnicity," "gender," "gender identity or expression," and "sex characteristics." There will be some overlap in the people fitting the definitions. However, at minimum the rules' definitions need to be fulsome enough to answer these questions:

- How is "gender" different from "sex"?
- How is "gender" different from "gender identity or expression"?
- How are "sex characteristics" different from "sex" and "sexual orientation"?
- How is "race" different from "ethnicity"?
- How does the definition of "disability" account for the decision in Williams v. Kincaid, 45 F.4th 759 (4th Cir. 2022), *reh'g denied* 50 F.4th 429 (4th Cir. 2023), *cert. denied* 142 S. Ct. 2414 (2023) (Alito, J., dissenting), a case binding only in the Fourth Circuit?

- “Veteran’s status” makes sense when it comes to staffing by a recipient, but how does it make sense as a protected class when it comes to beneficiaries of foreign assistance?

The DoS cannot expect recipients to comply with nondiscrimination mandates when such key terms are vague or otherwise undefined. Further, a recipient responsible for overseeing a subrecipient cannot do so if the recipient is unable to define these terms for the subrecipient. We acknowledge that the terms are vague, inter alia, because they are disputed within the larger American society. That is all the more reason for the DoS to supply definitions so recipients can know how the law is using these contested terms in regulations with which recipients must comply or face dire disqualifications and penalties.

It is fundamental due process of law, included within the matters of timely and fair notice, that government shall, at the outset, clearly and fully state what the law is.

B. The DoS uses “equitable” as opposed to “equal,” thereby creating a major ambiguity. With respect to grants and cooperative agreements, the new “award term” protecting beneficiaries defines “discrimination” as “withholding, adversely impacting, or denying *equitable access* to the benefits of foreign assistance.” 2 CFR 602.20(b)(1) and 602.40(a)(1) (emphasis added). With respect to contracts and foreign assistance awards, the protection of end users and beneficiaries is from “discrimination by withholding, denying or adversely impacting *equitable access*” to supplies or services. 48 CFR 652.225—72(a)(1) (emphasis added). Neither proposed rule defines the terms “equitable” or “equitable access.” Does the requirement simply mean equal opportunity to the benefits of a grant or contract? That would be in accord with Title VI of the ’64 Civil Rights Act, 42 U.S.C. 2000d et seq.; sec. 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794; and the Age Discrimination Act of 1975, 42 U.S.C. 6101-6107.[1] Or is the meaning of “equitable” and “equitable access” to align with critical theory and thereby require that recipients account for what is fair based on an accounting of oppressed peoples verses privileged peoples? Recipients cannot know what is required of them with respect to beneficiaries of grants and contracts until it is clear what is prohibited and what course of conduct the government requires.

C. The NPRM RIN 1400-AF65 is largely about DoS contracts and acquisitions. Neither the proposed rule nor the preamble says anything about the administration of these federal contracts by the Office of Federal Contract Compliance Programs [“OFCCP”] in the U.S. Department of Labor. Are the contracts and acquisitions that are the subject of NPRM RIN 1400-AF65 also subject to the rules and administration of the OFCCP? If so, why the double coverage of employment discrimination? Double coverage will increase compliance costs without producing any additional benefit, diminishing the funds available for the programs that DoS seeks to support.

D. A fourth matter needing clarification goes to determining which employees are covered by the employment nondiscrimination mandate when it comes to federal funds for a recipient’s

[1] *See* 22 CFR parts 141 to 146.

overhead. A typical grant or contract award will apportion about fifteen (15) per cent of the total award for overhead. Personnel costs are a part of any organization's overhead. The proposed regulations at 2 CFR 602.20(b)(2) and 602.40(a)(2); 48 CFR 652.225-72(a)(2) state that an employee is covered by the mandate if he or she "is engaged directly in the performance of this award." It would be clarifying for DoS to plainly state that employees providing overhead are not thereby "engaged directly" in the performance of the award or contract and so are not subject to this rule.

PART III. ADDITIONAL QUESTIONS CONCERNING EMPLOYMENT DISCRIMINATION

In addition to the needed definitions and clarifications noted in PART II, above, these Comments address a profound concern pertaining to DoS's proposed imposition of a new nondiscrimination mandate with respect to employment by faith-based recipients on the bases of novel and often vaguely defined protected classes. The classes include: (a) disability, if it includes gender dysphoria; (b) ethnicity, to the extent different from race; (c) gender, to the extent different from sex; (d) gender identity or expression, to the extent different from gender or sex; (e) sex characteristics, to the extent different from gender or sex; (f) sexual orientation; and (g) religion,[2] when pertaining to a religious recipient that defines itself based on its fundamental religious beliefs, vision, and mission.

