ETHICS AND PUBLIC POLICY CENTER

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EO 12866 Meeting
"Nondiscrimination in Foreign Assistance," RIN 1400-AF66,
and
"Department of State Acquisition Regulation:
Nondiscrimination in Foreign Assistance," RIN 1400-AF65

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Thank you for the opportunity[1] to provide comments on OIRA's review of two related rules from the Department of State, "Nondiscrimination in Foreign Assistance," RIN 1400-AF66,[2] and "Department of State Acquisition Regulation: Nondiscrimination in Foreign Assistance, RIN 1400-AF65[3] (together, "rules"). Because the rules are substantially similar, we address both, noting any relevant differences between the two.

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For the reasons we will explain, and as set out in more detail in our March 19, 2024, public comment to the State Department,[4] 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."[5] However, these rules would have the opposite effect.

Today, we will address five points of particular interest for OIRA.

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[1] As OMB cancelled a previous EO 12866 meeting it scheduled with EPPC on another rule, we are glad you are willing to hear EPPC scholars' input on this rule. *See* Rachel N. Morrison, *Biden and Becerra Kill Democratic Norms in Rush to Fund Big Abortion*, National Review (Oct. 8, 2021), https://www.nationalreview.com/bench-memos/biden-and-becerra-kill-democratic-norms-in-rush-to-fund-big-abortion/.

[2] 89 Fed. Reg. 3583 (Jan. 19, 2024).

[3] 89 Fed. Reg. 3625 (Jan. 19, 2024).

[4] 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 (March 19, 2024), [Hereinafter "EPPC Public Comment"], https://eppc.org/wp-content/uploads/2024/03/EPPC-Comment-Opposing-State-Nondiscrimination-in-Foreign-Assistance-Proposed-Rules.pdf.

[5] 89 Fed. Reg. at 3583; 89 Fed. Reg. at 3626.

1. OIRA should ensure that State demonstrates a need for rulemaking.

- *Purported need.* For all rulemaking, agencies must identify a need and demonstrate how the rule meets that need. Federal administrative agencies are required to engage in "reasoned decisionmaking."[6] To justify replacing current regulations, an agency must provide specific evidence as to how the current regulations are causing harm or burdens and how the rules would remedy the alleged defects without causing equal or greater harms and burdens.[7]
- Here, State has failed to demonstrate any need for its rules.
- The State Department says that says that the purpose of these rules "is to ensure effective implementation of foreign assistance programs consistent with U.S. foreign policy and the purposes of the FAA," the Foreign Assistance Act of 1961. "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.' 22 U.S.C. § 2151(a).[8]"
    - "The main effect of the proposed" award term or clause "is to ensure that the Department's policy and practice of nondiscrimination in planning foreign assistance projects and activities is followed through to completion by the recipients" and contractors that implement them. State says that the impact of the proposed nondiscrimination clause "is to require" recipients and contractors "to refrain from the discrimination described in the clause."[9]
- However, State has failed to demonstrate that there is any problem its new rule would solve.
    - The rues provide zero examples in either rule of any provider that discriminated against an intended beneficiary in providing foreign assistance.
    - Moreover, State *actually denies* that its rules will change the status quo:
        - State reassures affected entities that the proposed new nondiscrimination provision "does not ask them to alter the manner in which they conduct the work as set out in their awards."[10]
        - To the contrary, State says that its proposal would merely "expect[]" "the employees of small businesses . . . to be mindful of the principles of equity,

[6] *Michigan v. EPA*, 576 U.S. 743, 750 (2015).

[7] *Id*. at 779 (regulation is irrational if it disregards the relationship between its costs and benefits); *Alltelcorp v. FCC*, 838 F.2d 551, 561 (D.C. Cir. 1988) ("a regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist").

[8] 89 Fed. Reg. at 3584; 89 Fed. Reg. at 3626.

[9] 89 Fed. Reg. at 3584; 89 Fed. Reg. at 3627.

