AMERICAN ATHEISTS

March 27, 2020

Samuel Pearson-Moore
Deputy Assistant
Regulations Division
Office of General Counsel
U.S. Department of Housing and Urban Development
451 7th Street SW, Room 10276
Washington, DC 20410–0500

Re: Comment from American Atheists Concerning Comments on Proposed Rule on the "Equal Participation of Faith-Based Organizations: Implementation of Executive Order 13831." (Docket No. HUD-2020-0017-0001, RIN 2501-AD91)

Dear Mr. Pearson-Moore:

On behalf of American Atheists, I write in strong opposition to the Department of Housing and Urban Development's (the "Department") Proposed Rule to implement Executive Order 13831[1] affecting grants and services provided by religious organizations, as published in the Federal Register on February 13, 2020.[2] The Proposed Rule undermines religious equality and strips away essential religious freedom protections from people who receive from government-funded social services. This Proposed Rule will lead to beneficiaries forgoing needed services, particularly harming atheists, religious minorities, women, homeless people, and LGBTQ people. This conflicts with the very goals of social services programs by putting the interests of taxpayer-funded organizations ahead of the needs and religious freedom of people seeking these critical services. This proposal is dangerous, unnecessary, it contravenes constitutional requirements and federal law, and it opens recipients of government services to discrimination, harassment, and religious coercion. We strongly urge you to withdraw the Proposed Rule in its entirety.

American Atheists is a national civil rights organization that works to achieve religious equality for all Americans by protecting what Thomas Jefferson called the "wall of separation" between government and religion created by the First Amendment. We strive to create an environment where atheism and atheists are accepted as members of our nation's communities and where casual bigotry against our community is seen as abhorrent and unacceptable. We promote understanding of atheists through education, outreach, and community-building and work to end the stigma associated with being an atheist in America. Religious liberty is an individual right guaranteed by the First Amendment, and therefore government programs should have clear boundaries and safeguards to protect the religious freedom and equality of every beneficiary of government-funded social services.

[1] Exec. Order 13831, Establishment of a White House Faith and Opportunity Initiative, 83 Fed. Reg. 20715, May 8, 2018.

[2] Equal Participation of Faith-Based Organizations in HUD Programs and Activities: Implementation of Executive Order 13831, 85 Fed. Reg. 8215, Docket No. HUD-2020-0017-0001, RIN 2501-AD91 (proposed Feb. 13, 2020) (to be codified at 24 C.F.R. 5, 24 C.F.R. 92, 24 C.F.R. 578) [hereinafter "Proposed Rule"].

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The Proposed Rule undermines access to and the efficacy of government-funded social services.

Department social services programs affected by the Proposed Rule would include, but not be limited to, housing counseling grants, continuum of care programs, supportive housing for the elderly and persons with disabilities, emergency shelters, and housing opportunities for persons with HIV (HOPWA).

The Proposed Rule runs counter to the intended purpose of these programs by increasing the likelihood of inefficiencies, exposing beneficiaries to potential harms, and hindering access to vital government services.

First, the Proposed Rule eliminates the requirement that religious providers take reasonable steps to refer beneficiaries to alternative providers if requested. Although the requirement for this component was stripped by President Trump's May 2018 Executive Order, it is essential because millions of Americans are not comfortable receiving social services from religious providers, and therefore, they may forgo getting the services they need because they are unable to find an alternative provider on their own. The Department may certainly choose to retain this requirement even without the explicit duty to do so in the relevant Executive Order.

Second, the Proposed Rule strips the requirement for faith-based service providers to provide a written notice to the people they serve of their right to religious freedom. This notice informs beneficiaries that a provider cannot discriminate against them based on their beliefs or force them to participate in religious activities, and it explains the grievance processes for beneficiaries that face violations of their religious freedom or that are not provided with an alternative. Without this information, beneficiaries of these services become vulnerable because they would lack awareness that they can object to discrimination, proselytization, or religious coercion when receiving government-funded services.