Point One: Discretionary Waivers Available to some Recipients. Both sets of proposed regulations provide for a discretionary exemption (termed a "waiver") with respect to the employment practices of recipients. *See* 2 CFR 602.30; 48 CFR 625.7102. The exemptions give the DoS broad discretion to exempt a grant or contract recipient from the new employment nondiscrimination requirements. The U.S. Supreme Court recently said that when an exemption is held out to some who suffer a governmental burden, the same exemption must be extended to religious recipients. *See* Fulton v. Philadelphia, 141 S. Ct. 1868 (2021); Tandon v. Newsom, 141 S. Ct. 1294 (2021) (*per curiam*). The *Fulton* Court reasoned that to extend a secular-based exemption but not a religion-based exemption elevates the secular over the religious. This devalues religious exercise, which the government cannot do consistently with the Free Exercise Clause of the First Amendment. It did not matter that the city had never used the exemption in the past to assist a recipient for secular reasons. *Fulton*, 141 S. Ct. at 1878-79.

To prevent hardship and unnecessary litigation, to say nothing of inadvertently denying a religious organization its First Amendment rights, both regulatory "waivers" need to be explicitly extended to religious recipients. Surely DoS does not want a religious grant applicant or contract supplier to have its Free Exercise Clause rights inadvertently overlooked. Similarly, surely DoS would not want its own employees, ignorant of the rule in *Fulton* and *Tandon*, to deny a religious recipient a waiver that is its constitutional right.

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[2] The NPRMs do not say if the DoS is relying on the definition of "religion" found in sec. 701(j) of Title VII of the '64 Civil Rights Act. If so, that should be made explicit. If not, the regulation needs to supply a definition of "religion."

We request that 2 CFR 602.30 and 48 CFR 625.7102 be amended to expressly acknowledge this First Amendment right vested in religious recipients of grants and contracts.

We note that the "waiver" rule in NPRM, RIN 1400-AF65 at 48 CFR 625.7102(a), expressly takes into account a religious recipient's request for an accommodation "to allow a religious [provider] to employ individuals of a particular religion to carry out the activities under the award in a manner consistent with its religious beliefs." In part, this mirrors language used by OFCCP for federal religious contractors. However, the OFCCP exemption is not discretionary but a categorical right. That the exemption is a right is consistent with applicable Executive Orders of the Bush and Obama Administrations. The exemption is a right because, in accord with congressional intent, OFCCP regulations look to Title VII of the Civil Rights Act of 1964, section 702(a), for the nature of the exemption. The sec. 702(a) exemption permits a faith-based employer "to carry out the activities under the award in a manner consistent with its religious beliefs." Accordingly, 48 CFR 625.7102(a) must be altered to state that the religious contractor exemption is a right, not a waiver discretionary with the DoS. If this is not corrected, the DoS is acting at odds with OFCCP and congressional intent. That would be arbitrary and capricious.

Point Two: RFRA Operates as a Super Exemption from Federal Law. Neither of the two NPRMs makes any mention of the Religious Freedom Restoration Act, 42 U.S.C. 2000bb to 2000bb-4 ["RFRA"]. The Office of Legal Counsel, Department of Justice, has decided that RFRA did apply to give relief to a religious grantee's employment practices based on religion by overriding a contrary federal nondiscrimination statute. *See* Opinion Memorandum, Office of Legal Counsel, U.S. Dept. of Justice, "Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act" (June 30, 2007), https://www.justice.gov/d9/olc/opinions/attachments/2015/06/01/op-olc-v031-p0162.pdf.

It would greatly assist both the DoS and religious recipients to explicitly mention RFRA in each of the two sets of nondiscrimination mandates. For the DoS to expressly acknowledge in the regulations that RFRA may apply with respect to employment by recipients will reduce hardship in seeking funding and prevent wasteful litigation of RFRA's applicability. The addition also would be reassuring to religious recipients and encourage their greater participation in DoS programs. The DoS should not want a religious organization to overlook its RFRA rights merely because they are not expressly called out in the regulations. And, of course, we do not want DoS's own employees to overlook the operation of RFRA and thereby violate the law. That can be prevented by an expressed acknowledgement in the regulations of RFRA's priority in the galaxy of rights over discrimination claims.