[10] 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.").

fairness, and human dignity when performing the work under their contracts; *as they always have been*."[11]

- Given that State believes that affected entities "always have been" "mindful of the principles of equity, fairness, and human dignity when performing the work under their contracts," State concedes there is no need for the rules.
- As such, it appears that the Department's stated purpose in the rules is a ruse. It seems that the undisclosed and true purpose of the rules is to advance the Biden administration's radical pro-abortion and pro-LGBT agenda.
    - As we have seen in countless other rulemaking, the administration seeks use the regulatory process to advance policy goals that Congress does not share.
    - Furthermore, 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.
- Because the rules do not acknowledge the obvious religious liberty problems they will create and make no provision for how State will address these conflicts, the rules actually harm the Department's stated goals of achieving "effective, compressive, and sustainable" foreign assistance.
    - As explained more fully below, the proposed requirements would 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.

2. OIRA should ensure that the rules provide clarity and do not create confusion.

- State claims its rules establish "clear and meaningful nondiscrimination protections."[12] Yet they do no such thing. The scope of prohibited nondiscrimination obligations is far from clear under both rules and will create uncertainty and confusion for recipients and contractors alike.
- Below, we identify five areas where State should provide more clarity.

a. Undefined bases

- In its rules, State provides a laundry list of protected bases and even contemplates prohibiting discrimination based on unidentified bases.
    - The proposed award term and contract 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

[11] 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.").

[12] 89 Fed. Reg. at 3583; 89 Fed. Reg. at 3626.

information, indigeneity, marital status, parental status, political affiliation, or veteran's status."[13]

- The proposed grant term adds "or any factor not expressly stated as permissible in the award."[14]

- ***"Any Factor Not Expressly Stated."***
  - 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 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.

- ***Enumerated Bases.***
  - 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 rules would prohibit discrimination based on "sex," as well as on "gender," "sexual orientation," "gender identity or expression," "sex characteristics," and "pregnancy."
  - *Sex v. Gender.* 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. The Department should define "sex" and "gender" and clarify whether gender is just sex by another name or something else entirely.
    - For instance, in HHS's Unaccompanied Children Program Foundational Rule, finalized at the end of April 2024, the HHS Office of Refugee Resettlement noted that "the terms 'gender' and 'sex' are not synonymous, and are separately defined" in existing ORR regulations.[15]
  - *Sex Discrimination?* 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.

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[13] 89 Fed. Reg. at 3586; 89 Fed. Reg. at 3629.

[14] Proposed 2 CFR pt. 602.40(a), 89 Fed. Reg. at 3586.

[15] 89 Fed. Reg. 34384, 34543. Under these regulations, "sex" is defined as "a person's biological status and is typically categorized as male, female, or intersex," while "gender" is defined as "the attitudes, feelings, and behaviors that a given culture associates with a person's biological sex." 45 CFR § 411.5. We don't endorse these definitions or suggest State should adopt these definitions specifically. We only mention them as an example of an agency viewing the terms as distinct and providing definitions.

- *Title IX Rule.* Under the Department of Education's 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"),
    - 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").[16]
- *Section 1557 Rule.* Under the Department of Health and Human Services' Section 1557 rule, "Discrimination on the basis of sex includes, but is not limited to: discrimination on the basis of sex stereotypes; (i) Sex characteristics, including intersex traits; (ii) Pregnancy or related conditions; (iii) Sexual orientation; (iv) Gender identity; and (v) Sex stereotypes."[17]
- Under the Equal Employment Opportunity Commission's Pregnant Workers Fairness Act Rule, "reasonable accommodations" for a "known limitation related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions" would extend to "current pregnancy, past pregnancy, potential or intended pregnancy (which can include infertility, fertility treatments, and the use of contraception), and labor and childbirth (including vaginal delivery and cesarean section)" as well as "lactation, breastfeeding, and the decision to have or not have an abortion, among other conditions."[18]
- Is the Department adopting similar definitions of sex discrimination? If so, which one?

o Any final rules should also 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?

[16] 89 Fed. Reg. 33474, 33493, 33811, 33883 (to be codified at 34 C.F.R. pt. 106).

[17] 89 Fed. Reg. 37522, 37699 (to be codified at 42 C.F.R. pts. 438, 440, 457, 460; 45 C.F.R. pts. 80, 84, 92, 147, 155, 156.

[18] 89 Fed. Reg. 29096, 29189, 29191, 29191 n.24 (to be codified at 29 C.F.R. pt. 1636).