Third, the Proposed Rule greatly widens religious exemptions for government-funded religious providers by 1) expanding who qualifies for religious exemptions, 2) expanding the scope of those exemptions, and 3) encouraging the use of exemptions by religious entities. While existing regulations already allowed government-funded religious organizations to discriminate in employment on the basis of religion,[3] the Proposed Rule would make it easier for providers to use religion as a pretext to discriminate on other bases. At the same time that the Trump administration is stripping the requirement that providers give beneficiaries written notice of their rights, it is adding a requirement that the government provides written notice to faith-based organizations about their ability to get additional religious exemptions, including under RFRA. This paves the way for providers to refuse to provide key services and opens the door to discrimination in taxpayer-funded programs.

Lastly, the Proposed Rules eliminate safeguards that help prevent religious coercion in government-funded voucher programs or indirect aid. Existing regulations require that recipients must have at least one secular option to choose from in order to make a meaningful decision that they want to receive services from a religious organization. Courts have permitted different rules to apply to vouchers than

[3] Note that American Atheists strongly objects to existing regulations that allow government-funded religious organizations to discriminate in employment on the basis of religion as well. No organization should be allowed to engage in invidious discrimination with government funding merely because of their religious beliefs.

direct funding to religious organizations because beneficiaries can make an informed and real choice about which provider they receive services from. However, without the requirement for a secular alternative, beneficiaries can be forced to receive essential benefits from religious providers that engage in religious coercion, condition their services on participation in religious activities such as worship, or limit access to services based on religion. It is remarkable that the Department would propose such a clear and unmistakable violation of the First Amendment, sacrificing the religious freedom of beneficiaries to benefit politically powerful religious providers.

The Department's justifications for the Proposed Rule, as well as its interpretation of Supreme Court precedent, are meritless and legally incorrect.

In justifying this Proposed Rule, the Department relies heavily on *Trinity Lutheran Church of Columbia, Inc. v. Comer*,[4] misinterpreting the Supreme Court's decision to mean that the government cannot require faith-based organizations to provide alternative providers or notification to beneficiaries if the same is not required of secular organizations. On its face, this is a ridiculous interpretation – why should secular government-funded organizations be required to meet notice and referral requirements meant to prevent religious coercion when they, by definition, cannot engage in the type of conduct that endangers the religious freedom of beneficiaries? But even if the Department were correct about its interpretation of *Trinity Lutheran*, the correct rule change would be to impose the notice and referral requirements on all government-funded providers, not to strip away essential religious freedom protections for beneficiaries. These requirements are of de minimis burden, and they can easily be absorbed by organizations already receiving federal funding.

Moreover, the Department's reading of *Trinity Lutheran* is an exceedingly broad interpretation of a very narrow decision. *Trinity Lutheran* was expressly limited to discrimination based on religious identity with respect to playground resurfacing, and it explicitly stated it did not "address religious uses of funding or other forms of discrimination."[5] However, even if we take this case at its broadest possible interpretation, "that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can only be justified by a state interest 'of the highest order,'"[6] this decision remains inapplicable. The existing regulations already allow religious organizations to compete for government grants to fund social service programming on the same basis as secular organizations – they do not exclude religious organizations based on their religious identity.

Finally, even if *Trinity Lutheran* were to apply, the existing safeguards to protect the religious freedoms of beneficiaries further "a compelling government interest" and are narrowly tailored in a way to not exclude faith-based providers from seeking government grants. The costs to providers in to provide notice and have a list of alternative providers are minimal compared to the costs to beneficiaries seeking the government-funded social services they need. And again, if the Department wanted to ensure these requirements could not be perceived as a burden solely on religious organizations, they could simply impose them on all government-funded grantees.

[4] *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) [hereinafter "Trinity Lutheran"].
[5] *Id.,* Footnote 3.
[6] *Id.,* at 2019 (citations omitted).