For a religious organization to successfully invoke RFRA it must, as a *prima facie* matter, show that the law in question imposes a substantial burden on a religious practice of the organization. 42 U.S.C. 2000bb—1(a). Many faith-based social service providers hold that their selection of personnel is at the heart of the organization's nature and policies. Such a missional model entails working with and through local congregations as a vital source of funding and volunteers. In many contexts an authentically faith-based partner has a comparative advantage in building rapport with leaders, particularly in communities where a church may be the only

functioning civil society institution. But this advantage is undermined if the staff of the organization do not uphold its fundamental values.

Disaster relief organizations that are members of NAE hold that all people are made in God's image and are of undiminished dignity. They also believe that all have fallen short of God's holy standards. Those standards are not up for debate but are well understood and found in the Bible. Unsurprisingly, then, these missional entities hire and promote Christians who pledged to follow a biblical path in life. The task these employees do is refugee settlement and disaster relief, but they are called to do that ministry in response to the Christian gospel. The public face of such a humanitarian organization is its frontline workers. The selection of personnel is one of the ministry's principal policies in action. Although the mores in the larger society may have changed, the Bible has not. And, of course, the teachings of the historic church are protected as a matter of religious freedom. If they were not, that would be a one-sided freedom, one for populist religions alone. That is not and never has been our nation's First Amendment. As is often the case, it is the countercultural who are in need of the Bill of Rights.

Once a recipient organization has shown a substantial burden on one of its religious practices (a rather simple task here for a faith-based employer that takes the historical understanding of the Bible seriously), RFRA shifts the burden to the government. 42 U.S.C. 2000bb—1(b). That two-pronged burden is nearly impossible to overcome. Not only must it be proven that the government's interest in enforcing its employment nondiscrimination mandate without any exceptions is compelling, but it must show that not accommodating this particular RFRA claimant is the least restrictive means for the government to secure its compelling interest. Never in a U.S. Supreme Court case has the RFRA duty been overcome by the government. *See, e.g.*, Little Sisters of the Poor v. Pennsylvania, 140 S. Ct. 2367 (2020); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014). Appeals to inclusion and equity (*see* 89 Fed. Reg. at 3584) do not begin to add up to the DoS satisfying the two-prong rigors of strict scrutiny. And it should go without saying, RFRA is not discretionary with the DoS.

In light of the foregoing, RFRA should be expressly acknowledged in the regulations as potentially applicable when a religious recipient's employment practices come into question. Failing to acknowledge this vital American freedom will cause confusion for both DoS staff and faith-based recipients and undermine respect for the rule of law.

The logical place for the expressed mention of RFRA is directly after the two existing discretionary "waiver" rules. This is because RFRA operates much like a super exemption clause. We suggest inserting the RFRA rules at a new 2 CFR 602.31 (RFRA) and a new 48 CFR 625.7102—1 (RFRA).

Point Three: The "Ministerial Exception" Bars Some Employment Claims. Much as with RFRA, we ask that the regulations expressly alert all concerned to the possible application of the doctrine of church autonomy. In the employment context, a church autonomy defense is referred to by the term "ministerial exception." "Minister" is broadly defined, a legal term of art that DoS should take care to acknowledge in the regulation.

A “minister” need not be clergy or other ecclesiastic, have formal religious training, or be ordained. At the outset, the officers and executives of a religious humanitarian relief organization qualify as “ministers.” This is because corporate officers and executives are responsible for the vision and destiny of the organization, one that is deeply religious. The CEO of a religious nonprofit is not unlike the bishop of a diocese or the pastor of a local church. Let it also be said that the religious tasks of a “minister” need not take up a very large percentage of an employee’s day. In a leading case, a school teacher had many secular tasks; it was said that “her religious duties consumed only 45 minutes of each workday.”[3] Nevertheless, the test for employees that qualify as “ministers” is not, as the Chief Justice put it, “one that can be solved by a stopwatch.”[4] That is, if an employee is a minister for any part of his or her job, he or she is a minister for all purposes when it comes to application of the church autonomy defense.

Beyond the corporation’s officers and executives, a wide variety of employees at a religious humanitarian relief organization might be performing the functions of a “minister.” After all, a fourth-grade teacher at a primary school in *Hosanna-Tabor* was deemed a “minister” by a unanimous Supreme Court. Accordingly, what is needed here is for the regulations to expressly acknowledge the possible application of the “ministerial exception.” When the defense is raised by a recipient, then the regulations should direct the DoS to make further factual inquiries.