- 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?[19]

- Without answers to these questions and more, providers do not have clarity of their obligations under the proposed award term and contract clause. And it would be arbitrary and capricious for State to claim otherwise.

b. Harassment

- It is also unclear what constitutes "discrimination," and particularly harassment, especially on the basis of pregnancy, and gender identity or expression.
- For instance, EEOC's recently finalized harassment guidance[20] stated that sex-based harassment (i.e., a form of discrimination) includes harassment based on "pregnancy, childbirth, or related medical conditions," which "can include issues such as lactation; using or not using contraception; or deciding to have, or not to have, an abortion."[21]
- Does the Department adopt the same or similar position as the EEOC that sex-based harassment covers decisions about contraception and abortion?
- EEOC's harassment guidance also stated that sex-based harassment includes harassment based on "sexual orientation or gender identity, including how that identity is expressed."[22]
    - 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."[23] Here, though, the Department does not cite to *Bostock*. It just creates a list of protected bases out of whole cloth, so it is unclear whether it is relying on *Bostock*, and if or how its nondiscrimination requirements differ from *Bostock.*
- The EEOC's guidance provided examples of what unlawful harassment could include:

> epithets regarding sexual orientation or gender identity; physical assault due to sexual orientation or gender identity; outing (disclosure of an individual's sexual

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[19] *See* HHS, Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 40066, 40069 (May 9, 2024) (stating "gender dysphoria may rise to the level of a disability under section 504 and would provide protection against discrimination in programs or activities funded by HHS that is prohibited by section 504"); *see also* Rachel N. Morrison, *Biden DOJ Letter Pushes Transgender Misinformation and Implies Gender Dysphoria Is a Disability*, National Review (May 13, 2022), https://www.nationalreview.com/bench-memos/biden-doj-letter-pushes-transgender-misinformation-and-implies-gender-dysphoria-is-a-disability/.

[20] EEOC, Enforcement Guidance on Harassment in the Workplace (Apr. 29, 2024) [hereinafter EEOC Harassment Guidance], https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace.

[21] *Id.* § II.A.5.b.

[22] *Id.* § II.A.5.c.

[23] 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.

> orientation or gender identity without permission); harassing conduct because an individual does not present in a manner that would stereotypically be associated with that person's sex; repeated and intentional use of a name or pronoun inconsistent with the individual's known gender identity (misgendering); or the denial of access to a bathroom or other sex-segregated facility consistent with the individual's gender identity.[24]

- Example 15 provided a hypothetical scenario elaborating on what the Commission views as unlawful harassment based on gender identity.

> Chloe, a purchase order coordinator at a retail store warehouse, is approached by her supervisor, Alton, who asks whether she was "born a man" because he had heard a rumor that "there was a transvestite in the department." Chloe disclosed to Alton that she is transgender and asked him to keep this information confidential. After this conversation, Alton instructed Chloe to wear pants to work because a dress would be "inappropriate," despite other purchase order coordinators being permitted to wear dresses and skirts. Alton also asks inappropriate questions about Chloe's anatomy and sexual relationships. Further, whenever Alton is frustrated with Chloe, he misgenders her by using, with emphasis, "he/him" pronouns, sometimes in front of Chloe's coworkers. Based on these facts, Alton's harassing conduct toward Chloe is based on her gender identity.[25]

- Example 46 provided a hypothetical scenario of when, in the Commission's view, harassment based on gender identity creates an objectively hostile work environment.

> Jennifer, a female cashier who is transgender and works at a fast-food restaurant, is regularly and intentionally misgendered by supervisors, coworkers, and customers over a period of several weeks. One of her supervisors, Allison, intentionally and frequently uses Jennifer's prior male name, male pronouns, and "dude" when referring to Jennifer, despite Jennifer's requests for Allison to use her correct name and pronouns. Other managers also intentionally refer to Jennifer as "he" whenever they work together. In the presence of customers, coworkers ask Jennifer questions about her sexual orientation and anatomy and assert that she is not female. After hearing these remarks by employees, customers also intentionally misgender Jennifer and make offensive comments about her transgender status. Based on these facts, which must be viewed in the context of Jennifer's perspective as a transgender individual, Jennifer has been subjected to an objectively hostile work environment based on her gender identity that includes repeated and intentional misgendering.[26]

- Any final rules should clarify the following:
  - Does the Department consider the above examples listed in the EEOC's harassment guidance prohibited discrimination under its rules?

