

March 19, 2024

**Via Federal eRulemaking Portal**

Kevin E. Bryant  
Deputy Director  
Office of Directives Management  
Department of State  
600 19th Street, NW  
Washington, DC 20036

**RE: EPPC Scholars Comment Opposing State Department Proposed Rules  
“Nondiscrimination in Foreign Assistance,” RIN 1400-AF66, and “Department of  
State Acquisition Regulation: Nondiscrimination in Foreign Assistance,” RIN 1400-  
AF65**

Dear Mr. Bryant:

We write in response to the Department of State’s request for comments on two proposed rules that would establish certain nondiscrimination requirements for grant recipients and contractors in foreign assistance: “Nondiscrimination in Foreign Assistance”<sup>1</sup> and “Department of State Acquisition Regulation: Nondiscrimination in Foreign Assistance.”<sup>2</sup> Because the two proposed rules are substantially similar, we address both in a single comment, noting relevant differences between the two.

We are scholars at the Ethics and Public Policy Center (EPPC). Rachel N. Morrison is a Fellow, Director of EPPC’s HHS Accountability Project, and a former attorney at the Equal Employment Opportunity Commission. Eric Kniffin is a Fellow, member of the HHS Accountability Project, and a former attorney in the U.S. Department of Justice’s Civil Rights Division.

We support the State Department’s goal of ensuring “access for all eligible beneficiaries of the target population” without discrimination in order “to achiev[e] effective, comprehensive, and sustainable foreign assistance results.”<sup>3</sup> Yet these rules would have the opposite effect.

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<sup>1</sup> 89 Fed. Reg. 3583 (Jan. 19, 2024), <https://www.federalregister.gov/documents/2024/01/19/2024-01059/nondiscrimination-in-foreign-assistance>.

<sup>2</sup> 89 Fed. Reg. 3625 (Jan. 19, 2024), <https://www.federalregister.gov/documents/2024/01/19/2024-00972/department-of-state-acquisition-regulation-nondiscrimination-in-foreign-assistance>.

<sup>3</sup> 89 Fed. Reg. at 3583; 89 Fed. Reg. at 3626.

The proposed rules would impose a new “award term” and “contract clause,” respectively, to all State Department foreign assistance solicitations, awards, and contracts that would prohibit grant recipients and contractors from discriminating against beneficiaries *and* their employees on a long list of bases. Rather than achieving “effective, comprehensive, and sustainable” foreign assistance, as proposed, the rules would impose undefined and confusing nondiscrimination requirements. Requirements that State failed to demonstrate a need for. The rules would decimate the pool of foreign assistance providers—both American and foreign partners—by forcing faith-based and other providers to choose between providing assistance to beneficiaries and no longer being able to hire employees that align with their sincerely held religious beliefs or convictions.<sup>4</sup> The loss of these partners will impede the effective delivery of foreign aid and thwart the U.S. government’s foreign policy objectives. State should abandon its proposed rules.

### **1. State fails to demonstrate a need for rulemaking.**

State failed to demonstrate a need for its proposed rules. The proposed rules state that their purpose is to ensure effective implementation of foreign assistance programs consistent with U.S. foreign policy and the purposes of the Foreign Assistance Act of 1961 (FAA). Section 101 of the FAA 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.”<sup>5</sup>

Rather than focus on the commitments Congress identified in the FAA, the proposed rules focus on inclusion and equity. As the rules explain, the Department is “embedding equity across its foreign affairs work” and “seeks to improve the lives of people around the world by being inclusive and equitable in its foreign assistance efforts.”<sup>6</sup> According to State, equity and inclusion are “critical to achieving effective, comprehensive, and sustainable foreign assistance.”<sup>7</sup>

State asserts that the proposed nondiscrimination requirements are “essential in protecting and advancing the human rights of all persons and ensuring equitable access to Department foreign assistance programs;” “U.S. foreign assistance funding is less effective and efficient when discrimination prevents assistance from reaching those who might most benefit from such assistance.”<sup>8</sup> The rules’ nondiscrimination requirements purportedly advance U.S. foreign policy by “ensuring that U.S. foreign assistance is inclusive and equitable by reaching all intended beneficiaries, and efficiently accomplishing its intended objectives.”<sup>9</sup> They allegedly “send a strong signal to people around the world that equity and inclusion are values that the United States takes seriously.”<sup>10</sup>

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<sup>4</sup> 89 Fed. Reg. at 3583; 89 Fed. Reg. at 3626.

<sup>5</sup> 22 U.S.C. § 2151(a).

<sup>6</sup> 89 Fed. Reg. at 3583; 89 Fed. Reg. at 3626.

<sup>7</sup> 89 Fed. Reg. at 3583; 89 Fed. Reg. at 3626.

<sup>8</sup> 89 Fed. Reg. at 3583; 89 Fed. Reg. at 3626.

<sup>9</sup> 89 Fed. Reg. at 3583; 89 Fed. Reg. at 3626.

<sup>10</sup> 89 Fed. Reg. at 3583; 89 Fed. Reg. at 3626.

Yet idealistic and circular platitudes do not establish a need for rulemaking and do not demonstrate how the proposed rules meet the alleged need. The Department provides zero examples in either rule of any provider that discriminated against an intended beneficiary in providing foreign assistance. Indeed, State acknowledges that the proposed new nondiscrimination provision “does not require them to carry out activities beyond those in their cooperative agreements and grants; it does not ask them to alter the manner in which they conduct the work as set out in their awards.”<sup>11</sup> The proposal would merely “expect[]” “the employees of small businesses . . . to be mindful of the principles of equity, fairness, and human dignity when performing the work under their contracts; *as they always have been.*”<sup>12</sup> State undermines its own purported need for its rules, making them arbitrary and capricious.

While mentioning beneficiaries, State completely glosses over any need for its proposed employment nondiscrimination requirements and completely ignores the rules’ impact on faith-based providers. These actions fit the pattern and practice of the Biden administration to promote its radical pro-abortion and pro-LGBT policies at the expense of religious freedom. Consistent with other efforts by agencies under the current administration, these rules would allow State to funnel taxpayer dollars to ideologically progressive groups and force out faith-based and others that will not cow-tow to the administration’s radical pro-abortion and pro-LGBT agenda.

Further, State fails to demonstrate how its proposed nondiscrimination requirements will increase participation, promote efficiency and effectiveness, and improve lives around the world. As explained more fully below, the proposed requirements will achieve the opposite result. Many of the requirements will force faith-based partners out of state foreign assistance programs and will limit available providers on the ground, especially in countries that do not share the administration’s progressive views.

At bottom, these rules are a solution in search of a problem. State fails to provide specific examples of the problem its rules are allegedly solving. Broad idealistic statements do not legitimize a need for rulemaking or justify how a rule will solve an alleged problem. In short, there is no need for rulemaking.