Church autonomy is a First Amendment doctrine altogether distinct from the more familiar causes of action brought under the Establishment Clause and the Free Exercise Clause. The principle of church autonomy[5] was first recognized by the Supreme Court of the United States in the post-Civil War case of Watson v. Jones.[6] Early this century, in the unanimous decision of Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC,[7] the theory of church autonomy took on its most fully developed form as a constitutional immunity (dubbed the “ministerial exception” in the federal circuits when the immunity arises in the context of employment discrimination[8]) from government oversight that “interferes with the internal governance of the church.”[9] In *Watson*, the subject of internal governance that was immune from litigation was an internecine dispute over local church property that turned on which ecclesial unit within a larger denomination had final authority to resolve the disagreement. The core of the matter was that every church gets to choose its own polity. In *Hosanna-Tabor*, the matter of internal governance immune from litigation was a suit for employment discrimination

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[3] Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U.S. 171, 193 (2012).
[4] *Id*. at 194.
[5] The Supreme Court settled on the label “church autonomy” in Our Lady of Guadalupe School v. Morrissey-Berru, 140 S. Ct. 2049, 2061 (2020) (“The constitutional foundation for our holding was the general principle of church autonomy to which we have already referred . . . .”). In lieu of the church autonomy label, some lower courts use the term “ecclesiastical abstention.” But “ecclesiastical” is far too narrow a label to embrace the doctrine’s scope. And “abstention” wrongly suggests that the doctrine is discretionary. When it applies, church autonomy is mandated by the First Amendment.
[6] 80 U.S. (15 Wall.) 131 (1872).
[7] 565 U.S. 171 (2012).
[8] *Id*. at 188.
[9] *Id.*

against a religious school over the dismissal of a teacher who was assigned at least some religious duties.[10] The heart of the matter was that every church or other religious organization gets to choose its own spiritual leaders.

Notwithstanding the unanimity in *Hosanna-Tabor*, the High Court continues to regularly receive petitions to superintend church autonomy cases in lower federal and state courts, many of which evidence an overly wooden understanding of those subject matters of interior governance that are within a church's space for exclusive operation. Such rigidity was exemplified in the circuit courts in Our Lady of Guadalupe School v. Morrissey-Berru, but the High Court reversed.[11] The justices took less of a checklist approach in finding that for practical purposes classroom teachers at a K-12 religious school were functionally ministers of the faith to the next generation, thus the dismissal of an elementary teacher was categorically immune to claims of employment discrimination.[12]

When confronted with church autonomy theory, the federal appellate courts are tacitly struggling with where to locate the boundary that marks off matters of internal church governance from the government's general regulatory powers. The Supreme Court has responded to this line-drawing task with general language, the most quoted being a passage from Kedroff v. Saint Nicholas Cathedral recognizing that:

> [The First Amendment grants] a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.[13]

Similarly, Serbian Eastern Orthodox Diocese v. Milivojevich declared that the First Amendment permits religious organizations "to establish their own rules and regulations for internal discipline and government" and therefore authorities must defer to decisions by such bodies "on matters of discipline, faith, internal organization, or ecclesiastical rule, custom, or law," and these same civil authorities are not to delve into matters of "theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them."[14] The *Hosanna-Tabor* Court recalled a passage in *Watson* which related that "whenever the questions of discipline, or of faith or ecclesiastical rule, custom or law" have been internally determined by church officials, such matters are now closed and not to be reopened by civic authorities.[15] An equally overarching passage appeared in *Our Lady of Guadalupe* to explain the result in *Hosanna-Tabor*: "The constitutional foundation for our holding was the general principle of church autonomy to which we have already

[10] The Court wrote that the "ministerial exception *bars . . . a suit*" challenging the school's decision to dismiss the teacher. *Id*. at 196 (emphasis added).
[11] 140 S. Ct. 2049 (2020).
[12] *Id.* at 2062-68.
[13] 344 U.S. 94, 116 (1952) (footnote omitted).
[14] 426 U.S. 696, 713, 714, 724 (1976).
[15] 565 U.S. at 185 (quoting *Watson*, 80 U.S. at 727).

referred: independence in matters of faith and doctrine and in closely linked matters of internal government."[16] Accordingly, the theory of church autonomy casts a zone of independence to those relatively few but "core" organizational structures, rituals, and doctrines, as well as "key" personnel and membership functions, that determine the destiny of the religious entity in question.[17]

The nature of church autonomy as a distinct constitutional defense became more evident when, in cases decided in this new century, the Court announced that the theory rests on both of the Religion Clauses in the First Amendment.[18] A second way in which church autonomy theory stands apart is that the doctrine has its own unique line of U.S. Supreme Court case law.[19] A third means by which church autonomy doctrine demonstrates it is distinct is that the injury or harm associated with the claim is not the prevention (or compelling) of a religious belief or practice. For example, the school in *Hosanna-Tabor* obviously had no religious tenet requiring it to dismiss disabled teachers. Rather, the injury that mattered for purposes of church autonomy was that the civil rights law trespassed in the highly sensitive zone of authority to hire and fire ministers.