[24] EEOC Harassment Guidance § II.A.5.c.

[25] *Id.*

[26] *Id.* § III.B.3.d.

- 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? This brings us to the next point.

c. Pronouns

- ***Practical Problems.***
  - 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?[27]
    - 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 a beneficiary's or employee'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[28];
    - It/its to refer to a human being[29];

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

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

[29] *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.

- Ze/zir (or hir), xe/xyr, fae/faer, ae/aer[30];
- Leaf/leafself[31];
- Love/loves[32];
- Pumpkin/spice[33];
- Pup/pupself[34];
- Fish/fishself[35];
- Toy/toyself[36];
- Nor/mal[37];
- Beep/boop[38];
- Hee/haw[39];
- Rawr/rawrs[40];
- Clown/clownself[41]; etc.

- Does the pronoun mandate extend to:
  - Titles and honorifics?
  - The use of emojis as pronouns?[42]
  - Individuals who use mixed or multiple sets of pronouns?[43]
  - Individuals who continually change their pronouns?[44]
  - Individuals that request that different types of people use different pronouns when referring to them?

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

[31] *See id.*

[32] *See* @lesbiansnowwhite, TikTok (Feb. 6, 2023), https://www.tiktok.com/@lesbiansnowwhite/video/7197266276870409515.

[33] *See* @lesbiansnowwhite, TikTok (Sept. 21, 2023), https://www.tiktok.com/@lesbiansnowwhite/video/7281473755426131242.

[34] *See* @lesbiansnowwhite, TikTok (May 5, 2023), https://www.tiktok.com/@lesbiansnowwhite/video/7229899571638439210.

[35] *See* The Mad Real World, *Crazy Tik Tok Guide to Genders: Fish / Fishself*, YouTube (April 6, 2022), https://www.youtube.com/watch?v=8XXyp58IbKo.

[36] *See id.*

[37] *See* @lesbiansnowwhite, TikTok (Mar. 8, 2023), https://www.tiktok.com/@lesbiansnowwhite/video/7208392801657097518.

[38] *See* @lesbiansnowwhite, TikTok (May 20, 2023), https://www.tiktok.com/@lesbiansnowwhite/video/7235467934502522155.

[39] *See* @lesbiansnowwhite, TikTok (Mar. 11, 2023), https://www.tiktok.com/@lesbiansnowwhite/video/7209527043975957803.

[40] *See* @lesbiansnowwhite, TikTok (May 29, 2023), https://www.tiktok.com/@lesbiansnowwhite/video/7238805383563824427.

[41] *See* @tom_f420, TikTok (Feb. 17, 2023), https://www.tiktok.com/@tom_f420/video/7201353809078045957.

[42] *See, e.g.*, @lesbiansnowwhite, TikTok (Oct. 20, 2023), https://www.tiktok.com/@lesbiansnowwhite/video/7292246787513945386; @lesbiansnowwhite, TikTok (Aug. 19, 2023), https://www.tiktok.com/@lesbiansnowwhite/video/7269234553724734763.

[43] *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/.

[44] *See, e.g.*, Libs of TikTok, Twitter (May 31, 2023), https://twitter.com/libsoftiktok/status/1664097577401298945.

- 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.

- ***Free Speech and Religious Exercise Concerns.*** 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 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).[45]
  - 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.[46] The case was ultimately settled, with the university agreeing to pay $400,000 in damages and attorney's fees.[47]
  - State should acknowledge in any final rule the free speech and free exercise concerns raised by the Senators and acknowledged by the Sixth Circuit.
  - Any final rules should 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. (We will address more fully State's obligations under federal law to respect recipients' and contractors' religious exercise.)

d. Equity

- Equity is a major theme throughout the rules. As the rules explain, the Department is "embedding *equity* across its foreign affairs work."[48] To this end, prohibited discrimination explicitly includes "withholding," "denying," or "adversely impacting" "equitable access" to federally funded foreign assistance benefits, supplies, or services.[49] At the same time, State says the nondiscrimination requirement for award recipients will "complement and affirm other commitments to *equity* in U.S. foreign policy, maximizing

[45] 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.

