Comment of Eric W. Treene on the Department of State Proposed Rule
Nondiscrimination in Foreign Assistance
RIN 1400-AF66

I am an attorney in Washington, D.C., an Adjunct Professor at the Catholic University Columbus School of Law, and a Fellow at the Catholic University Center for Religious Liberty. For nineteen years in four Administrations, I was the Special Counsel for Religious Discrimination at the Civil Rights Division of the U.S. Department of Justice. I write in my personal capacity to point out constitutional and legal defects in the Proposed Rule's application to the employment practices of faith-based providers of social services.

As a threshold matter, there is a lack of clarity in the Proposed Rule, and a conflict between the description of the Proposed Rule in the "summary" section of the Notice of Proposed Rulemaking and the actual language of the Proposed Rule. The summary section states that the Proposed Rule bars employment discrimination against "persons employed in the performance of the grants and funded in whole or in part with foreign assistance funds." This suggests that the Proposed Rule is a bar on employment discrimination where the person's *position* is funded by the Department of State. However, the language of the actual Proposed Rule is much broader. It states that the bar is on discrimination in employment of "any employee . . . whose *work* will be subsidized in whole or in part by Federal foreign assistance funds under this award, unless expressly permitted by applicable U.S. law." (emphasis added). In contrast to the summary's description of persons whose employment is funded with foreign assistance funds, the actual Proposed Rule would appear to bar discrimination against any employee whose work is subsidized in whole or in part by U.S. funds. If this is the case, a church school in Tanzania that receives a subsidy for the free lunches it gives to students would not be able to hire only teachers belonging to the church's faith, even if their entire salary was paid for by the church. Based on the Proposed Rule's language, if covered funds are used to pay for the lunches, then the teacher's work is being subsidized. If the Department of State in fact only seeks to condition funds that are used to pay the *salaries* of employees, as appears to be the intent set forth in the summary, it should modify the Proposed Rule language to make this clear.

However, it is important to note that regardless of which of the two options the Department of State intends, interference with the hiring decisions of religious

organizations through either means is constitutionally and legally problematic. Depending on the nature of the position, the operation of the Proposed Rule may be barred by the Establishment Clause of the U.S. Constitution or in other circumstances is illegal under U.S. statutory law.

Positions within a religious organization that are ministerial in nature, that is, that involve leading the faithful or teaching the faithful, may not be interfered with by nondiscrimination statutes or rules. In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012), the Supreme Court held that applying Title VII of the Civil Rights Act of 1964 to a religious organization's selection of a minister violated both the Free Exercise Clause and the Establishment Clause. The Court held that "[r]equiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs." *Id*. at 188. This, the Court held, infringes the Free Exercise Clause by interfering with "a religious group's right to shape its own faith and mission through its appointments," *id.*, and violates the Establishment Clause's prohibition on "government involvement in such ecclesiastical decision." *Id.* at 189.

The ministerial exception, the Supreme Court held in *Hosanna Tabor*, applies to "any 'employee' who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith." *Id*. at 199. The Court subsequently made clear in *Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), that ministerial positions are not limited to positions titled with "minister" or similar clerical titles, *id.* at 2063-64, but includes any employees involved in leading the faith group or teaching the faith. *Id.* at 2064-66. In *Our Lady of Guadelupe*, the Court concluded that the term "minister" included elementary Catholic school teachers involved in teaching basic religious doctrine and practice. *Id.* at 2066. The Court thus held that the schools had a right to hire and fire those positions in their discretion, and thus held that two teachers could not bring age and disability discrimination claims. The Court held that hiring for such ministerial positions is part of decision-making regarding "faith and doctrine," and "State interference in that sphere would obviously violate the free exercise of religion, and any attempt by government to dictate or even to influence such matters would constitute one of the central attributes of an establishment of religion. The First Amendment outlaws such intrusion." *Id.* at 2060.

Because infringements on the right of religious organizations to choose their teachers and leaders violates the Establishment Clause as well as the Free Exercise, it applies both to U.S. citizens, such as U.S.-based religious nonprofits, as well as foreign organizations. The Establishment Clause is a structural restraint on government, and not simply an individual right, and thus applies extraterritorially. *Lamont v. Woods*, 948 F.2d 825, 835 (1991) (holding that the Establishment Clause applies extraterritorially, and observing that "the basic structure of the Establishment Clause, which imposes a restriction on Congress, differs markedly from that of the Fourth Amendment, which confers a right on the people"); *see also* Jessica Hayden, *Mullahs On A Bus: The Establishment Clause And U.S. Foreign Aid*, 95 Geo. L.J. 171 (2006).