## **2. The proposed rules’ expansive list of protected bases and undefined nondiscrimination requirements create confusion.**

The proposed rules would impose a new “award term” and “contract clause,” respectively.<sup>13</sup> The proposed term and clause would prohibit grant recipients and contractors from discriminating against beneficiaries *and* their employees “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,

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<sup>11</sup> 89 Fed. Reg. at 3585; *see also* 89 Fed. Reg at 3627 (“It does not require them to carry out activities beyond those in their contract SOWs and terms and conditions.”).

<sup>12</sup> 89 Fed. Reg. at 3628 (emphasis added); *see also* 89 Fed. Reg. at 3585 (“The employees of small businesses will be expected to be mindful of the principles of equity, fairness, and human dignity when performing their work funded by taxpayer dollars as they have always been.”).

<sup>13</sup> 89 Fed. Reg. at 3583; 89 Fed. Reg. at 3626.

parental status, political affiliation, or veteran’s status.”<sup>14</sup> The proposed grant term adds “or any factor not expressly stated as permissible in the award.”<sup>15</sup>

State claims its rules establish “clear and meaningful nondiscrimination protections.”<sup>16</sup> Yet they do no such thing. The expansive list of protected bases and scope of prohibited nondiscrimination obligations is far from clear and will create uncertainty and confusion for recipients and contractors alike. Below, we identify four areas where State should provide more clarity.

#### **a. Undefined bases**

In its proposed rules, State provides a laundry list of protected bases and even contemplates prohibiting discrimination based on unidentified bases. Does State really expect award recipients to not discriminate against their employees based on “*any factor* not expressly stated as permissible in the award”? Under the proposed rule, would employers be permitted to make employment decisions based on competence, efficiency, or tardiness, or would that be impermissible because those are factors not “expressly stated as permissible in the award”? Requiring employers to not discriminate based on *any* factor not expressly permitted would be burdensome and decrease efficiency in providing foreign assistance.

Although State provides a long list of specific protected bases, it fails to define the scope of those bases and explain if or how they overlap or are distinct from each other.

For example, the proposed rules would prohibit discrimination based on “sex,” as well as on “gender,” “sexual orientation,” “gender identity or expression,” “sex characteristics,” and “pregnancy.” Historically, “gender” was synonymous with “sex,” but more recently, “gender” is being used (often, but not always) to express a subjective internal identity rather than a person’s objective biology. We ask the Department to define “sex” and “gender” and clarify whether gender is just sex by another name or something else entirely.

Does the Department view “gender,” “sexual orientation,” “gender identity or expression,” “sex characteristics,” and “pregnancy” as a subset of sex discrimination or separate bases? For instance, in other rules proposed by the Biden administration, agencies attempted to shoehorn sexual orientation, gender identity, pregnancy, and abortion into sex discrimination prohibitions. We provide three examples below.

- Under the Department of Education’s proposed Title IX rule, discrimination “on the basis of sex” in federally funded education programs and activities would be defined and expanded to include (“at a minimum”) discrimination on the basis of:
  - sexual orientation,
  - gender identity,
  - sex stereotypes, (i.e., “fixed or generalized expectations regarding a person’s aptitudes, behavior, self-presentation, or other attributes based on sex”),

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<sup>14</sup> 89 Fed. Reg. at 3586; 89 Fed. Reg. at 3629.

<sup>15</sup> Proposed 2 CFR 602.40(a), 89 Fed. Reg. at 3586

<sup>16</sup> 89 Fed. Reg. at 3583; 89 Fed. Reg. at 3626.

- sex characteristics (including “a person’s physiological sex characteristics and other inherently sex-based traits,” and “intersex traits”), and
  - pregnancy or related conditions (defined as: “(1) Pregnancy, childbirth, termination of pregnancy, or lactation; (2) Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation; or (3) Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or their related medical conditions”).<sup>17</sup>
- Under the Department of Health and Human Services’ proposed Section 1557 rule, “Discrimination on the basis of sex includes, but is not limited to, discrimination on the basis of sex stereotypes; sex characteristics, including intersex traits; pregnancy or related conditions; sexual orientation; and gender identity.”<sup>18</sup>
  - Under the Equal Employment Opportunity Commission’s Pregnant Workers Fairness Act proposed regulation, “reasonable accommodations” for their “known limitations related to the pregnancy, childbirth, or related medical conditions” would extend to “current pregnancy, past pregnancy, potential pregnancy, lactation (including breastfeeding and pumping), use of birth control, menstruation, infertility and fertility treatments, endometriosis, miscarriage, stillbirth, or having or choosing not to have an abortion, among other conditions.”<sup>19</sup>

Is the Department adopting similar definitions of sex discrimination? If so, which one?

We also ask the Department to clarify the following. What are the differences, if any, between “gender” and “gender identity” and “gender expression”? How many and what genders are recipients and contractors prohibited from discriminating against? Is “gender expression” a broad spectrum and as unlimited as there are genders? Does “gender expression” encompass *any* way that a person desires to express a gender? Does it include dress, hairstyle, and pronouns? Would an employer be able to require an employee to comply with a dress code inconsistent with the employee’s gender expression even if that expression disrespects the culture of those to whom it is providing foreign assistance? Does “disability” encompass gender dysphoria?<sup>20</sup>

Without answers to these questions and more, providers do not have clarity of their obligations under the proposed award term and contract clause.

## **b. Harassment**

It is also unclear what constitutes “discrimination,” and particularly harassment, especially on the basis of pregnancy, and gender identity or expression.

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<sup>17</sup> 87 Fed. Reg. 41390, 41531-34.

<sup>18</sup> 87 Fed. Reg. 47824, 47916.

<sup>19</sup> 88 Fed. Reg. 54714, 54721.

<sup>20</sup> See Rachel N. Morrison, *Biden DOJ Letter Pushes Transgender Misinformation and Implies Gender Dysphoria Is a Disability*, Nat’l Rev. (May 13, 2022, 12:18 PM), <https://www.nationalreview.com/bench-memos/biden-doj-letter-pushes-transgender-misinformation-and-implies-gender-dysphoria-is-a-disability/>.

For instance, the EEOC proposed harassment guidance<sup>21</sup> that stated sex-based harassment (i.e., a form of discrimination) includes harassment based on “pregnancy, childbirth, or related medical conditions, including lactation,” and can include “harassment based on a woman’s reproductive decisions, such as decisions about contraception or abortion.”<sup>22</sup> Does the Department adopt the same or similar position as the EEOC that sex-based harassment covers decisions about contraception and abortion?

EEOC’s proposed harassment guidance also stated that “sex-based harassment includes harassment on the basis of sexual orientation and gender identity, *including how that identity is expressed.*”<sup>23</sup> (The EEOC’s understanding of sex-based harassment is allegedly based on *Bostock*. But as we explained in our public comment, “*Bostock* was a limited holding and does not support this proposed broad application of gender identity harassment.”<sup>24</sup> Here, though, the Department does not cite to *Bostock*. It just creates a list of protected bases out of whole cloth.)