[46] *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021).

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

[48] 89 Fed. Reg. at 3583; 89 Fed. Reg. at 3626.

[49] 89 Fed. Reg. at 3586 (2 C.F.R. pt. 602.20(b)(1)); 89 Fed. Reg. at 3629 (48 C.F.R. pt. 652.225-72(a)(1)).

their coherence and effectiveness,"[50] while the nondiscrimination requirements for contractors will "[c]omplement and affirm other commitments to *equality* in U.S. foreign policy, maximizing their coherence and effectiveness."[51]

- These statements seem to be at odds. State does not define the terms "equity," "equality," or "equitable access," creating confusion for grant recipients and contractors.
- State should 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?
- State should 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.[52]
- State has a legal duty to prohibit discrimination, even discrimination for the purpose of equity. OIRA should ensure that State's efforts to promote equity do not encourage or enable illegal discrimination and the final rules 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.[53]
- 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?

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[50] 89 Fed. Reg. at 3583 (emphasis added).

[51] 89 Fed. Reg. at 3626 (emphasis added).

[52] 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. *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.

[53] 89 Fed. Reg. at 3586 (2 C.F.R. pt. 602.20(b)(2)); 89 Fed. Reg. at 3629 (48 C.F.R. pt. 652.225-72(a)(2)).

- State should provide more clarify 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. OIRA should ensure that the rules adequately protect religious liberty.

- We begin with an overview of scope of the rules' nondiscrimination requirements and waiver provisions.
  - 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."[54] Recipients and contractors would be required to provide notice of the nondiscrimination requirement to beneficiaries and employees.[55]
  - The Department reserves the right to waive these generally applicable nondiscrimination requirements for employees if "it is determined to be in the best interest of the U.S. government."[56]
    - 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."[57]
    - The waiver provisions give no indication that State will take into account its obligations under U.S. laws or the federal constitution.
  - Only one of the proposed rules—the rule for contractors—mentions religion at all. That rule, in proposed Section 625.7102, contemplates that this waiver process could "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."[58]
    - 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 to permit religious organizations to take religion into account when making employment decisions.
    - Nothing in the preamble for this contractor rule says anything about this provision or indeed about religion at all.
    - This language is reminiscent of (though not identical to) Title VII's religious organization exemption. Title VII, which is discussed below, is the federal civil rights law that prohibits discrimination in employment on the basis of race, color, religion, sex, and national origin.

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[54] *Id*.

[55] 89 Fed. Reg. at 3587 (2 C.F.R. pt. 602.40(c), (d)); 89 Fed. Reg. at 3629 (48 C.F.R. pt. 652.225-72(c), (d), (f)).

[56] 89 Fed. Reg. at 3586 (2 C.F.R. pt. 602.30(a)); 89 Fed. Reg. at 3629 (48 C.F.R. pt. 625.7102(a)).

[57] *Id*.

[58] 89 Fed. Reg. at 3629 (48 C.F.R. pt. 652.7102(a)).

        - 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."*
    - 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."[59]

- As we will outline, these aspects of the 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 rules' scant detail on how they would affect religious employers is remarkable given the critical role that countless religious organizations—foreign and domestic—play in federal aid programs. As noted in our public comment, presidents and USAID officials have affirmed the importance of leveraging partnerships with religious organizations to advance federal policy.[60]
- The State Department relies on religious organizations because they 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—what Jesus called "the least of these."[61] 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.
- 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.

b. The president's "broad discretion" is subject to U.S. laws and Constitution.

- Although State claims these rules "would have the effect of protecting and promoting . . . democratic values,"[62] 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 rules boldly assert that State's proposal is an exercise of the president's "broad discretion in the conduct of

[59] 89 Fed. Reg. at 3586 (2 C.F.R. pt. 602.30(d)); 89 Fed. Reg. at 3629 (48 C.F.R. pt. 652.7102(e)).

[60] EPPC Public Comment at 11-12.

[61] Matthew 25:30.