If the Proposed Rule were applied to penalize a Catholic organization for hiring only men as priests or an Islamic school for only hiring Muslims teachers, the Department of State would be violating the Establishment Clause, regardless of whether these were U.S. organizations or foreign organizations. For example, if a Catholic church in a village in India ran a residential Catholic school, that school could be foreclosed by the Proposed Rule from receiving U.S. foreign assistance funds to provide malaria netting on the grounds that it was headed by a priest whom the church required to be male. The same would be true if the teachers were nuns required to be women. This example assumes the reading of the Proposed Rule according to the current proposed regulatory language rather than the description of the regulation in the summary, as discussed above. But even if the State Department clarified the language of the Proposed Rule to indicate that it is not limiting funding programs generally, but only funding of *positions,* this would still violate the ministerial exception in many circumstances. If this same school received a grant to pay for health education, and this went to pay for 10% of one of the Catholic school teachers' salaries, that would prevent school from requiring that the Catholic school teachers be Catholic if it accepted the funds. This is the type of governmental interference in ecclesiastical matters that the Establishment Clause generally, and the ministerial exception specifically, forbids.

In addition to the ministerial exception, the Religious Freedom Restoration Act, 42 U.S.C. §§2000bb et seq. ("RFRA"), mandates that any federal governmental action that imposes a "substantial burden" on a "person" must be justified by a compelling governmental interest pursued through the least restrictive means. There are employment positions within religious organizations that may not be leadership or religious teaching positions falling within the ministerial exception, but nonetheless are positions which a religious organization believes are important to be filled by followers of the same faith. Indeed, in Title

VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e et seq., Congress has recognized that it is important for religious employers to be able to hire people of a particular religion to carry out their work. Thus, it includes an exemption, 42 U.S.C. §§2000e-1(a), which removes liability for employment discrimination by religious organizations under Title VII when hiring people of a particular religion to carry out the organization's work. This exemption is commonly referred to as the Section 702 exemption. The Supreme Court, in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987), held that the Section 702 exemption prevents "interference with the decision-making process in religions." *Id.* at 336. This principle that religious organizations may find it important to hire people of their faith to carry out their work is firmly entrenched in the law.

Denying foreign aid funds to a religious organization because it follows this long-recognized practice of hiring people of the group's faith to carry out its work would in many circumstances impose a substantial burden on its religious exercise, which would trigger strict scrutiny. The Supreme Court in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014), held that the financial penalties or tax increases in the Affordable Care Act for employers who do not have compliant policies could constitute a substantial burden on religious employers whose plans are noncompliant for grounds of religious conscience. *Id.* at 720. Likewise, conditioning governmental benefits on abandoning religious practices can create a substantial burden on religion in violation of RFRA. *See, e.g., Perrier-Bilbo v. United States*, 954 F.3d 413, 431 (1st Cir. 2020) (holding that, based on Supreme Court Free Exercise precedent, a "substantial burden" under RFRA, exists "[w]here the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs"), *quoting Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717-18 (1981) (alteration in original); *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1067 (9th Cir. 2008) (substantial burden under RFRA may be created by "condition[ing] a governmental benefit upon conduct that would violate their religious beliefs").

RFRA applies to substantial burdens on the religion of "persons" by "government." Government is defined as including a department of the United States, and thus includes the State Department. Domestic corporations and other persons who seek or receive foreign assistance grants from the State Department are thus plainly covered. Moreover, a plain text reading of RFRA also would lead to the conclusion that it applies extraterritorially. "Person" is not defined by

RFRA, so by the ordinary meaning of the word, it includes any person, including foreign persons such as religious organizations. Nonetheless, at least one court has held that since RFRA was intended to reinstate prior Free Exercise jurisprudence, the limits on extraterritorial application of the Free Exercise Clause should be applied to RFRA notwithstanding the plain text of RFRA. *See Rasul v. Myers*, 563 F.3d 527 (D.C. Cir. 2009).

The Proposed Rule thus would in many applications violate the Constitution and RFRA. But there is an additional reason why it is flawed. Its stated policy is to promote the U.S. values of "equity, fairness, and human dignity" through implementing nondiscrimination principles. But the Proposed Rule fails to acknowledge the unique nature of religious organizations, and thereby the Proposed Rule actually undermines diversity and inclusiveness and the ability of the State Department to engage with the full range of civil society organizations working to protect human dignity around the globe. Nondiscrimination laws are undoubtedly crucial elements of United States civil rights law. But it is important to remember that what these civil rights laws aim to stop is *invidious* discrimination. As the constitutionally mandated ministerial exception and the statutory Section 702 exemption illustrate, far from being insidious, there is in fact a substantive good in allowing religious organizations to use religious criteria in deciding who will lead them and carry out their work. True principles of equity and diversity recognize the depth and richness that different religious organizations bring in countries throughout the world. It is in the interest of United States public diplomacy and engagement with civil society to work with a wide range of partners, including religious partners. The Proposed Rule would severely undermine that opportunity.

If the Proposed Rule goes forward, it is imperative to the legality of the Final Rule, and to the United States' policy interests abroad, that the Proposed Rule be modified to account for the unique nature of religious organizations and their needs. The Proposed Rule does state that the nondiscrimination in employment provision of the Proposed Rule applies "unless expressly permitted by applicable U.S. law," but it is unclear whether "expressly permitted by applicable U.S. law" encompasses the Supreme Court's ministerial exception and RFRA. If these are intended to be included, this should be made clear in the Final Rule. If not, it is imperative that the Final Rule be modified to accommodate the constitutional and statutory rights of religious employers.