Going forward, then, it is clarifying to conceptualize the full range of First Amendment religious-freedom jurisprudence as having three distinct tracks: nonestablishment cases, free-exercise cases, and church-autonomy cases. The key to conceptually setting apart church-autonomy cases from the more conventional free-exercise claims begins with an appreciation that church

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[16] 140 S. Ct. at 2061.

[17] *Id.* at 2055 ("core"); *Hosanna-Tabor*, 565 U.S. at 199 (Alito, J., concurring) ("key").

[18] *Our Lady of Guadalupe*, 140 S. Ct. at 2060; *Hosanna-Tabor*, 565 U.S. at 181, 184, 188-89. The Chief Justice explained the play between the two clauses this way:

> By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.

Hosanna-Tabor, 565 U.S. at 188-89. Accordingly, personal religious exercise (Free Exercise Clause) is seen as being enlarged when disestablishment (Establishment Clause) is understood as separating the machinery of government from involvement with the internal operations of religious bodies.

[19] The U.S. Supreme Court's church autonomy cases are rather few. In chronological order they are: *Watson*, 80 U.S. (13 Wall.) 679 (1872) (involving control over church property disputed by factions within a church); Bouldin v. Alexander, 82 U.S. 131, 139-40 (1872) (involving an attempted takeover of a church by rogue elements); Gonzalez v. Roman Catholic Archbishop, 280 U.S. 1 (1929) (involving the authority to appoint or remove a church official); *Kedroff*, 344 U.S. 94 (1952) (involving a legislative attempt to alter the polity of a church); Kreshik v. St. Nicholas Cathedral, 363 U.S. 190 (1960) (involving a judicial attempt to alter the polity of a church); Presbyterian Church v. Hull Mem'l Church, 393 U.S. 440 (1969) (involving control over church property disputed by factions within a church); Md. & Va. Churches of God v. Church at Sharpsburg, 396 U.S. 367 (1970) (involving control over church property disputed by factions within a church); *Milivojevich*, 426 U.S. 696 (1976) (involving the authority to appoint or remove a church minister and to reorganize the church polity); NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) (absent expressed congressional intent, religious K-12 schools not subject to mandatory collective bargaining); Jones v. Wolf, 443 U.S. 595 (1979) (involving control over church property disputed by factions within a church); *Hosanna-Tabor*, 565 U.S. 171 (2012) (involving application of the ministerial exception); *Our Lady of Guadalupe*, 140 S. Ct. 2049 (2020) (involving application of the ministerial exception).

autonomy claims are not a mere aggregate of the personal rights of a church's members.[20] Rather, church autonomy is a structural limitation on the government's constitutional authority[21]—much like the Constitution's three branches, each with limited authority. Just as the structural feature of separation of powers denotes limited, delegated powers being vested in each of the government's three branches, with checks and balances among them, church autonomy is structural in the sense that it denotes inherent, limited powers vested exclusively in institutional religion and still other powers vested exclusively in civil government.[22] This is often referred to in the vernacular as a type of separation of church and state. Its structural character means that institutional religion is vested with a discrete zone of reserved operations.

One sees this demonstrated, for example, in cases like *Hosanna-Tabor*—the authority to hire, promote, and discharge religious functionaries is reserved to the church school. Once the High Court determined that the teacher's job description fell, at least in part, within the "ministerial" sphere, the case was over. There could be no follow-on inquiry into whether the school's rationale for the teacher's dismissal was pretextual.[23] Rather, as the Chief Justice wrote, once it is decided that some of the employee's tasks were those of a "minister," the government's authority over the dispute was foreclosed. The First Amendment already had struck the balance in favor of the church school.[24] When it applies, therefore, the theory of church autonomy gives rise, in the first instance, to an immunity from being sued about matters in the zone.[25] This means that the immunity here is not just a defense from liability.[26] Rather, it is a defense from

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[20] Justice William Brennan's concurring opinion in Corp. of Presiding Bishop v. Amos, 483 U.S. 327 (1987), put it nicely:

> [R]eligious organizations have an interest in autonomy in ordering their internal affairs, so that they may be free to: select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions. . . . For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals. Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself.

Id. at 341-42 (quotation marks omitted).