[62] 89 Fed. Reg. at 3583; 89 Fed. Reg. at 3625.

foreign affairs to allocate foreign assistance funding for particular programs and to set the conditions on U.S. funding to implementers of those programs."[63]

- The unlimited discretion State claims for itself here certainly is not compatible with "democratic values." It also 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."[64] The Supreme Court has affirmed that federal law likewise "imposes conditions on foreign aid."[65]
- 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. We ask OIRA to ensure that the rules are consistent with the State Department's 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.
- Our public comment provides a brief overview of relevant religious liberty law.
- **First**, as USAID and eight other federal agencies acknowledged in a proposed rule issued last year, recent Supreme Court decisions have described a "**Nondiscrimination Principle"** based in the First Amendment's Free Exercise Clause.[66] Under these cases, the agencies note, "disqualifying otherwise eligible recipients from a public benefit 'solely because of their religious character' imposes 'a penalty on the free exercise of religion that triggers the most exacting scrutiny.'"[67] The rule was finalized by the agencies in March.[68]
    - 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."[69] 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

[63] 89 Fed. Reg. at 3584; 89 Fed. Reg. at 3627.

[64] *Arar v. Ashcroft*, 585 F.3d 559, 611 (2d Cir. 2009).

[65] *USAID 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.").

[66] 88 Fed. Reg. 2395 (Jan 13, 2023).

[67] 88 Fed. Reg. 2401 (quoting *Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2255 (2021) (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012, 2021 (2017))).

[68] 89 Fed. Reg. 15671 (Mar. 4, 2024).

[69] *Trinity Lutheran*, 582 U.S. at 469.

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 rules) make the requirement not "generally appliable" and thus subject to strict scrutiny.[70]

- 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."[71] 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.

- **Second**, **Title VII** likewise recognizes the right of religious employers to use religious criteria in their hiring decisions.
  - 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.
  - As described in our public comment,[72] and as recognized by the EEOC in its religion guidance, Section 702 of Title VII states allows "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."[73]
  - "Religion," as defined in Title VII, "includes all aspects of religious observance and practice, as well as belief."[74] As such, Title VII allows qualifying religious organizations to make employment decisions based on religion, which includes beliefs, observances, and practices.
- **Third**, the **Religious Freedom Restoration Act (RFRA)**[75] subjects the federal government to strict scrutiny when it substantially burdens religious exercise.[76] As the Supreme Court recognized in *Bostock*, RFRA is a "super statute" that "might supersede Title VII's commands in appropriate cases."[77] Last year, the Fifth Circuit held that RFRA prohibits the EEOC from enforcing its interpretation of Title VII against objecting religious employers.[78]

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[70] *Id*. at 466.

[71] *Fulton v. City of Philadelphia*, 593 U.S. 522, 541 (2021) (cleaned up).

[72] *See* EPPC Public Comment at 15.

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

[74] 42 U.S.C. § 2000e.

[75] 42 U.S.C. §§ 2000bb–2000bb-4.

[76] EPPC Public Comment at 11-12.

[77] *Bostock v. Clayton County*, 590 U.S. 644, 682 (2020) (citing 42 U.S.C. § 2000bb-3).

[78] *Braidwood Mgmt. v. EEOC*, 70 F.4th 914, 940 (5th Cir. 2023).

- **Fourth**, even if State takes the position that, in some circumstances, its application of the rules would not be subject to the Free Exercise Clause or federal law, it is still bound by the First Amendment's **Establishment Clause**.[79]
    - 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."[80] "[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."[81]
    - As described in our public comment, the Establishment Clause requires government to respect religious institutions' autonomy to make internal management decisions that are essential to their central mission.[82]
    - One aspect of this autonomy, called the "ministerial exception," protects a religious organization's right to "select, supervise, and if necessary, remove a minister without interference" from the federal government.[83] Though "the individuals involved in pioneering cases were described as 'ministers,'"[84] 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."[85]

d. In light of the above, the rules' waiver provisions are wholly inadequate and illegal.