The EEOC’s proposed guidance provided examples of what unlawful harassment could include:

epithets regarding sexual orientation or gender identity; physical assault; harassment because an individual does not present in a manner that would stereotypically be associated with that person’s gender; intentional and repeated use of a name or pronoun inconsistent with the individual’s gender identity (misgendering); or the denial of access to a bathroom or other sex-segregated facility consistent with the individual’s gender identity.<sup>25</sup>

Example 4 provided a hypothetical scenario elaborating on what the Commission views as unlawful harassment based on gender identity.

Jennifer, a cashier at a fast food restaurant who identifies as female, alleges that supervisors, coworkers, and customers regularly and intentionally misgender her. One of her supervisors, Allison, frequently uses Jennifer’s prior male name, male pronouns, and “dude” when referring to Jennifer, despite Jennifer’s request for Allison to use her correct name and pronouns; other managers also intentionally refer to Jennifer as “he.” Coworkers have asked Jennifer questions about her sexual orientation and anatomy and asserted that she was not female. Customers also have intentionally misgendered Jennifer and made threatening statements to her, but her supervisors did not address the harassment and instead reassigned her

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<sup>21</sup> Available for download here: <https://www.regulations.gov/document/EEOC-2023-0005-0001> [hereinafter EEOC Harassment Guidance].

<sup>22</sup> *Id.* at 8.

<sup>23</sup> *Id.* at 10-11 (emphasis added).

<sup>24</sup> EPPC Scholar Comment on EEOC PROPOSED Enforcement Guidance on Harassment in the Workplace, Docket ID EEOC–2023–0005, RIN 3046–ZA02, at 6 (Nov. 1, 2023), <https://eppc.org/wp-content/uploads/2023/11/EPPC-Scholar-Comment-on-EEOC-Proposed-Harassment-Guidance.pdf>.

<sup>25</sup> EEOC Harassment Guidance at 11-12.

to duties outside of the view of customers. Based on these facts, Jennifer has alleged harassment based on her gender identity.<sup>26</sup>

Does the Department consider the above examples listed in the EEOC’s proposed harassment guidance prohibited discrimination under its proposed rules? Will recipients and contractors have to allow males who identify as women into female-specific spaces, including in countries where such behavior is culturally inappropriate? Will recipients and contractors have to use non-biologically based pronouns for beneficiaries and employees? We address this last point in more detail below.

### c. Pronouns

Imposing a pronoun mandate via nondiscrimination requirements raises many unanswered questions about how a recipient and contractor should navigate the mandate in practice. Will recipients and contractors be required to police pronoun usage by employees and beneficiaries? Does the guidance apply to *any* pronouns a person claims reflect the person’s gender identity? Does it apply to “neopronouns”? Does it apply to pronouns that would otherwise be inappropriate, impolite, or offensive words? Is there any limit on what pronouns employers and employees would be required to use if a person claims those pronouns reflect the person’s gender identity? Does the pronoun mandate apply to pronouns a person says corresponds with their gender identity but appear to mock or troll others’ pronouns?<sup>27</sup> If not, how can recipients and contractors determine a “proper” use of pronouns? If a person’s gender identity is subjective and self-defined, on what basis does State recommend that recipients and contractors determine whether a person’s self-proclaimed pronouns do not actually reflect that person’s self-proclaimed gender identity?

For example, would it be considered harassment to not use the following pronouns consistent with an individual’s gender identity:

- He/him to refer to a biological female;
- She/her to refer to a biological male;
- They/them to refer to a singular individual<sup>28</sup>;
- It/its to refer to a human being<sup>29</sup>;
- Ze/zir (or hir), xe/xyr, fae/faer, ae/aer<sup>30</sup>;
- Leaf/leafself<sup>31</sup>;

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<sup>26</sup> *Id.* at 12.

<sup>27</sup> See, e.g., Louis Chilton, *Star Wars: Mandalorian Star Gina Carano Accused of ‘Mocking Trans People’ with ‘Boop/Bop/Bbeep’ Pronouns Joke*, Independent (Sept. 14 2020, 2:28 PM), <https://www.independent.co.uk/arts-entertainment/tv/news/star-wars-mandalorian-gina-carano-trans-pronouns-bio-twitter-disney-b436015.html>.

<sup>28</sup> See *Understanding Neopronouns*, Human Rights Campaign (last updated May 18, 2022), <https://www.hrc.org/resources/understanding-neopronouns>.

<sup>29</sup> See Beth Greenfield, *Here’s why some LGBTQ Youth Are now Embracing the Nonbinary Pronoun ‘it/its’*, Yahoo (Aug. 17, 2021), <https://www.yahoo.com/lifestyle/heres-why-some-lgbtq-youth-are-embracing-non-binary-pronoun-it-its-223331366.html>.

<sup>30</sup> See Scottie Andrew, *A Guide to Neopronouns, from ae to ze*, CNN (Aug. 12, 2023, 5:00 AM), <https://www.cnn.com/us/neopronouns-explained-xe-xyr-wellness-cec/index.html>.

<sup>31</sup> See *id.*

- Love/loves<sup>32</sup>;
- Pumpkin/spice<sup>33</sup>;
- Pup/pupself<sup>34</sup>;
- Fish/fishself<sup>35</sup>;
- Toy/toyself<sup>36</sup>;
- Nor/mal<sup>37</sup>;
- Beep/boop<sup>38</sup>;
- Hee/haw<sup>39</sup>;
- Rawr/rawrs<sup>40</sup>;
- Clown/clownself<sup>41</sup>; etc.

Does the pronoun mandate extend to:

- Titles and honorifics?
- The use of emojis as pronouns?<sup>42</sup>
- Individuals who use mixed or multiple sets of pronouns?<sup>43</sup>
- Individuals who continually change their pronouns?<sup>44</sup>
- Individuals that request that different types of people use different pronouns when referring to them?

As demonstrated by the questions and examples above, a gender identity or expression pronoun mandate is impractical, unsustainable, and would decrease the efficient allocation of foreign assistance. The State Department should clarify that pronouns do not fall under its nondiscrimination requirements.

A pronoun mandate via nondiscrimination obligations would also raise serious concerns about free speech and religious exercise. If discrimination includes “misgendering” and pronouns, the Department must consider First Amendment protections for free speech or

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<sup>32</sup> See <https://www.tiktok.com/@lesbiansnowwhite/video/7197266276870409515>.

<sup>33</sup> See <https://www.tiktok.com/@lesbiansnowwhite/video/7281473755426131242>.

<sup>34</sup> See <https://www.tiktok.com/@lesbiansnowwhite/video/7229899571638439210>.

<sup>35</sup> See <https://www.youtube.com/watch?v=8XXyp58IbKo>.

<sup>36</sup> See *id.*

<sup>37</sup> See <https://www.tiktok.com/@lesbiansnowwhite/video/7208392801657097518>.

<sup>38</sup> See <https://www.tiktok.com/@lesbiansnowwhite/video/7235467934502522155>.

<sup>39</sup> See <https://www.tiktok.com/@lesbiansnowwhite/video/7209527043975957803>.

<sup>40</sup> See <https://www.tiktok.com/@lesbiansnowwhite/video/7238805383563824427>.