[21] *See, e.g.,* Lee v. Sixth Mount Zion Baptist Church, 903 F.3d 113, 118 n.4 (3d Cir. 2018); Whole Woman's Health v. Smith, 896 F.3d 362, 367, 373-74 (5th Cir. 2018) (citing *Hosanna-Tabor* to conclude that the Religion Clauses' "structural protection" applies against "judicial discovery procedures"); Conlon v. InterVarsity Christian Fellowship, 777 F.3d 829, 836 (6th Cir. 2015).

[22] *See, e.g.,* Kiryas Joel Vill. Bd. of Educ. v. Grumet, 512 U.S. 687, 690 (1994) (operation of government school district is exclusive governmental function); Larkin v. Grendel's Den, Inc., 459 U.S. 116, 126 (1982) (issuance of liquor license is exclusive governmental function).

[23] 565 U.S. at 194-95.

[24] *Id.* at 196 ("When a minister who has been fired sues her church alleging that her termination was discriminatory, the First Amendment has struck the balance for us."). The structural nature of the doctrine is not to be confused with subject matter jurisdiction. A district court has Article III jurisdiction to decide a church autonomy matter. *Id.* at 195 n.4. But it is the First Amendment (". . . shall make no law . . . "), not Article III, that speaks to civil courts and their lack of delegated authority over topics within the exclusive sphere of the church.

[25] *Hosanna-Tabor*, 565 U.S. at 196 (the "ministerial exception *bars . . . a suit*") (emphasis added).

[26] In a footnote, the Court in *Hosanna-Tabor* said that church autonomy was not a "jurisdictional bar" but an affirmative defense. *Id.* at 195 n.4. The defense indeed does not go to a federal court's subject matter jurisdiction

being sued at all. That means that discovery should be limited to church autonomy issues until it is resolved as to whether the lawsuit is indeed a church autonomy case.[27] If so, it must be immediately dismissed.[28] If it is not an autonomy case, then discovery on the merits may resume and the case proceeds with trial preparation.

Similar to RFRA, the logical place for the expressed mention in the regulations of the church autonomy doctrine (or "ministerial exception") is directly after the existing discretionary "waiver" rule. This is because the "ministerial exception" defense operates as an immunity, that is, when the defense is applicable then the dispute comes to an abrupt end. There is nothing more for the court to do but dismiss the case. The "ministerial exception" is not discretionary.

We suggest the DoS adopt rules to be codified at a new 2 CFR 602.32 (ministerial exception) and a new 48 CFR 625.7102—2 (ministerial exception). Further, the officers and executives of religious recipients should be categorically designated as "ministers" for purposes of the ministerial exception.

Point Four: Administrative Procedure Act and the Major Questions Doctrine. The Major Questions Doctrine is a method of interpretation in disputes where the question before the court is whether an administrative agency has exceeded its authority under the Administrative Procedure Act when construing a congressional statute. The central concern is with separation of powers, specifically the executive branch trenching into authority reserved to Congress to make the law. *See* Biden v. Nebraska, 143 S. Ct. 2355 (2023); West Virgina v. Environmental Protection Agency, 142 S. Ct. 2587 (2022).

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under U.S. CONST. art. III. Church autonomy, rather, is grounded in the First Amendment. And as already discussed, church autonomy is structural by its very nature. A court, of course, has no authority to not honor constitutional structure. In *Hosanna-Tabor*, this meant immediate dismissal of the entire lawsuit once it was recognized that the employee bringing the claim was a "minister."

[27] *See Our Lady of Guadalupe*, 140 S. Ct. at 2060 (citing McClure v. Salvation Army, 460 F.2d 553, 560 (5th Cir. 1972) and Rayburn v. General Conf. of Seventh-Day Adventists, 772 F.2d 1164, 1171 (4th Cir. 1985)); McCarthy v. Fuller, 714 F.3d 971, 975 (7th Cir. 2013); Demkovich v. St. Andrew the Apostle Parish, 3 F.4th 968, 980-82 (7th Cir. 2021) (en banc); and EEOC v. Catholic Univ. of Am., 83 F.3d 455, 466-67 (D.C. Cir. 1996).