- In light of the above, we find the rules' waiver provisions deeply troubling and wholly inadequate.
- As detailed in our public comment, the waiver provisions in the rules are unlawful because they do not even give lip service to State's obligations to respect religious liberty under the U.S. Constitution and federal law.[86] 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 rules' disregard for the State Department's legal and constitutional obligations, the rights of religious employers, and the critical role that religious entities play in our nation's foreign aid programs renders the rules arbitrary and capricious, and contrary to law.

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[79] *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).

[80] *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2060 (2020).

[81] *Id*.

[82] EPPC Public Comment at 16.

[83] *Our Lady of Guadalupe*, 140 S. Ct. at 2060.

[84] *Id*.

[85] *Id*. at 2073 (cleaned up).

[86] EPPC Public Comment at 16-17.

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.
- As described in our public comment,[87] without an explicit exemption, the rules would give State officials unlimited discretion to grant or deny requests from religious organizations to use religious criteria in hiring decisions.
    - 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 rules places an unnecessary and unfair burden on religious organizations to present such legal arguments to defend their eligibility.
    - Even worse, the uncertainty the rules create would more than likely dissuade prime organizations from even applying to participate in covered programs moving forward.
- For all these reasons, we ask OIRA to ensure that the State Department's final rules are consistent with the administration's obligations under the Constitution and federal law to respect religious liberty.
- We also ask the State Department to clarify how the religious liberty protections in its final rule apply to foreign religious organizations, both those that work directly with State and those that are subrecipients and subcontractors.
- For the reasons set out in our public comment, the State Department ought to offer a straightforward religious exemption that is easy for religious organizations to understand and easy for State officials to apply.
- Given that State has stated in the rules that affected entities, including religious organizations, have "always" been "mindful of the principles of equity, fairness, and human dignity when performing the work under their contracts," the State Department has no reason not to grant religious organizations a clear exemption that allows them to continue to take religion into account in their employment decisions.

[87] EPPC Public Comment at 17-19.

4. OIRA should ensure that the rules do not overstate their benefits or fail to consider their costs.

- ***Benefits***.
  - 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."[88]
  - 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."[89]
  - However, State cannot claim a benefit not gained by its rules.
    - 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 rules cannot claim as a benefit something the rules do not improve.
- ***Costs.***
  - The rules identify costs associated with the creation of policies and procedures, implementation, training, and "potential changes in hiring practices for certain employees."[90]
  - 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 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 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.

[88] 89 Fed. Reg. at 3585; 89 Fed. Reg. at 3627-28.

[89] 89 Fed. Reg. at 3585; 89 Fed. Reg. at 3627-28.

[90] 89 Fed. Reg. at 3585; 89 Fed. Reg. at 3628.

- 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's 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."[91] These costs must be considered.

5. OIRA should ensure that State considers the following alternatives and recommendations.

- In our public comment, we provided many suggestions of alternatives and recommendations State should consider. We copy seven of them below for OIRA's reference.
- ***Waiver Process***. State should amend the 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, State should 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 earlier) to religious hiring rights is not commonly known to the average humanitarian 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.
- ***Agency Intent Provision.*** To clarify for officials and applicants/offerors that religious organizations have an equal opportunity to seek federal funding without sacrificing their

[91] Letter from Nine U.S. Senators to Anthony Blinken, Secretary, U.S. Dep't of 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.

religious character, State should add 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.[92]

- ***Religious Organization Guidance***. The State Department should 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.

[92] *See* USAID, STANDARD PROVISIONS FOR U.S. NONGOVERNMENTAL ORGANIZATIONS at M11 Equal Participation by Faith-Based Organizations (revised Oct. 24, 2023), *available at* https://www.usaid.gov/about-us/agency-policy/series-300/references-chapter/303maa.

- ***Delete "Expressly."*** The proposed rules prohibit discrimination against employees "unless *expressly* permitted by applicable U.S. law."[93] 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, 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. As such, State should delete the term "expressly."
- ***Discrimination Reports.*** State should clarify 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.
- ***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. As an alternative approach, State should consider 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. State should consider adopting 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 literacy rates.

CONCLUSION

We urge OIRA to ensure that the statutory and regulatory process is upheld, and that State's rules have sufficient legal analysis that reflects its obligations under the Constitution, the Administrative Procedure Act, executive orders, federal laws protecting religious liberty, and all other relevant legal authority.

[93] 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.