<sup>41</sup> See [https://www.tiktok.com/@tom\\_f420/video/7201353809078045957](https://www.tiktok.com/@tom_f420/video/7201353809078045957).

<sup>42</sup> See, e.g., <https://www.tiktok.com/@lesbiansnowwhite/video/7292246787513945386>; <https://www.tiktok.com/@lesbiansnowwhite/video/7269234553724734763>.

<sup>43</sup> See Gabrielle Kassel, *How to Respect and Affirm Folks Who Use Multiple Sets of Pronouns*, Well+Good (July 12, 2021), <https://www.wellandgood.com/multiple-sets-pronouns/>.

<sup>44</sup> See, e.g., <https://twitter.com/libsoftiktok/status/1664097577401298945>.



religious exercise and provide guidance to recipients and contractors as to how these fundamental rights interact with the nondiscrimination requirement.

For instance, on October 10, 2023, a group of Senators sent a letter to the State Department raising compelled speech and religious liberty concerns with the State Department's gender identity pronoun policy, citing the First Amendment, Title VII, and the Religious Freedom Restoration Act (RFRA).<sup>45</sup> The letter cites the 2021 Sixth Circuit decision in *Meriwether v. Hartop*, which allowed a professor's First Amendment challenge to a university pronoun policy to proceed on free-speech and free-exercise grounds.<sup>46</sup> The case was ultimately settled, with the university agreeing to pay \$400,000 in damages and attorney's fees.<sup>47</sup>

We ask State to acknowledge in any final rule the free speech and free exercise concerns raised by the Senators and acknowledged by the Sixth Circuit. We ask that any final rule clarify the Department's position on whether the First Amendment, Title VII, and RFRA provide protections for recipients and contractors, employees, or beneficiaries who object to using pronouns that do not correspond to a person's biological sex. (Below, we discuss more fully State's obligations under federal law to respect recipients' and contractors' religious exercise.)

#### **d. Equity**

As mentioned above, equity is a major theme throughout the proposed rules. As the rules explain, the Department is "embedding *equity* in foreign affairs work."<sup>48</sup> To this end, prohibited discrimination explicitly includes "withholding," "denying," or "adversely impacting" "equitable access" to federally funded foreign assistance benefits, supplies, or services.<sup>49</sup> At the same time, State says its proposed rules "[c]omplement and affirm other commitments to *equality* in U.S. foreign policy, maximizing their coherence and effectiveness."<sup>50</sup>

These statements seem to be at odds. State does not define the terms "equity" or "equitable access," creating confusion for grant recipients and contractors. We ask State to clarify what it means by "equitable access." What does equitable access look like? How can a grant recipient and contractor ensure equitable access for beneficiaries? How will they know if they are withholding or denying equitable access? Does it mean equal opportunity or something else? If something else, how can a recipient or contractor fulfill its nondiscrimination requirements and the U.S.'s commitment to equality while discriminating to achieve equal outcomes?

In support of its proposed rule, State points to E.O. 13985 and E.O. 14091 on advancing racial equity and supporting underserved communities. In accordance with the Biden

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<sup>45</sup> Letter from Ted Budd, U.S. Senator, and 10 Other Senators, to Antony Blinken, Secretary, U.S. Dep't of State, Oct. 20, 2023, <https://www.budd.senate.gov/wp-content/uploads/2023/10/10.20.23-Budd-Letter-to-Blinken-on-Updated-Guidance1.pdf>.

<sup>46</sup> *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021).

<sup>47</sup> *Meriwether v. Trustees of Shawnee State Univ.*, No. 1:18-cv-00753 (S.D. Ohio Apr. 14, 2022), press release available at <https://adfmmedia.org/case/meriwether-v-trustees-shawnee-state-university>.

<sup>48</sup> 89 Fed. Reg. at 3583; 89 Fed. Reg. at 3626.

<sup>49</sup> Proposed 2 CFR 602.20(b)(1), 89 Fed. Reg. at 3586; proposed 48 CFR 652.225-72(a)(1), 89 Fed. Reg. at 3629.

<sup>50</sup> 89 Fed. Reg. at 3583 (emphasis added); 89 Fed. Reg. at 3626 (emphasis added).

Administration's push for equity in federal programs, the Department must be careful not to illegally discriminate, permit, or encourage illegal discrimination by others. There has been a concerning trend by governments and others to illegally discriminate under the guise of equity. For example, under the current Administration, multiple states' federally funded COVID-19 vaccine distributions used racial set-asides to promote "equity" in blatant violation of Title VI and Section 1557 of the Affordable Care Act.<sup>51</sup> We ask that State clarify that unless expressly permitted by the award or contract, that no recipient or contractor can prioritize providing foreign assistance to certain groups and not others based on a protected basis.

State has a legal duty to prohibit discrimination, even discrimination, for the purpose of equity. We urge State to ensure that its efforts to promote equity do not encourage or enable illegal discrimination and to make clear that such discrimination in their federally funded foreign assistance programs will not be tolerated.

#### **e. Covered Employees**

There is also a lack of clarity over which employees are covered by the proposed nondiscrimination requirements. The proposed award term and contract provision state that the nondiscrimination requirement applies to employees who are "engaged directly in the performance" of the award or contract and "whose work will be subsidized in whole or in part" by State foreign assistance funds.<sup>52</sup> It is unclear the extent to which "in part" would apply to indirect costs. Is this limited to employees whose salary is whole or in part paid by the award or contract? If award or contract funds go to overhead, does that mean all employees could come under the auspices of the nondiscrimination requirements? We ask the Department to provide more clarity about which employees would be covered and whether funding towards overhead or supplies means support staff' and other employees' work is subsidized, at least in part, by the award term or contract. The Department should also clarify that its regulations specifically exclude costs indirectly charged.

### **3. The proposed rules provide inadequate protections for religious liberty.**

The proposed rules also offer inadequate assurances about the State Department's intentions to honor its legal and constitutional obligations towards the many religious organizations that do or may participate in affected programs.

The State Department asserts that the proposed new nondiscrimination rules would apply to all beneficiaries and employees "who [are] or will be engaged directly in the performance" of the award or contract and whose work will be funded or subsidized "in whole or in part" by State foreign assistance funds "unless expressly permitted by applicable U.S. law."<sup>53</sup> Recipients and

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<sup>51</sup> See Complaint for Race, Color, and National Origin Discrimination in Violation of Section 1557 and Title VI by New Hampshire et al. in COVID-19 Vaccine Distribution, [https://eppc.org/wp-content/uploads/2021/09/OCR-Complaint-for-Unlawful-Racial-Set-Asides-in-NH-COVID-Vaccine-Distribution\\_Redacted.pdf](https://eppc.org/wp-content/uploads/2021/09/OCR-Complaint-for-Unlawful-Racial-Set-Asides-in-NH-COVID-Vaccine-Distribution_Redacted.pdf).

<sup>52</sup> Proposed 2 CFR 602.20(b)(2), 89 Fed. Reg. at 3586; proposed 48 CFR 652.225-72(a)(2), 89 Fed. Reg. at 3629.

