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From: The Accord Network[1]
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Institutional Religious Freedom Alliance[2]
Ethics & Religious Liberty Commission, Southern Baptist Convention[3]
CRISTA Ministries d/b/a World Concern
Christian Legal Society

Date: Tuesday, March 19, 2024

RE: Proposed Addition of New Award Term Entitled "Nondiscrimination In Foreign Assistance" (Published 1-19-2024)

**Submitted electronically via Federal Rulemaking Portal: https://regulations.gov*
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The undersigned organizations affirm the Department of State ("Department" or "State Department") for proposing regulations that would require contractors and recipients of federal foreign assistance from the Department in the form of grants or contracts to refrain from discriminating against beneficiaries or potential beneficiaries. However, we have serious concerns about the proposed rule requiring new forms of nondiscrimination of employees.

Unfortunately, the proposed changes to Sections 602 and 625 would subordinate faith-based organizations and risk the loss of these organizations from partnering with the State

[1] The Accord Network ("Accord") is a membership-driven community of over 120 Christ-centered organizations (operational as well as academic) committed to holistic transformation in global relief and development. The diverse members range in size and scope from small and focused on one region to multi-sector agencies serving around the world. Accord serves members by cultivating relationships, sharing resources, and representing the interests of the broader network. In sum, the members have over 110,000 employees that collectively deliver over $4 billion of resources annually in support of the world's most vulnerable. A list of Accord members can be found here: https://accordnetwork.org/memberslist.

[2] Institutional Religious Freedom Alliance ("IRFA"), a division of the Center for Public Justice, works with a multi-faith and multi-sector network of faith-based organizations and associations, and with religious freedom advocates and First Amendment lawyers and scholars, to protect and advance the religious freedom that faith-based organizations need so that they can make their distinctive and best contributions to the common good.

[3] The Ethics and Religious Liberty Commission ("ERLC") is the moral concerns and public policy entity of the Southern Baptist Convention ("SBC"), the nation's largest Protestant denomination, with over 13 million members in roughly 50,000 churches and congregations. The ERLC is charged by the SBC with addressing public policy affecting such issues as religious liberty, marriage and family, the sanctity of human life, and ethics.

Department in the delivery of foreign assistance, thereby undermining the foreign policy objectives of the U.S. government.

To illustrate the full extent of the potential loss to foreign assistance of USAID's top 50 largest foreign assistance recipients, religious organizations comprise $613 million in obligated agency funding in FY '23. They have worked in over 100 countries programming in water, sanitation and hygiene (WASH), displaced persons and refugee support, countertrafficking, and strengthening of civil society structures like health care and justice systems.

To prevent such a loss, we strongly recommend to the Department of State our comments below on how to make sure that its proposed rules in the above-referenced dockets provide assurance to agency officials, prime organizations, auditors, religious organizations, and any other interested stakeholder that the State Department can and must continue to work with FBOs in foreign assistance programming and that a FBO's religious character, affiliation, practices, and expressions of religious beliefs will not preclude the FBO from full participation in State Department foreign assistance programming.

We preface our specific comments by acknowledging and underlining the very strong commitment in current law to religious freedom, as expressed in the Religion Clauses of the First Amendment, the Religious Freedom Restoration Act ("RFRA")—a "super statute"[4] adopted by Congress in 1993—and provisions in multiple statutes, including civil rights statutes. We note, as two important examples of the latter, the religious organization exemptions in Title VII of the Civil Rights Act of 1964, concerning employment discrimination (Sections 702(a) and 703(e)(2)), and, in Title IX, concerning sex discrimination in federally funded educational activities (Sections 1681(a)(3) and 1687). Constitutional and civil rights principles require overriding protection for religious freedom in the context of nondiscrimination protections.

We note, as well, the federal faith-based initiative: the commitment of succeeding administrations of both political parties to ensure that religious organizations can compete on a level playing field with secular organizations for federal financial assistance. The faith-based initiative is a vital bipartisan commitment[5] to remember in the context of this proposal, a proposal that would modify the Uniform Guidance in a way detrimental to religious organizations interested in federal grants.

And we note the recent announcement by the U.S. Agency For International Development of a new strategic religious engagement policy, described in *Building Bridges in Development*.[6] In

[4] *Bostock v. Clayton County*, 140 S. Ct. 1731, 1754 (2020).

[5] Carl Esbeck and Stanley Carlson-Thies, "Happy Birthday, Charitable Choice: Two Decades of Bipartisan Cooperation on Government Funding and Religion" (August 22, 2016), https://cpjustice.org/happy-birthday-charitable-choice-20-years-of-success/.

[6] *Building Bridges in Development: USAID's Strategic Religious Engagement Policy*, USAID, September 2023, *available at* https://www.usaid.gov/policy/strategicreligiousengagement (September 2023).

announcing the policy, Administrator Samantha Power said,

> "I've seen how during times of crisis . . . [faith-based leaders] are often the first to arrive and the last to leave. Many have committed their lives to fighting for justice and caring for those with the greatest needs, grounded in the principles of their faith and living out their religious conviction in a way that uplifts humanity and inspires us all. And when we partner with these changemakers, the results can be extraordinary."[7]

Accordingly, the strategic religious engagement policy directs USAID to expand its financial partnerships—its grantmaking—with religious organizations.