[28] At this juncture there frequently arises a chicken or the egg problem. If the subject of the case falls within the zone of church autonomy, then the church cannot be sued and the complaint is summarily dismissed. However, certain minimal facts are prerequisite to the matter falling within the sphere of church autonomy, and the parties may genuinely contest those facts. Such a contest may complicate a motion to dismiss for failure to state a claim. For example, the record may be so underdeveloped that it is not yet clear if the employee filing the discrimination claim is a "minister" for purposes of the ministerial exception. While the employer will insist that enough uncontested facts are known such that the employee is a "minister," the employee will equally insist that certain essential facts are contested, and they must be resolved before it can be determined if the case does indeed fall in the sweet spot of church autonomy. If the factual record is truly underdeveloped, limited discovery should be allowed on the motion to dismiss. Additionally, interlocutory appeal may be pursued by the employer if the trial court refuses to immediately grant dismissal and instead orders the parties to proceed to discovery—discovery not just on the motion, but also on the merits. The circuits are split on allowing use of the collateral-order doctrine to immediately appeal. *Compare* McCarthy v. Fuller, 714 F.3d 971, 974-76 (7th Cir. 2013) (allowing interlocutory appeal) *with* Faith Bible Chapel Int'l v. Tucker, 36 F.4th 1021 (10th Cir. 2022) (rejecting interlocutory appeal), *reh'g en banc denied*, 53 F.4th 620 (10th Cir., filed Nov. 15, 2022) (split 6 to 4), *cert. denied*, 143 S. Ct. 2608 (2023).

These two NPRMs would bring about a major new extension of the law concerning nondiscrimination in employment. This is of concern to all recipients, secular or religious. But it is of profound concern when the NPRMs pertain to the DoS's proposed imposition of a new nondiscrimination mandate with respect to employment by faith-based recipients on the bases of novel and often vaguely defined protected classes: (a) disability, if it includes gender dysphoria; (b) ethnicity, to the extent different from race; (c) gender, to the extent different from sex; (d) gender identity or expression, to the extent different from gender or sex; (e) sex characteristics, to the extent different from gender or sex; (f) sexual orientation; and (g) religion, when pertaining to a religious recipient that defines itself based on its beliefs, vision, and mission.

Nowhere is the DoS given express authority to promulgate employment nondiscrimination rules and regulations concerning sexuality.[29] In contrast, we have noted above that there are multiple laws that caution the DoS to not proceed in a manner that trenches on religious liberty, namely: sec. 702(a) of Title VII of the '64 Civil Rights Act,[30] the Free Exercise Clause in *Fulton*, RFRA, and the ministerial exception as derived from the two Religion Clauses of the First Amendment.

In the preamble for each of the two NPRMs before us, DoS asserts the power to expand its authority to enforcing civil rights nondiscrimination provisions. The DoS points to the authority of the President as having broad discretion over matters of foreign policy. *See* 89 Fed. Reg. at 3584. Further, section 101 of the Foreign Assistance Act of 1961 provides that: ''[T]he Congress reaffirms the traditional humanitarian ideals of the American people and renews its commitment to assist people in developing countries to eliminate hunger, poverty, illness, and ignorance.'' 22 U.S.C. 2151(a). These grants of authority are relevant as broad, general propositions. But they do not speak to employment nondiscrimination, be a recipient secular or religious. To impose employment nondiscrimination requirements on religious recipients will have major political and social implications on religious freedom, something specifically protected at the highest level of our law, i.e., the First Amendment. The specific always supersedes the general.

Consider as well the harm to the beneficiaries. As written, the NPRMs could exclude from partnering with DoS the most experienced and competent organizations doing emergency relief and refugee services, assistance that is provided without discrimination to eligible beneficiaries. To eliminate them from eligibility as implementing partners will harm refugees and the victims of world catastrophes, those DoS is trying to help, and it could certainly diminish the DoS's ability to carry out its mission (''. . . eliminate hunger, poverty, illness, and ignorance.''). Further,

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[29] *See* 22 CFR parts 141 to 146.

[30] Section 702(a) of Title VII exempts religious employers from the entire title when such an employer is acting in accord with its religious beliefs or practices. *See* Fitzgerald v. Roncalli High School, 73 F.4th 529, 535 (7th Cir. 2023) (Brennan, J., concurring); Starkey v. Roman Catholic Archdiocese of Indianapolis, 41 F.4th 931, 946 (7th Cir. 2022) (Easterbrook, J., concurring). Both Judges Brennan and Easterbrook are reading sec. 702(a) in accord with the plain text of the civil rights statute, which in turn is the prevailing interpretive principle of the U.S. Supreme Court.

as noted above, the Constitution and Congress, via RFRA and the “ministerial exception,” respectively, have given highest priority to religious freedom.

Notably absent from this preamble is evidence that the rules would solve real world problems. The preamble cites no examples of people complaining about applying for employment at faith-based recipients and being turned away. It cites no complaints that it has received from would-be job applicants.