<sup>53</sup> Proposed 2 CFR 602.20(b)(2), 89 Fed. Reg. at 3586; proposed 48 CFR 652.225-72(a)(2), 89 Fed. Reg. at 3629.

contractors would be required to provide notice of the nondiscrimination requirement to beneficiaries and employees.<sup>54</sup>

Under both rules, State reserves the right to waive the nondiscrimination requirements for employees if “it is determined to be in the best interest of the U.S. government.”<sup>55</sup> Waiver 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.”<sup>56</sup> The waiver provisions give no indication that State will take into account its obligations under U.S. laws or the federal constitution.

Without any discussion in the preamble, the regulations for contractors also contemplate a waiver “to allow a religious corporation, association, educational institution, or society to employ individuals of a particular religion to carry out the activities under the award in a manner consistent with its religious beliefs.”<sup>57</sup> This language is reminiscent of (though not identical to) Title VII’s religious organization exemption. Title VII is the federal civil rights law that prohibits discrimination in employment on the basis of race, color, religion, sex, and national origin.

The critical difference here, however, is that this language in the regulation for contractors is couched within the State’s completely discretionary waiver. In essence, State is asserting the right to interfere with a religious contractor’s employment decisions whenever it concludes that doing so “is in the best interest of the U.S. government.”

The regulations for award recipients do not echo this language from the regulation for contractors. Neither proposed rule explains why only one contemplates a waiver for religious organizations to make employment decisions based on their religion.

If a waiver is granted, the Grants Officer or the head of the contracting activity “shall notify the Assistant Secretary of the Bureau for Democracy, Human Rights, and Labor, or their designee in writing within 30 days.”<sup>58</sup>

As outlined below, these aspects of the proposed rules are deeply flawed. They fail to acknowledge the critical role that religious organizations play in helping the United States carry out its foreign aid programs as well as the State Department’s obligations under the Constitution and federal laws.

**a. Religious organizations play a significant and irreplaceable role in State Department programs.**

The proposed rules’ scant detail on how they would affect religious employers is unacceptable, given the critical role that countless religious organizations—foreign and domestic—play in federal aid programs. The U.S. Agency for International Development’s

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<sup>54</sup> Proposed 2 CFR 602.40(c), (d), 89 Fed. Reg. at 3587; proposed 48 CFR 652.225-72(c), (d), (f), 89 Fed. Reg. at 3629.

<sup>55</sup> Proposed 2 CFR 602.30(c), (d), 89 Fed. Reg. at 3586; proposed 48 CFR 625.7102(a), 89 Fed. Reg. at 3629.

<sup>56</sup> Proposed 2 CFR 602.30(c), (d), 89 Fed. Reg. at 3586; proposed 48 CFR 625.7102(a), 89 Fed. Reg. at 3629.

<sup>57</sup> Proposed 48 CFR 652.7102(a), 89 Fed. Reg. at 3629.

<sup>58</sup> Proposed 2 CFR 602.30(d), 89 Fed. Reg. at 3586; proposed 48 CFR 652.7102(e), 89 Fed. Reg. at 3629.

(USAID) Administrator, Samantha Power, recognized the importance of faith-based organizations in a recent announcement regarding its new strategic religious engagement policy. Administrator 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.<sup>59</sup>

This strategic religious engagement policy directs USAID to not only continue but also to expand its grantmaking with religious organizations.

Administrator Power's comments recognize that the federal government's foreign policy objectives cannot be achieved without robust participation of religious organizations. For decades, federal agencies have partnered with religious organizations through grants and contracts to provide government-funded aid and services. Religious organizations have proven to be among the most efficient and effective partners in stewarding federal resources, particularly when serving needy and vulnerable populations.

At home and abroad, presidents from both political parties have reaffirmed the importance of leveraging partnerships with religious organizations to advance federal policy. A 2010 report from President Obama's Faith-Based and Neighborhood Partnerships Advisory Committee acknowledged that faith-based social service providers are "serious, innovative, and—in fact, indispensable—partners for the U.S. Government" in achieving key policy goals.<sup>60</sup>

In short, the State Department relies on the help of religious organizations that are excellent at what they do. This excellence cannot be understood apart from the religious convictions that drive these entities to serve others, including—in many cases especially—"the least of these."<sup>61</sup> Religious organizations cannot maintain their identity and advance their missions unless they maintain the freedom to select employees that share and reflect their religious convictions.

For this reason alone, the proposed rules are misguided and would undermine our nation's foreign aid programs. The central role that religious organizations play in our nation's foreign aid infrastructure makes it all the more important that the State Department describe in detail how its proposed nondiscrimination rules would affect its current and prospective religious partners, those here in the United States and those around the world.

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<sup>59</sup> 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>.

<sup>60</sup> Report of Recommendations to the President, President's Advisory Council on Faith-based and Neighborhood Partnerships, 3 (March 2010), available at [ofbnp-council-final-report.pdf](http://ofbnp-council-final-report.pdf) ([archives.gov](http://archives.gov)).

<sup>61</sup> Matthew 25:30.

## **b. The president’s “broad discretion” is subject to U.S. laws and Constitution.**

Although State claims these proposed rules “would have the effect of protecting and promoting . . . democratic values,”<sup>62</sup> its broad nondiscrimination provisions are not rooted in federal law and the State Department does not acknowledge any limits on its discretion to grant or requested waivers from religious organizations. To the contrary, the proposed rules boldly assert that State’s proposal is an exercise of the president’s “broad discretion in the conduct of foreign affairs to allocate foreign assistance funding for particular programs and to set the conditions on U.S. funding to implementers of those programs.”<sup>63</sup>

This proclamation does not comport with the State Department’s legal obligations. The executive branch’s power to “conduct [] foreign policy” is “not limitless. The bounds in both wartime and peacetime are fixed by the same Constitution.”<sup>64</sup> Federal law also “imposes conditions on foreign aid.”<sup>65</sup>

As set out below, both the constitution and federal law preclude the State Department from granting itself unbounded discretion to impose nondiscrimination requirements on religious organizations’ employment practices. State must ensure, and its proposed rule must demonstrate, that its proposals are consistent with its constitutional and legal obligations.

## **c. Overview of State Department Religious Liberty Obligations**

State’s nondiscrimination requirements must comply with its obligations to respect religious exercise under the First Amendment and federal law.

### **(i) The Free Exercise Clause’s “Nondiscrimination Principle”**

Last year, USAID and eight other federal agencies issued a joint proposed rule on a subject related to the present proposals, “Partnerships With Faith-Based and Neighborhood Organizations.”<sup>66</sup> In that proposed rule, the agencies acknowledged what they called a “Nondiscrimination Principle” that has been emphasized in several recent Supreme Court decisions, most significantly *Trinity Lutheran Church of Columbia, Inc. v. Comer*<sup>67</sup> and *Espinoza v. Montana Department of Revenue*.<sup>68</sup> Under these cases, the agencies note, “disqualifying otherwise eligible recipients from a public benefit ‘solely because of their religious character’

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<sup>62</sup> 89 Fed. Reg. at 3583; 89 Fed. Reg. at 3625.