USAID's need for a new strategic engagement policy is a reminder that, if religious organizations are, in reality, to be welcomed to compete for federal financial assistance, it is essential that the stated rules—State Department's proposed rules—make it plain both to officials administering the funds and to religious organizations that may desire to partner with the government that there is truly a level playing field. The rules *should* plainly state the religious freedoms that apply and *should not* mandate requirements not necessitated by statute or the Constitution.

Scope of Comments

We comment on two sections of each NPRM:

1. the qualified ban on employment nondiscrimination on the basis of religion, sex, gender, sexual orientation, gender identity or expression, or sex characteristics;[8] and

2. the effectively standardless waiver in federal assistance awards[9] and the inadequate waiver in federal acquisition contracts.[10]

Amendments Needed

We urge the Department to amend each NPRM to expressly state:

1. what laws the Department recognizes as applying to the nondiscrimination employment provision in each NPRM and as expressly permitting exemption therefrom.

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[7] Speech by Samantha Power in announcing *Building Bridges in Development: USAID's Strategic Religious Engagement Policy*, USAID, *available at* https://www.usip.org/events/building-bridges-development-usaids-strategic-religious-engagement-policy.

[8] Proposed Sections 602.20(b)(2) and 602.40(a)(2); proposed Sections 625.7103 and 652.225-72.

[9] Proposed Section 602.30.

[10] Proposed Section 625.7102.

2. that such laws include the First Amendment to the U.S. Constitution, Sections 701j and 702 in Title VII of the Civil Rights Act of 1964, and the Religious Freedom Restoration Act of 1993.

3. that the nondiscrimination employment provision in each NPRM does not apply to the following categorically exempted employers:

   a. a religious corporation, association, society or educational institution (as defined by Sections 702 or 703e(2) of Title VII] or a church, in the United States; or

   b. a person (inclusive of entities) whose rights under the Religious Freedom Restoration Act [42 USC 2000bb] or the First Amendment to the U.S. Constitution would be violated by application of that regulatory requirement to its employees.

4. that the Department has the burden of proving that an applicant or offeror who invokes this categorical exemption does not qualify for it.

These recommended amendments could be implemented as suggested in Sections 2b and 2c in Appendix A (pp. 18-20).

Legal Infirmities of the NPRMs

For the following reasons, we believe each NPRM as proposed:

1. is arbitrary and capricious because it fails to consider a reasonable alternative, specifically, *categorical exemption of religious organizations* applying for federal foreign assistance grants and federal acquisition contracts from the proposed employment nondiscrimination requirements.

2. needlessly creates costly regulatory uncertainty with its subjective and vague or standardless waiver provision in proposed Sections 602.30 and 625.7102 and by unhelpfully exempting where "*expressly permitted by applicable law"*[11] without identifying what law the Department deems "applicable" or what otherwise prohibited action is "expressly permitted" thereunder.

3. fails to show why the earlier rule is in error.

4. fails to show how the employment nondiscrimination provision in the NPRMs will achieve the Department's stated purpose "to ensure effective

[11] *Id*.

implementation of foreign assistance programs consistent with U.S. foreign policy and the purposes of the [Foreign Assistance Act]."[12]

5. Depends on the unreasonable and unproven assumption that "effective implementation of foreign assistance programs consistent with U.S. foreign policy and the purposes of the [Foreign Assistance Act]"[13] is diminished by continuing to respect the religious hiring rights guaranteed to religious organizations under the First Amendment, Title VII of the Civil Rights Act of 1964, the Religious Freedom Restoration Act of 1993, and multiple presidential orders.

6. Exceeds the bounds of Congressional intent as expressed in Section 702 of Title VII of the Civil Rights Act of 1964 and in the Religious Freedom Restoration Act of 1993.

Discussion of Recommended Amendments

The "Policy" section of the new award terms expressly forbids a grant recipient or subrecipient, or a contractor or subcontractor, from discriminating on the basis of, among other criteria, "religion, sex, gender, sexual orientation, gender identity or expression, sex characteristics, . . . against:

> . . .
>
> (2) any employee, agent, or candidate for a position, who is or will be 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.

Significantly, both proposed regulations, for grants[14] and contracts,[15] include the proviso: "*unless expressly permitted by applicable law*" (emphasis added).

However, employment preference on the basis of some of the criteria apparently forbidden by the proposed regulations is indeed "expressly permitted by applicable law," when exercised in the U.S. *Those laws should be named, so that otherwise qualified faith-based applicants for grants or contracts, agency officials, prime organizations, and auditors do not mistakenly assume no such law exists.* Title VII of the Civil Rights Act of 1964 is such a law. So is the Religious Freedom Restoration Act of 1993 ("RFRA").[16] And so are the Free Exercise, Establishment, Speech, and

[12] 89 Fed. Reg. at 3584 (January 19, 2024).

[13] *Id*.

[14] Proposed Section 602.20(b)(2), 89 FR 3586.

[15] Proposed Section. 652.225-72(a)(2), 89 FR 3629.

[16] 42 USC 2000bb *et seq.*

Assembly Clauses of the First Amendment to the U.S. Constitution. The regulations should explicitly identify these "applicable laws." Moreover, the regulations must explain that these laws protect the right of some applicants to be *exempted categorically*, not by subjective waiver, from the regulations' employment nondiscrimination provisions.