The major questions doctrine is a separate and distinct ground under the Administrative Procedure Act for withdrawing this expansion of employment nondiscrimination rules where these exceed the authority delegated by Congress. In West Virginia v. Environmental Protection Agency, 142 S. Ct. 2587 (2022), the Court restored to administrative law a proper regard for separation of powers, requiring agencies to refrain from making momentous decisions without clear congressional authority. Specifically, the Court held that the Environmental Protection Agency [“EPA”] did not have authority to limit emissions at existing power plants through what is called “generation shifting” to renewable energy sources such as solar and wind. Because the EPA’s proposed Clean Power Plan was significant enough to fall under the “major questions doctrine,” the Court held that the Plan required specific congressional approval. Chief Justice Roberts, for the Court, wrote that “something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to ‘clear congressional authorization’ for the power it claims.” *Id.* at 2609. Justice Gorsuch, joined by Justice Alito, wrote a concurring opinion. Justice Gorsuch noted the broad importance of the major questions doctrine, stating that it “seeks to protect against ‘unintentional, oblique, or otherwise unlikely’ intrusions” on the areas of “self-government, equality, fair notice, federalism, and the separation of powers.” *Id.* at 2620.

Even more recently, in Biden v. Nebraska, 143 S. Ct. 2355 (2023), the Court found that the President’s student loan forgiveness initiative violated the major questions doctrine. The proposal would have impacted 45 million former college students and cost an estimated $430 billion. Every indebted former student was to have ten thousand dollars of his or her loan forgiven, and certain low-income individuals were to be forgiven as much as twenty thousand dollars. Quoting from its prior cases, the Court said that, to determine whether Congress has granted authority for new and ambitious administrative actions, the major questions doctrine directs courts to examine the history and breadth of the authority that the agency [here the Department of Education] is asserting, and the economic and political significance of that assertion of power. *Id*. at 2372.

Title VI of the ’64 Civil Rights Act authorizes the DoS to enforce nondiscrimination with respect to its spending programs on the bases of race, color, and national origin. Section 504 of the Rehabilitation Act of 1973 authorizes the DoS to enforce nondiscrimination with respect to its spending programs based on disability. And, finally, the Age Discrimination Act of 1975 authorizes the DoS to enforce nondiscrimination with respect to its spending programs on the basis of age. Nowhere has Congress authorized the DoS to fashion employment

nondiscrimination rules on the bases of ethnicity, gender, gender identity or expression, sex characteristics, sexual orientation, or religion.

Apart from race, national origin, age, and disability, the DoS has no history of enforcing nondiscrimination rules in federally funded programs. This is the work of the Equal Employment Opportunity Commission or the OFCCP. Expanding the reach of these new nondiscrimination provisions is an enormous arrogation of new authority by the DoS to itself. It will entail costly new oversight of grant recipients, especially burdensome to religious recipients.

The NPRM's bearing on employment and sexuality regulates an area of traditional state law concern, with more progressive states regulating this subject in their human rights laws and more conservative states not regulating. Accordingly, the NPRMs would impact and sometimes even preempt state laws, subverting federalism, which is another form of the Constitution's separation of powers. The wisdom of disrupting state regulation of employment discrimination and sexuality is a congressional matter, not one for the unelected employees at DoS.

Even if straightforward consideration of the scope of the two NPRMs were not sufficient to demonstrate the need for specific congressional approval under the major questions doctrine, Congress's repeated failure to act in the way contemplated here by the DoS should be sufficient to demonstrate a positive lack of congressional guidance. For years, Congress has had pending legislation that would add sexual orientation and gender identity to statutory nondiscrimination provisions, but the bills repeatedly have died in the House or Senate. *See, e.g.,* The Equality Act, H.R. 5 — 117th Congress (2021). The continued failure to pass legislation in an elected body regularly subject to the voters is democracy in action—a saying "no" to this proposed aggrandizement of power to the executive. DoS clearly exceeds its authority in trying to expand its own power to do what Congress has repeatedly declined to do, either by legislation or by clear delegation to DoS or another more experienced agency such as the Equal Employment Opportunity Commission.

In the absence of specific congressional approval concerning nondiscrimination in employment on the bases of ethnicity, gender, gender identity or expression, sex characteristics, sexual orientation, and religion as protected classes, the DoS must refrain from promulgating 2 CFR 602.20(b)(2) and 48 CFR 652.225-72(a)(2). This is so even if the DoS is forthcoming with the clarifications requested in Part II, above.

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Thank you for your attention to the foregoing Comments.

Respectfully submitted,

National Association of Evangelicals, Compassion International, Inc., and Thomas More Society

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