<sup>63</sup> 89 Fed. Reg. at 3584; 89 Fed. Reg. at 3627.

<sup>64</sup> *Arar v. Ashcroft*, 585 F.3d 559, 611 (2d Cir. 2009).

<sup>65</sup> *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 140 S. Ct. 2082, 2087–88 (2020) (“Congress may condition funding on a foreign organization’s ideological commitments—for example, pro-democracy, pro-women’s rights, anti-terrorism, pro-religious freedom, anti-sex trafficking, or the like.”).

<sup>66</sup> 88 Fed. Reg. 2395 (Jan 13, 2023).

<sup>67</sup> 582 U.S. 449 (2017).

<sup>68</sup> 140 S. Ct. 2246 (2020).

imposes a penalty on the free exercise of religion that triggers the most exacting scrutiny.”<sup>69</sup> The rule was finalized by the agencies earlier this month.<sup>70</sup>

Starting with *Trinity Lutheran Church of Columbia, Inc. v. Comer*, the Court has focused less on what kinds of government funding are permitted by the Establishment Clause and more on what sort of equal access to government funds is required by the Free Exercise Clause. In *Trinity Lutheran*, the Court held that under the First Amendment’s Free Exercise Clause, an applicant could not be excluded from a state grant program simply because of the applicant’s religious nature.

As these nine executive agencies acknowledged, in the years since *Trinity Lutheran*, the Supreme Court has confirmed and further developed this Nondiscrimination Principle in a number of cases. Most relevant here is *Fulton v. City of Philadelphia*,<sup>71</sup> where the Court held that the Free Exercise Clause required the government to provide regulatory accommodation to a funded, faith-based foster care placement agency.

This Nondiscrimination Principle requires State to ask itself, as it establishes and administers funding programs, whether its rules force faith-based social service providers “to choose between participation in a public program and their right to free exercise of religion.”<sup>72</sup> When the government puts religious groups to this choice, it implicates concerns protected by the Free Exercise Clause. Furthermore, these cases make clear that the government does not violate the Establishment Clause when it respects Americans’ Free Exercise rights.

Though the Supreme Court has held that the Free Exercise Clause does not require the government to grant religious accommodations to generally applicable laws, the Supreme Court made clear in *Fulton v. City of Philadelphia* that individualized exemptions to a nondiscrimination requirement (such as the waiver process described in the proposed rules) make the requirement not “generally applicable” and thus subject to strict scrutiny.<sup>73</sup>

Under strict scrutiny, it is not enough for the government to assert an interest that is compelling in the abstract, such as an interest in preventing employment discrimination. Rather, courts must “scrutinize the asserted harm of granting specific exemptions to particular religious claimants.”<sup>74</sup> Here, State’s “general interest” in nondiscrimination requirements is not compelling without reference to the specific application of those requirements to a particular recipient or contractor.

## **(ii) Title VII’s Religious Organization Exception**

Federal law likewise recognizes the right of religious employers to use religious criteria in their hiring decisions.

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<sup>69</sup> 88 Fed. Reg. 2401 (quoting *Espinoza*, 140 S. Ct. at 2244, *Trinity Lutheran*, 137 S. Ct. at 2021).

<sup>70</sup> 89 Fed. Reg. 15671 (Mar. 4, 2024).

<sup>71</sup> 593 U.S. 522 (2021).

<sup>72</sup> *Trinity Lutheran*, 582 U.S. at 469.

<sup>73</sup> *Id.* at 466.

<sup>74</sup> *Fulton v. City of Philadelphia*, 593 U.S. 522, 541 (2021) (cleaned up).

Title VII reflects Congress' judgment that the government's interest in eradicating employment discrimination must account for the unique needs of religious organizations. The law recognizes that a religious organization's ability to make employment decisions based on its sincere religious tenets is at the heart of what it means to be a religious organization.

Section 702 of Title VII states, in the relevant part, "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."<sup>75</sup> *This subchapter* covers discrimination (including harassment) claims based on race, color, religion, sex, and national origin. Thus, even though religious organizations are generally subject to Title VII's nondiscrimination requirements on the basis of race, color, sex, and national origin, by the text of Title VII, those prohibitions (part of "this subchapter") do not apply with respect to "the employment of individuals of a particular religion."

EEOC's religion guidance rightly recognizes that Title VII's religious exemptions "allow a qualifying religious organization to assert as a defense to a Title VII claim of discrimination or retaliation that it made the challenged employment decision on the basis of religion."<sup>76</sup> Employment, as the EEOC recognizes, covers the full range of the employer-employee relationship, which includes policies about abortion, pronouns, and sex-specific spaces. "Religion," as defined in Title VII, "includes all aspects of religious observance and practice, as well as belief."<sup>77</sup> As such, Title VII allows qualifying religious organizations to make employment decisions based on religion, which includes beliefs, observances, and practices.

### **(iii) The Religious Freedom Restoration Act**

The Religious Freedom Restoration Act (RFRA), 42 U.S.C. §§ 2000bb–2000bb-4, subjects the federal government to strict scrutiny when it substantially burdens religious exercise. Under RFRA, the federal government "shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless "it demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."<sup>78</sup>

As the Supreme Court recognized in *Bostock*, RFRA is a "super statute" that "might supersede Title VII's commands in appropriate cases."<sup>79</sup> Last year, the Fifth Circuit held that RFRA prohibited the EEOC from enforcing its interpretation of Title VII against objecting religious employers.<sup>80</sup>

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<sup>75</sup> 42 U.S.C. § 2000e-1(a).

<sup>76</sup> EEOC, Compliance Manual on Religious Discrimination § 12-1.C.1 (2021), *available at* <https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination>.

<sup>77</sup> 42 U.S.C. § 2000e.

<sup>78</sup> *Id.* § 2000bb-1(a)-(b).

<sup>79</sup> *Bostock v. Clayton Cnty.*, 590 U.S. 644, 682 (2020) (citing 42 U.S.C. § 2000bb-3).

<sup>80</sup> *Braidwood Management v. EEOC*, 70 F.4th 914, 940 (5th Cir. 2023).

#### **(iv) The Establishment Clause’s Structural Restraints Protect Church Autonomy**

Even if State takes the position that, in some circumstances, its application of the proposed rules would not be subject to the Free Exercise Clause or federal law, it is still bound by the First Amendment’s Establishment Clause.<sup>81</sup>

Unlike the individual rights guaranteed under the constitutional and statutory provisions detailed above, the Establishment Clause is a structural restraint on the federal government. One aspect of this structural restraint is that the State Department is precluded from interfering with “the right of churches and other religious institutions to decide matters of faith and doctrine.”<sup>82</sup> “[A]ny attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion.”<sup>83</sup>

As the Supreme Court has noted, the government’s obligation to respect the “independence of religious institutions in matters of ‘faith and doctrine’” requires government to avoid interfering with “matters of church government.”<sup>84</sup> The Establishment Clause thus means that the federal government must always respect religious institution’s autonomy to make internal management decisions that are essential to the institution’s central mission.