For the reasons discussed infra, we respectfully urge that both regulations expressly state:

1. ***that the employment nondiscrimination requirement of the Rule [Section 602.20 (b)(2) of 2 CFR Part 602, and Sections 625.710 and 652,225-72 of 48 CFR Parts 625 and 652] does not apply to any grant or contract applicant/offeror or recipient/contractor:***

   a. ***that is a religious corporation, association, society or educational institution (as defined by Section 702 or 703e(2) of Title VII] or that is a church, in the United States; or***

   b. ***whose rights under the Religious Freedom Restoration Act [42 USC 2000bb] or the First Amendment to the U.S. Constitution would be violated by application of that regulatory requirement to its employees.***

2. ***that the Department shall have the burden of proving that an applicant that invokes this exemption nevertheless does not qualify for it.***

This preeminent recommendation could be implemented as suggested in Sections 2b and 2c in Appendix A (pp. 18-20).

Otherwise, as currently drafted, the regulations will infringe statutory and constitutional rights, frustrate the regulations' stated purpose, impede the delivery of foreign assistance, threaten the U.S. government's foreign policy objectives, foment expensive litigation and result in the unintended exclusion of religious organizations from being applicants and offerors for the Department's grants and contracts.

Employment discrimination by religious corporations, associations, educational institutions, and societies is "expressly permitted by applicable law" in Title VII.

In guiding the implementation of federal grant and federal contract programs to extend eligibility to faith-based organizations, Executive Order 13279 (December 12, 2002) invokes the Free Exercise and Establishment Clauses of the First Amendment (of course, these constitutional requirements apply whether or not they were mentioned in this EO). President Bush also used verbatim the language of Section 702 of Title VII in clarifying the eligibility of faith-based organizations for federal contracts:

> Section 202 of this Order [prohibiting employment discrimination by a federal contractor] shall not apply to a Government contractor or subcontractor that is a religious corporation, association, educational institution, or society, with respect to the employment of individuals of a particular religion to perform

> work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

The purpose of these proposed regulations is clear: to implement the Foreign Assistance Act ("FAA"), including to "reaffirm[] the traditional humanitarian ideals of the American people"[17] and the goal, among others, of "(3) the encouragement of development processes in which individual civil and economic rights are respected and enhanced."[18] The American people expressed their humanitarian ideal about employment nondiscrimination through the passage of Title VII of the 1964 Civil Rights Act, under the supreme authority of the U.S. Constitution, including its First and Fourteenth Amendments. The "traditional humanitarian ideal" and the "individual civil . . . rights" to be advanced by the FAA and the Department is not unqualified nondiscrimination, but that value subject to the inalienable core rights protected by the First Amendment, by the Religious Freedom Restoration Act of 1993[19] and the express statutory safe harbor of Sections 702 [and 703e(2) of Title VII].

So, Title VII is "applicable law," and Section 702 covers religious creed and conduct and all forms of discrimination, for the following reasons.

The Religious Organization Exemption in Section 702a ("Section 702a") is clear and the exemption it provides is broad:

> (a) Inapplicability of subchapter to certain aliens and employees of religious entities
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> > This 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 by such corporation, association, educational institution, or society of its activities.

42 USC 2000e-1.

The opening words "This subchapter" refer to Title VII—all of it. In the Religious Organization Exemption, Congress thus excluded from the government's regulatory reach anything falling within a religious organization's employment practices based upon religion. In Section 701j, Congress made unambiguously plain and broad the scope of the "religion" being protected by 702a: "all aspects of religious observance and practice, as well as belief." 42 USC

[17] 89 Fed. Reg. at 3584, quoting the Foreign Assistance Act ("FAA"), 22 U.S.C. 2151(a).

[18] FAA, 22 U.S.C. 2151(a)(3).

[19] 42 U.S.C. 2000bb.

2000e-(j). Moreover, Congress amended Section 702a in 1972 to eliminate "religious" as a modifier or limitation on the scope of "activities" protected by the exemption.[20]

Courts affirm this reading of Section 702. The leading case on the application of the Title VII exemptions to protect religious employers' *employee conduct standards* is *Little v. Wuerl,* 929 F.2d 944 (3d Cir. 1991). The Third Circuit placed particular emphasis on the impermissibility of a civil court, in the context of a religious employer, evaluating employee *conduct*:

> Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals *faithful to their [i.e., the organization's] doctrinal practices*, whether every individual plays a direct role in the organization's "religious activities." Against this background and with sensitivity to the constitutional concerns that would be raised by a contrary interpretation, we read the exemption broadly. We conclude 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. Thus, it does not violate Title VII's prohibition of religious discrimination for a parochial school to discharge a Catholic or a non-Catholic teacher who has publicly engaged in *conduct regarded by the school as inconsistent with its religious principles.*

Id. at 951 (emphasis added).

Other courts have similarly concluded that the Title VII religious exemptions apply to employee creed and conduct to which an employer has a religious objection. *Kennedy v. St. Joseph's Ministries*, 657 F.3d 189, 194 (4th Cir. 2011) ("Congress intended the explicit exemptions to Title VII to enable religious organizations to create and maintain communities composed solely of individuals faithful to their doctrinal practices…. [P]ermission 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."); *Hall v. Baptist Mem. Health Care Corp.*, 215 F.3d 618, 624 (6th Cir. 2000) (the Title VII exemptions have "been interpreted to include the decision to terminate an employee whose conduct or religious beliefs are inconsistent with those of its employer"); *see also Henry v. Red Hill Evangelical Lutheran Church of Tustin*, 201 Cal. App. 4th 1041, 1052 (Cal. App. 2011) (citing *Kennedy* and *Hall* with approval for the proposition that the decision to employ persons "of a particular religion" under the Title VII exemptions includes the decision to terminate an employee whose conduct is inconsistent with the religious beliefs of the employer); *Saeemodarae v. Mercy Health Serv.,* 456 F. Supp. 2d 1021,

[20] Equal Employment Opportunity Act of 1972, Pub.L No. 92–261, § 3, 86 Stat. 103, 104; *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987) (agreeing with the district court that Congress' purpose in amending was to minimize governmental "interfer[ence] with the decision-making process in religions"); *Spencer v. World Vision*, 619 F. 3d 1109, 1117 (9th Cir. 2011), *amended and superseded by* 633 F.3d 723 (9th Cir. 2011).

1039-40 (N.D. Iowa 2006) (Title VII exemptions allow religious employer to terminate employee whose conduct is inconsistent with the religious beliefs of the employer); *Newbrough v. Bishop Heelan Catholic Sch.*, 2015 WL 759478 *12-13 (N.D. Iowa 2015) (citing *Little* and *Saeemodarae* for the same proposition).

Judge Brennan on the United States Court of Appeals for the Seventh Circuit recently summarized the proper reading of Section 702:

> The debate as to whether the exemption applies is with the qualifying clause: "with respect to the employment of individuals of a particular religion." § 2000e–1(a). Under Title VII, "religion" is a defined term that "includes all aspects of religious observance and practice, as well as belief." 42 U.S.C. § 2000e(j). But who decides the requisite religious belief, observance, or practice? And what must courts do when a covered employer supplies a religious reason for an adverse employment decision that implicates a protected class other than religion? These questions reveal the fault lines when considering the statutory text, caselaw, and the parties' arguments. Fitzgerald posits that the "religion" referenced in the exemption is the individual's religion. But were that the focus, the exemption would read differently, as the "individual's religion." Instead, the exemption states, "individuals of a particular religion." § 2000e–1(a) (emphasis added). "Of" in ordinary usage has both a possessive and a descriptive meaning, and to choose between the two, context is instructive. Of, GARNER'S MODERN ENGLISH (4th ed. 2016). The term "particular" in the phrase "individuals of a particular religion" already hints at a religious employer's selectivity in employment. Considered as a whole, the exemption's text applies only to a religious employer and only "with respect to the employment of individuals … to perform work connected with the carrying on by such [religious employer] of its activities." § 2000e–1(a). This context shows that the § 702(a) exemption is concerned with "alleviating significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 339 (1987). The focus is on a religious employer's ability to perform its religious activities.

Fitzgerald v. Roncalli High School, 73 F.4th 529, 535 (7th Cir. 2023) (Brennan, J., concurring).

Section 702a shields religious employers from all *other* Title VII claims, not just claims of religious discrimination. At least four decisions—two from federal circuit courts and two from federal district courts—have applied the Title VII exemptions as a defense to a Title VII claim of sex discrimination when the religious employer asserted a theological or doctrinal basis for its challenged employment decision. *See Curay-Cramer v. Ursuline Academy of Wilmington, Del.*, 450 F.3d 130 (3d Cir. 2006); *E.E.O.C. v. Miss. Coll.*, 626 F.2d 477 (5th Cir. 1980); *Maguire v. Marquette Univ.*, 627 F. Supp. 1499 (E.D. Wis. 1986), *aff'd in part on other grounds*, *vacated in*

part, 814 F.2d 1213 (7th Cir. 1987); *Bear Creek Baptist Church v. E.E.O.C.*, 571 F. Supp. 3d 571 (N.D. Tex. 2021).

In a case decided in 2022, Circuit Judge Frank Easterbrook, concurring, noted that when religious employer exemptions apply, they shield the employer from *all* claims under Title VII, not just claims of religious discrimination. *Starkey v. Roman Catholic Archdiocese of Indianapolis*, 41 F.4th 931 (7th Cir. 2022). Judge Easterbrook observes that some courts have mistakenly interpreted Section 702(a) to apply only to claims of discrimination based on religion. He notes, as we do, that religious organizations are not categorically exempt from Title VII. But he emphasizes, with a certain incredulousness that more courts were not picking up on this straightforward textual point, that "when the [adverse employment] decision is founded on the employer's religious belief, then *all of Title VII drops out*." *Id*. at 946 (emphasis added).