One aspect of this autonomy is a religious organization’s right to select those individuals who carry out certain key roles. This doctrine, generally referred to as the “ministerial exception,” holds that affirms that a constituent part of this “independence on matters ‘of faith and doctrine’” is “the authority to select, supervise, and if necessary, remove a minister without interference” from the federal government.<sup>85</sup> Though “the individuals involved in pioneering cases were described as ‘ministers,’”<sup>86</sup> the doctrine applies more broadly to those employees “in whom the members of a religious group put their faith, or someone who personifies the organization’s beliefs and guides it on its way.”<sup>87</sup>

#### **d. In light of the above, the proposed rules’ waiver provisions are wholly inadequate and illegal.**

In light of the above, we find the proposed rules’ waiver provisions deeply troubling and wholly inadequate. Although religious organizations play a critical role in the nation’s foreign aid programs, State says almost nothing about how its proposed nondiscrimination rules would affect them. It has proposed a waiver provision, but the terms of that provision are as poorly explained as the rule itself.

Just as the rule does nothing to explain why the proposed rules are necessary and makes no effort to root its proposed nondiscrimination rule in federal law, the State Department’s

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<sup>81</sup> See *Lamont v. Woods*, 948 F.2d 825, 840-41 (2d Cir. 1991) (the Establishment Clause applies to the federal government’s foreign aid programs).

<sup>82</sup> *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 2052.

<sup>85</sup> *Id.* at 2060.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 2073 (cleaned up).



proposed waiver is not rooted in and is not constrained by anything else than the executive branch's will. State's proposed waiver agrees to take "applicable foreign laws" into account, though it reserves the right to violate them. That is startling, but the proposed rule gives foreign laws more respect than federal constraints on its policy goals, which it fails to acknowledge at all.

The proposed rules' waiver provisions are also problematic because they would shield State from accountability to Congress or the general public. The only notice required under the rules is to the Assistant Secretary of the Bureau for Democracy, Human Rights, and Labor.<sup>88</sup> Furthermore, this notice is only required when a waiver is granted. The proposed rules do not require any records at all when a waiver request is denied.

In sum, the State's proposal would create an extremely broad nondiscrimination policy that represents its policy goals rather than the will of the American people. The proposed waiver provision is worthless because State claims unlimited discretion to grant or deny exceptions based on its own wishes. The waiver provisions do not even give lip service to State's obligations to respect religious liberty under the U.S. Constitution and federal law. Finally, the proposed waiver process would keep such scant records that it would be difficult for religious service providers, the legislative branch, and the public to understand how State is wielding its power.

For all these reasons, the proposed rules' disregard for its constitutional obligations, the rights of religious employers, and the way State relies on religious entities to carry out foreign aid programs renders the proposed rules arbitrary and capricious, and contrary to law.

**e. Explicit religious exemptions are necessary to prevent the exclusion of religious organizations, both domestic and foreign.**

To amend these deficiencies, State should rework its proposed waiver process. The State should acknowledge the constitutional and legal limits on its ability to impose nondiscrimination terms on religious employers. We also ask that religious organizations be given a guaranteed exemption to make employment decisions based on religion. This exemption should, at the very least, affirm a religious organization's right to require that its employees agree and abide by the organization's religious tenets.

Without an explicit exemption, religious organizations must overcome a presumptive barrier of ineligibility. Furthermore, the proposed rules give no guidance to State officials on how they are to balance competing interests in response to a waiver request. Whether a religious organization will be forced to choose between its religiously-informed hiring practices and participating in a State foreign aid program should not be left up to the varying and inconsistent discretion of contract officers, OIG investigators, or suspension and debarment officials who may not immediately appreciate the legal protections afforded to religious organizations. The limitless discretion asserted in the proposed rules places an unnecessary and unfair burden on religious organizations to present such legal arguments to defend their eligibility. Further, these protected rights may not be understood by auditors or prime organizations, particularly those adverse to enforcement by the OIG or suspension or debarment officials, again creating an

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<sup>88</sup> Proposed 2 CFR 602.20(d)(2), 89 Fed. Reg. at 3586 and proposed 48 CFR 652.7102(e), 89 Fed. Reg. at 3629.

unnecessary and unfair burden on religious organizations to defend their eligibility to join partnerships in pursuit of funding opportunities.

Even worse, the uncertainty the proposed rules create would more than likely dissuade prime organizations from even applying to participate in covered programs moving forward. Many prime organizations will be risk-averse. They would not want to deal with the possibility of a weakened proposal or want to assume the risk of an enforcement action because the State Department questions the eligibility of a subrecipient religious organization.

Finally, religious organizations may themselves not understand that they are still eligible under the proposed new rule and may voluntarily recuse themselves from funding opportunities. For example, consider E.O. 13672, which expanded the definition of sex discrimination to include sexual orientation and gender identity but did not remove the religious organization exemption under Title VII. Although religious organizations could still make employment decisions on the basis of religion and be eligible for federal contracts under E.O. 13672, many religious organizations have elected to avoid the risk of conflict and the burden of defending their eligibility and stopped pursuing federal contracts.

Unfortunately, we fear that what have represented here as negative consequences from the proposed rules might actually be the State's policy goals. We hope that State is not attempting to either chase faith-based groups out of participating in foreign aid programs or—even worse—is attempting to coerce religious organizations into violating their religious convictions. We ask State to clarify its intent. The best way for State to do so would be to make concrete commitments to honoring the First Amendment and religious liberty in a vastly stronger and more rigorous waiver process.

There are many questions about the application of the rules' requirements to foreign religious organizations, both those that work directly with State and those that are subrecipients and subcontractors. It is unclear what religious protections these foreign organizations have, especially if they work directly with a secular organization that needs to religious protection.

We recommend that the State Department remove the complications of having each foreign religious organization analyze its own eligibility and create for foreign religious organizations a categorical exemption from the nondiscrimination requirement.

In creating such an exemption, the State Department will also alleviate the practical challenge that would be caused by the flow-down requirement,<sup>89</sup> 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 Department expects 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.

Allowing a guaranteed exemption and religious protections for religious organizations, both domestic and foreign, will help prevent a loss of delivery of federal foreign assistance.

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<sup>89</sup> 89 Fed. Reg. at 3585.

These organizations are seasoned, effective, and well-respected technical leaders in addressing the root causes of systemic poverty and preventing death and further suffering in humanitarian emergencies. When their mission aligns with federal foreign aid objectives, the powerful combination of faith-driven mission and federal funding has achieved extraordinary good for the security of the world and the United States.<sup>90</sup> These two structures—federal partnerships and religious exercise protections—have and can continue to work together to collectively achieve the shared goal of helping others. The State Department’s proposals to expand nondiscrimination provisions in grants, contracts, and other agreements without explicit acknowledgment of protections for religious organizations jeopardize the ability of faith-based groups to confidently continue successful partnerships. It is ultimately the vulnerable people that will suffer if these partnerships are unable to continue.