The Equal Employment Opportunity Commission's own Religious Guidelines note that Section 702a exempts employers from more than religious discrimination claims:

> Consistent with applicable EEOC 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.[21]

The U.S. Department of Justice likewise has recognized that the Title VII religious exemptions apply to conduct and encompass more than a mere right to hire co-religionists:

> Under that exemption [702(a)], religious organizations may choose to employ only persons whose beliefs *and conduct* are consistent with the organizations' religious precepts. For example, a Lutheran secondary school may choose to employ only practicing Lutherans, only practicing Christians, or *only those willing to adhere to a code of conduct* consistent with the precepts of the Lutheran community sponsoring the school.[22]

The Section 702 exemption supports common sense and practice. Many religious employers sincerely and logically desire to employ people of the same religion who do not merely assent to a creed but strive to conduct themselves in accord with that religion's Scripture or precepts. As recognized by Congress in defining "religion"[23] when enacting Title VII (Section

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[21] EEOC, Compliance Manual on Religious Discrimination, issued 1/15/22, § 12.I.C.1, footnotes 75-77 and accompanying text, *available at* https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination#h_430474065131916107487270 11.

[22] Memorandum from the Attorney General to All Executive Departments and Agencies, *Federal Law Protections for Religious Liberty* (Oct. 6, 2017), 82 Fed. Reg. 49668, 49670 (Oct. 26, 2017) at 6 (emphasis added), *available at* https://www.justice.gov/opa/press-release/file/1001891/download.

[23] "The term 'religion' includes all aspects of religious observance and practice, as well as belief." 42 USC 2000e-(j) *[Section 701j of Title VII]*.

701j), to hire people of the same religion may legitimately comprehend hiring only those who share and uphold in their personal conduct this practice and belief.

Therefore, Section 702 determines that Title VII shall not apply to any religious organization with respect to the latter's employment practices that touch on *any aspect of religious observance, practice, or belief* (including a staff code of personal conduct) by *any employee* performing *any activities* of the organization—from CEO to facilities assistant—regardless of the form of discrimination (religious or otherwise). And Title VII is "applicable law" that "expressly permits" and protects hiring practices apparently prohibited by the proposed regulations unless a department grant officer subjectively grants a waiver.

The Religious Freedom Restoration Act (RFRA) is "applicable law" here and protects preferential employment practices of certain religious "persons."[24]

Just as neither the FAA nor the statutes authorizing the Department to award federal contracts—40 USC 486(c); 41 USC 3101 *et seq*—expressly carves out applicability of Title VII, neither do they carve out RFRA. By its terms, RFRA applies to all federal law unless it is expressly referenced and excluded by Congress.[25] A near unanimous Congress agreed in RFRA that it applies as a superseding overlay over all federal law, including regulations implementing acts of Congress like the FAA and 41 USC 3101 *et. seq*.

To invoke RFRA, a "person"—here, a grant applicant or contract offeror—must show that the employment discrimination regulation imposes a "substantial burden" on its "free exercise of religion." To have religious organizations endure the scrutiny of agency officials, prime organizations, and auditors and defend their employment practices as "expressly permitted by applicable law," burdens the free exercise of religion, triggering the protection of RFRA. So too, to have one's access to potentially hundreds of millions of dollars in grants or contracts dependent on the subjective and discretionary opinion of the grants or contracts officer to issue or refuse a waiver substantially burdens the free exercise of religion, triggering the protection of RFRA. To be denied access to compete by denial of a waiver would be a substantial burden under RFRA. RFRA would be invoked whenever a grant applicant or contractor would be pressured—in order to be eligible—to subjugate their religious standards of employee creed or conduct for grant-funded employees.

If strict scrutiny were thereby triggered, then the burden of persuasion[26] would shift to the State Department or the Labor Department's Office of Federal Contract Compliance Programs

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[24] The Supreme Court has determined that "persons" protected under RFRA include corporations, not just individuals. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

[25] SEC. 6. APPLICABILITY. (a) IN GENERAL. —This Act applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act. (b) RULE OF CONSTRUCTION. —Federal statutory law adopted after the date of the enactment of this Act is subject to this Act unless such law explicitly excludes such application by reference to this Act.

[26] 42 USC 2000bb-2(3).

("OFCCP") to show both a compelling government interest in imposing this requirement on this religious applicant and that there is no way to further that government interest in a manner less onerous to the religious free exercise of the applicant.

Meeting that burden under RFRA would be exceedingly difficult for the State or Labor Departments because the government's interest weighs in favor of the religious applicant/offeror. The latter could point to acts of Congress—Sections 702 and 703e2 of Title VII as well as RFRA—and the absence of any clause in the Foreign Assistance Act or 41 USC 3101 expressly superseding RFRA.

According to the Office of Legal Counsel of the Department of Justice, RFRA can supersede any law (including any regulation) prohibiting employment discrimination by a faith-based employer, depending on the facts or unless Congress expressly exempted from RFRA the grant-authorizing statute.[27]

In sum, the Religious Organizations Exemption of Title VII as well as RFRA are "applicable law." The State Department should execute both those statutes and thereby save recipients, contractors, and taxpayers the expense of litigation. Sections 602.30 and 625.7101 should include a categorical *exception* (not waiver) for religious grant applicants, recipients, or subrecipients in the U.S., as described above, to avoid conflict with Title VII and/or RFRA. This will also maximize the pool of potential grant applicants, many of whom would not apply because their religious hiring rights are not for sale.

The proposed text of the waiver in Sec. 602.30 of the Nondiscrimination in Foreign Assistance rule would violate the Free Exercise Clause.

The proposed rule allows the grants officer the discretion to *waive* the ban on employment discrimination by grant recipients.[28] In addition to creating the potential for arbitrary and capricious agency action due to lack of process and transparency, the waiver is subjective and virtually standardless: "if it is in the best interest of the U.S. government" and "[s]uch determinations will take into account the totality of the circumstances, including, but not limited to, whether the waiver is requested as an accommodation to comply with applicable foreign laws, edicts, or decrees."[29]

The waiver in Section 602.30 is not generally applicable; it allows for and empowers government agents to make individualized exceptions to the employment nondiscrimination rule.

[27] "Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act", June 29, 2007, *available at* https://www.justice.gov/d9/olc/opinions/attachments/2015/06/01/op-olc-v031-p0162.pdf.

[28] Section 602.30 ("Waiver.").

[29] Section 602.30(a), at 3586.

This triggers the strictest scrutiny afforded by U.S. law, the same high standard guaranteed by RFRA.[30]

As under RFRA, the burden of persuasion would shift to the State Department or Labor's OFCCP to show both a compelling government interest in imposing this requirement on this religious applicant and that there is no way to further that government interest in a manner less onerous to the religious free exercise of the applicant.

Meeting that burden under the Free Exercise Clause would be at least as difficult for the Department as under RFRA because the government's interest weighs in favor of the religious grant applicant. In Title VII,[31] Congress has defined the government's interest in employment discrimination by religious employers. In RFRA, Congress has similarly declared the government's interest is exceedingly rare when an employment discrimination regulation substantially burdens free exercise of religion.

Therefore, Sections 602.30 and 625.7101 should include a categorical *exemption* (not waiver) for religious grant applicants, recipients, or subrecipients in the U.S., as described below (see boldface italics) and as suggested in redlining in Appendix A, to avoid conflict with the Free Exercise Clause as well as Title VII and RFRA.

A Categorical Religious Organization Waiver from the Employment Nondiscrimination Provision will advance the stated purpose of the Regulations.

The stated purpose of the proposed rulemaking is: "to ensure effective implementation of foreign assistance programs consistent with U.S. foreign policy and the purposes of the [Foreign Assistance Act]."[32] That purpose will be frustrated unless religious applicants described above are categorically exempted. The NPRMs' selective disqualification of those faith-based applicants with religious standards of employee creed or conduct would be inconsistent with that purpose.

Disqualifying or forcing self-opt out by some of the most effective implementers of foreign assistance just because they have religious creed and conduct standards would frustrate this purpose by significantly reducing the number of potential grant applicants. A smaller pool of qualified applicants/recipients will not "ensure effective implementation."

That explanation of purpose in the Supplementary Information section then quotes the purpose of the FAA: "the Congress reaffirms the traditional humanitarian ideals of the American people and renews its commitment to assist people in developing countries."[33]

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[30] *Fulton v. City of Philadelphia*, 593 U.S. 522, 141 S. Ct. 1868 (2021); *Tandon v. Newsom*, 593 U.S. 61, 141 S. Ct. 1294 (2021).

[31] Sections 702 and 703e2.

[32] 89 Fed. Reg. at 3584 (January 19, 2024).

[33] *Id*.

In passing the First Amendment, Title VII religious organization exemptions, and RFRA, Congress has affirmed the ideal of the American people and their commitment to religious freedom. This proposed rule, without categorical exemption, would frustrate its stated purpose.

Therefore, the undersigned respectfully urge that both regulations expressly state:

1. ***that the employment nondiscrimination requirement of the Rule [Section 602.20 (b)(2) of 2 CFR Part 602 and Section 625.710 of 48 CFR Part 625] does not apply to any grant or contract applicant/offeror or recipient/contractor:***

    a. ***that is a religious corporation, association, society or educational institution (as defined by Section 702 or 703e(2) of Title VII] or that is a church, in the United States; or***

    b. ***whose rights under the Religious Freedom Restoration Act [42 USC 2000bb] or the First Amendment to the U.S. Constitution would be violated by application of that regulatory requirement to its employees.***

2. ***that the Department shall have the burden of proving that an applicant that invokes this exemption nevertheless does not qualify for it.***

This preeminent recommendation could be implemented as suggested in Sections 2b and 2c in Appendix A (pp. 18-20).

Specific Recommendations

An edited version of the following proposed language is attached (Attachment A) for convenience.

A. Create a Centralized Review for Consistent Adjudication to Avoid Arbitrary and Capricious Agency Decisions

Should a report of alleged violation be received by a State Department official, whether to the contract officer, OIG, or suspension or debarment official, the State Department has not presented a structure or process to review and adjudicate such reports or offerings of remedy.[34] A defined process with standards for adjudication is necessary for transparency and consistency of approach. We recommend that a centralized review familiar with the laws referenced above be created for consistent adjudication. We also recommend that the State Department suspend any enforcement action until a challenge to an organization's alleged violation is reviewed and an agency determination made.

B. Create Guidance Document Affirming the Eligibility of Religious Organizations

We recommend that the State Department issue a guidance document that clearly 1) articulates the State Department's intention not to exclude religious organizations, 2) affirms the eligibility of religious organizations who hire and operate in a manner consistent with the

[34] Proposed Section 602.20.

organizations' religious mission, and 3) indicates that an organization is presumed eligible until proven otherwise (to shift off of religious organizations the burden of defending eligibility). This will reduce the opportunity for arbitrary and capricious agency determinations. It may also reduce the number of questions posed by prime organizations, auditors, and agency officials, thereby reducing the burden on religious organizations.