Yet under the proposed rules, religious organizations would be marginalized, which would impede the effective delivery of foreign assistance.

#### **4. The proposed rules overstate their benefits and fail to consider their costs.**

The proposed rules are “significant regulatory action[s]” necessitating regulatory impact analysis of the proposals’ benefits and costs.<sup>91</sup> The rules claim that their benefits include promoting nondiscrimination in State foreign assistance programs, which purportedly “promotes programmatic efficiency” and “expressly reinforcing notions of equity, fairness, and human dignity.”<sup>92</sup> These benefits are allegedly realized by (1) ensuring solicitations, awards, and contracts clearly provide notice of the nondiscrimination requirement; (2) avoiding costs of evaluating proposals by those “who are unwilling to provide” foreign assistance to all intended beneficiaries or recipients; and (3) helping ensure that foreign assistance reaches the intended beneficiaries or recipients and is “not undermined by discriminatory exclusion.”<sup>93</sup>

However, State cannot claim a benefit not gained by its proposed rule. As discussed above, State fails to cite a single example of a recipient or contractor that is unwilling to provide foreign assistance to all intended beneficiaries and recipients, much less that State incurred costs of evaluating their proposals. State also failed to identify a single case of a beneficiary who did not receive foreign assistance due to discriminatory exclusion. If intended beneficiaries are not currently being excluded from receiving assistance due to discrimination, then the proposed rules cannot claim as a benefit something the proposed rules do not improve.

The proposed rules identify costs associated with the creation of policies and procedures, implementation, training, and “potential changes in hiring practices for certain employees.”<sup>94</sup> However, State fails to consider the harms to religious recipients and contractors (both domestic and foreign partners), as well as the beneficiaries they assist, if they can no longer provide

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<sup>90</sup> REPORT OF RECOMMENDATIONS TO THE PRESIDENT, PRESIDENT’S ADVISORY COUNCIL ON FAITH-BASED AND NEIGHBORHOOD PARTNERSHIPS 95-116 (March 2010), *available at* <https://obamawhitehouse.archives.gov/sites/default/files/microsites/ofbnp-council-final-report.pdf>.

<sup>91</sup> 89 Fed. Reg. at 3585; 89 Fed. Reg. at 3627.

<sup>92</sup> 89 Fed. Reg. at 3585; 89 Fed. Reg. at 3627-28.

<sup>93</sup> 89 Fed. Reg. at 3585; 89 Fed. Reg. at 3627-28.

<sup>94</sup> 89 Fed. Reg. at 3585; 89 Fed. Reg. at 3628.

foreign assistance because they are unable to make employment decisions based on religion. The loss of such partners will decrease efficiency in providing foreign assistance and decrease the possible pool of eligible partners across the world.

The proposed rules will also impose burdens of time and expense on State and on recipients and contractors. The Department must consider the following burdens:

- 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.

As a February 7 letter to Secretary of State Antony Blinken by Senator Marco Rubio and eight other Senators aptly put it, the State Department "contemplates a future in which bureaucrats at the State Department can force a socially progressive worldview on partners in strategically vital regions."<sup>95</sup> The proposed rules "violate the rights and beliefs of faith-based partner organizations and their beneficiaries, undermine relationships with key stakeholders, and threaten U.S. security interests."<sup>96</sup> We concur with the Senators' assessment.

## **5. In any final rules, the Department should consider and adopt the following alternatives and recommendations.**

***Waiver Process.*** First, the State should amend the proposed rules to create an explicit religious exemption for religious employers. To the extent that State finds it also necessary to continue to offer discretionary waivers, we ask State to explain how a recipient or contractor would seek or apply for a waiver. Is there an appeal process for any denial of a waiver? Who will evaluate waiver requests? How would State ensure that the person or persons responsible for overseeing waiver requests will have the background knowledge and expertise to understand religious liberty case law and its application? The protection afforded by federal law (discussed above) to religious hiring rights is not commonly known to the average humanitarian

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<sup>95</sup> Letter from Nine U.S. Senators to Antony Blinken, Secretary, U.S. Dep't State, at 1 (Feb. 7, 2024), <https://www.rubio.senate.gov/wp-content/uploads/2024/02/02.07.24-SMR-et-al-letter-to-SECSTATE-re-Nondiscrimination-in-Foreign-Assistance.pdf>.

<sup>96</sup> *Id.*

organization, State Department contract or agreement officer, OIG investigator, suspension or debarment official, or even attorney. This is one reason why an explicit religious exemption is a simpler solution than a discretionary waiver.

***Discrimination Reports.*** We also ask for clarity on the process to review and adjudicate a report of the alleged violation received by a State Department official (whether to the contract officer, OIG, or suspension or debarment official). 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. This will avoid arbitrary and capricious agency decisions.

***Religious Organization Guidance.*** We recommend that the State Department issue a guidance document that clearly (a) articulates the State Department's intention not to exclude religious organizations, (b) affirms the eligibility of religious organizations who hire and operate in a manner consistent with the organizations' religious missions, and (c) indicates that an organization is presumed eligible until proven otherwise to shift the burden of defending eligibility off of religious organizations. 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, reducing the burden on religious organizations and on the Department.

***Agency Intent Provision.*** 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 should be added. That subsection could read as follows:

Nothing in this section precludes 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 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.

Including such language 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.<sup>97</sup>

***Consistent Language in Both Rules.*** While the grant and the contractor rules are similar, they are not identical and there are some meaningful differences in the text of the proposed regulations. We urge the Department to consider an alternative approach of making the assistance and acquisition language the same, reflecting a common approach, and to avoid being arbitrary and/or capricious.

***Flexible Notice Requirements.*** In proposed 602.40(c)-(d) and 652.225–72(c)-(d), State requires recipients and contractors to provide notice. But notice as prescribed may not be appropriate or make sense in all contexts. 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.

***Delete “Expressly.”*** The proposed rules prohibit discrimination against employees “unless *expressly* permitted by applicable U.S. law.”<sup>98</sup> 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. As discussed above, 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.

## Conclusion

For all these reasons, State should abandon its proposed rules. In the alternative, State should take these comments and suggestions into account and issue a revised rule that truly reflects democratic values, respects religious liberty, and explicitly acknowledges and submits to the constitutional and statutory limits on the president’s foreign policy.

Sincerely,

Rachel N. Morrison, J.D.  
Fellow and Director  
HHS Accountability Project  
Ethics & Public Policy Center

Eric N. Kniffin, J.D.  
Fellow  
HHS Accountability Project  
Ethics & Public Policy Center

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<sup>97</sup> See USAID [Standard Provisions for US NGOs](#), M11. EQUAL PARTICIPATION BY FAITH-BASED ORGANIZATIONS.

<sup>98</sup> Proposed 2 CFR 602.20(b)(2), 89 Fed. Reg. at 3586; proposed 48 CFR 652.225–72(a)(2), 89 Fed. Reg. at 3629.