C. Create Exemption for Foreign Religious Organizations

Foreign religious organizations presumably comply with their local employment laws. Therefore, we recommend that the State Department remove the complications of having each foreign religious organization analyze their own eligibility and instead create for foreign religious organizations a categorical exemption from the nondiscrimination requirement.

In doing so, the State Department will also alleviate the practical challenge that would be caused by the flow-down requirement,[35] for example, if a local NGO subrecipient is in a country where it is illegal to specifically target inclusion of populations as beneficiaries or employees, e.g., Uganda. It is unclear how the agency expects federal recipients to navigate such scenarios other than to assume that all foreign organizations who comply with their local laws are exempt from the nondiscrimination requirement.

D. Create Subsection to Explain Agency Intent

To clarify for officials and applicants/offerors that religious organizations have an equal opportunity to seek federal funding, without sacrificing their religious character, we recommend that a new subsection to the proposed standard award term be added:

> Nothing in this section should preclude faith-based organizations from full participation in State Department awards for which they are otherwise eligible. Neither the State Department nor entities that make and administer subawards of USAID funds shall discriminate for or against an organization on the basis of the organization's religious character or affiliation. Additionally, religious organizations shall not be disqualified from participating in State Department funding because such organizations are motivated or influenced by religious faith to provide social services, or because of their religious character or affiliation. A faith-based organization may continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs, provided that it does not use direct financial assistance from the State Department to support or engage in any explicitly religious activities. Furthermore, a religious organization's exemption from the federal prohibition on employment discrimination on the basis of religion, set forth in Section 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–1, is not forfeited when the organization receives financial assistance from the federal government.

[35] *Supra* note 2, at 3585.

Including this paragraph in the State Department's proposed award terms would help avoid the confusion and misinterpretation (and resulting discouragement of applicants/offerors and diversion of time and resources in litigation) that too often persists in federal assistance and acquisition. For comparison, language like that above has been included in every USAID grant or cooperative agreement as a mandatory standard provision (MSP) since at least the George W. Bush Administration and including the Obama and Biden Administrations.[36] It is legally accurate; nothing in *Bostock* or in any Equal Protection Clause decision of the Supreme Court has altered these bedrock principles of the Religion Clauses of the First Amendment.

E. Delete "Expressly"

The proposed rule prohibits federal recipient discrimination of beneficiaries and employees "unless *expressly* permitted by applicable U.S. law." Hiring practices are either legal or illegal. The addition of "expressly" suggests that the State Department is requiring an additional layer of qualification to an otherwise legal practice. This is both confusing and increases the potential for error in the discretionary determination by contract officers, OIG officials, suspension and debarment officers, primes, and auditors.

F. Clarify Scope of Nondiscrimination Requirement for Direct Costs and not Indirect Costs

The nondiscrimination requirement, as applied to employees, agents, or candidates for a position, is for "who is or will be 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."[37] We assume that since the State Department assumes the burden on recipients is minimal, it intended the nondiscrimination requirement to apply to persons directly charged to awards, and *not* to personnel whose salaries or benefits or office equipment may be indirectly charged, either through Negotiated Indirect Cost Rate Agreement ("NICRA") or otherwise. Therefore, we recommend clarifying the scope to specifically exclude costs indirectly charged to awards.

G. Create Consistent Approach across Acquisition and Assistance

The agency should make the acquisition and assistance language the same, reflecting a common approach, to avoid being arbitrary and/or capricious.

H. Revise the Notice Requirement in Proposed 602.40(g)

We suggest requiring the provision of notice without mandating the particular process to give recipients room to choose the most effective vehicle of communication, particularly in contexts with low rates of literacy.

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[36] USAID, Standard Provisions for US NGOs, M11. EQUAL PARTICIPATION BY FAITH-BASED ORGANIZATIONS.

[37] Proposed Section 602.20(b)(2).

I. Estimated Burden Is Grossly Underestimated

We recommend that the State Department consider the following burdens of time and expense when estimating the potential burden on itself and on recipients:[38]

- Extraordinary time and cost burden on religious organizations of defending eligibility and compliance to contract officers, OIG officials, suspension and debarment officers, prime organizations, and auditors.
- Cost and time burden to require all State Department recipients to post in workplace (cost of materials, translation, effort to post in all workplaces without exclusion for remote field offices, management oversight to ensure compliance, process validation by internal and external auditors).
- Time burden on recipients of reporting perceived violations and on the agency to field such reports, escalate, review, adjudicate, in a way that is consistent and not arbitrary or capricious.
- Time burden on agency to review violative recipients' offerings of remedy and to determine whether such remedies are "in a manner reasonably acceptable to the Department."
- Time burden on recipients to request a waiver and for the agency to determine whether to grant such a waiver, in a way that is consistent and transparent and not arbitrary or capricious.

In Appendix A, we respectfully suggest, with redlining, how the grants NPRM could be modified to implement our recommended amendments. Corresponding changes to the NPRM for acquisition contracts could similarly be made.

Thank you for soliciting and considering our views.

The Accord Network
Samaritans Purse
Institutional Religious Freedom Alliance
Ethics & Religious Liberty Commission, Southern Baptist Convention
CRISTA Ministries d/b/a World Concern
Christian Legal Society

[38] *Supra* note 2, at 3586 ("Total Estimated Burden Time: 10 hours.").

Attachment A – Recommended Revisions in Redline

Insert into both the acquisition and assistance regulations the following changes:

§ 602.40
Award term.
The following term will be incorporated in Department of State Federal awards as applicable:

Nondiscrimination in Foreign Assistance (Date)

a. Department of State policy requires that the recipient or grantee not illegally discriminate on the basis of 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 or any factor not expressly stated as permissible in the award, against:

1. any beneficiary or potential beneficiary of the foreign assistance provided in performance of the award, such as, but not limited to, by withholding, adversely impacting, or denying equitable access to the benefits of foreign assistance; and

2. any employee, agent, or candidate for a position, who is or will be engaged directly in the performance of this award and whose salaries and benefits~~work~~ will be directly charged~~subsidized~~ in whole or in part to~~by~~ Federal foreign assistance funds under this award~~, unless expressly permitted by applicable U.S. law~~. This provision is not intended to include employees, agents, or candidates for a position whose salaries and benefits constitute indirect costs, inclusive of NICRA.

b. Section a. does not apply to any applicant or recipient:

1. that is a religious corporation, association, society or educational institution (as defined by Sec 702 or 703e(2) of Title VII) or that is a church, mosque, temple, synagogue, or other religious community in the United States;
2. that is a foreign religious corporation, association, society, educational institution, or church, mosque, temple, synagogue, or other religious community; or
3. whose rights under the Religious Freedom Restoration Act [42 USC 2000bb] or the First Amendment to the U.S. Constitution would be violated by application of that regulatory requirement to its employees.

c. the Department shall have the burden of proving that an applicant that invokes the exemption in b. nevertheless does not qualify for it.

d. Nothing in this section should preclude faith-based organizations from full participation in State Department awards for which they are otherwise eligible. The State Department shall not discriminate for or against an organization on the basis of the organization's religious character or affiliation. Additionally, religious organizations shall not be disqualified from participating in State Department funding because such organizations are motivated or influenced by religious faith to provide social services, or because of their religious character or affiliation. A faith-based organization may continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs, within the limits contained in this provision. Furthermore, a religious organization's exemption from the Federal prohibition on employment discrimination

on the basis of religion, set forth in Sec. 702(a) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–1 is not forfeited when the organization receives financial assistance from the federal government.

~~b~~e. Nothing in this award term is intended to limit the ability of a recipient to target activities toward the assistance needs of certain populations as defined in the award.

~~c~~f. The recipient shall ~~post in conspicuous places available~~provide notice to employees and beneficiaries in their predominant languages ~~the notices to be provided by the Department of State~~ regarding the nondiscrimination policy implemented in this award term.

~~d~~g. The recipient shall notify beneficiaries and prospective beneficiaries that the recipient is prohibited from illegally discriminating on the basis of 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. The notice shall include information (telephone numbers, email addresses, and mailing addresses) necessary to contact the Department of State Inspector General's Fraud, Waste, and Abuse hotline to report potential violations of this award term.

~~e~~h. The recipient shall take such action with respect to any subaward or contract as the Department of State may direct as a means of enforcing this award term, including terminating for noncompliance.

~~f~~i. The recipient shall:

1. Notify its employees and agents of:

i. The policy prohibiting illegal discrimination, described in paragraphs (a) and (b) of this award term; and

ii. The actions that will be taken against employees or agents for violations of this policy. Such actions for employees may include, but are not limited to, removal from the award, reduction in benefits, or termination of employment; and

2. Take appropriate action, up to and including termination, against employees, agents, or subrecipients that violate the policy in paragraph (a) of this clause.

~~g~~j. *Notification.*

1. The recipient shall inform the Grants Officer, Grants Officer Representative, and the Department of State Inspector General immediately of:

i. Any credible information it receives from any source (including host country law enforcement) that alleges an employee of the recipient, subrecipient entity, an employee of a subrecipient, or their agent has engaged in conduct that violates the policy in paragraphs (a), (b), and (d) of this award term; and

ii. Any actions taken against an employee of the recipient, subrecipient entity, an employee of a subrecipient employee, or their agent pursuant to this award term.

2. If the allegation may be associated with more than one award, the recipient shall inform the Grants Officer for the award with the highest dollar value.

~~h~~k. *Remedies*. In addition to other remedies available to the U.S. Government, the recipient's failure to comply with the requirements of this award term may result in:

1. Requiring the recipient to remove an employee or subrecipient employee from the performance of the award;

2. Requiring the award recipient to terminate a subaward;

3. Suspension of award payments until the recipient has taken appropriate remedial action;

4. Declining to exercise available options under the award;

5. Termination of the award for default or cause, in accordance with the Department of State Standard Terms and Conditions for Federal Awards; or

6. Suspension or debarment.

~~i~~l. The recipient must insert this award term, modified as appropriate or necessary to identify the parties, including this paragraph, in all subawards under this award.