The Department also expresses concerns the alternative provider requirement may violate the Religious Freedom Restoration Act,[7] but the current regulations already account for RFRA. RFRA asks whether the law places a "substantial burden" on religious exercise, and if it does the government must indicate a "compelling government interest" by the "least restrictive means." Firstly, we note that the strict scrutiny test established by RFRA goes beyond constitutional requirements,[8] and any exemption granted through this law is subject to constitutional restrictions.[9] As noted below, any interpretation of this statute must meet Establishment Clause requirements.

Moreover, protections under RFRA do not apply to de minimis burdens or even significant burdens on religious exercise when there are significant countervailing interests. Requiring groups that partner with the government and receive government funding to respect the religious freedoms of others by providing notice and referrals to other providers does not represent a substantial burden. Religious organizations voluntary partner with the government, and if they don't want to fulfill requirements designed to improve efficiencies and meet objectives, or if they believe these minor requirements are a burden that outweighs the funding they receive to implement these social service programs, they can decline the funding.[10]

The Department failed to meet its burden under the Administrative Procedures Act to justify the Proposed Rule and to meet constitutional requirements, and therefore the Proposed Rule is arbitrary and capricious.

The Administrative Procedures Act (APA) proscribes regulations that are "arbitrary, capricious…or otherwise not in accordance with law…"[11] The Department is required to provide "adequate reasons for its decisions."[12] It is required to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[13] Furthermore, it cannot "fail[] to consider an important aspect of the problem, [or offer] an explanation...[that] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[14] Finally, "reasonable regulation ordinarily requires paying attention to the advantages *and* the

[7] 42 U.S.C. § 2000bb, et seq. [hereinafter "RFRA"].
[8] *See Employment Division, Department of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990) ("The "compelling government interest" requirement seems benign, because it is familiar from other fields…. What it produces in those other fields -- equality of treatment, and an unrestricted flow of contending speech -- are constitutional norms; what it would produce here -- a private right to ignore generally applicable laws -- is a constitutional anomaly…. The First Amendment's protection of religious liberty does not require this.")
[9] *See, e.g., City of Boerne v. Flores*, 521 U.S. 507, 544 (refusing to enforce RFRA against the states because doing so would be unconstitutional).
[10] We note that the Department's argument here could apply equally to *any* requirement of these programs, not just those relating to notice and referral. If the Department is going to look at every aspect of each program individually to meet a compelling interest test, then in effect, religious organizations would be free to simply take government funding without strings or even meeting basic program requirements. This outrageous outcome is clearly not contemplated by *Trinity Lutheran*, RFRA, nor the First Amendment.
[11] 5 U.S.C.A. § 706(2)(A).
[12] *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125 (2016).
[13] *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 42 (1983).
[14] *Id.*, at 43.

disadvantages of agency decisions."[15] When an administrative agency substantially changes its position, these requirements are heightened because of the threat to "serious reliance interests,"[16] and any "[u]nexplained inconsistency is…a reason for holding an interpretation to be an arbitrary and capricious change from agency practice…"[17] Moreover, the APA broadly prohibits regulations "contrary to constitutional right[s]."[18]

The Department has failed to meet its burden under the APA because did not explain why the Proposed Rule was necessary, nor did it consider the burden on beneficiaries. The notice and referral requirements were instituted under the Obama Administration based on recommendations from the President's Advisory Council on Faith-Based and Neighborhood Partnerships.[19] This landmark convening of various viewpoints on matters of religious freedom, including several prominent faith-based institutions, achieved consensus on 12 unanimous recommendations which formed the basis of Executive Order 13559.[20] This common ground honored our nation's commitment to religious freedom while not imposing unnecessary burdens upon religious providers in carrying them out. At the time, the Council determined that the changes would both "improve social services and strengthen religious liberty."

Regulations based on Executive Order 13559 have been working well since 2016, and the Department has not provided any reason for the Proposed Rule except that it assumes, without evidence, that there is a significant burden to religious organizations.[21] For the 2016 rule, the Department previously estimated a cost to providers "of no more than 2 burden hours and $100 annual materials cost for notices and 2 burden hours per referral." This proved to be a wild overestimate; the Department now concedes that the burden per notice is no more than 2 minutes. Moreover, while the Department estimates a cost savings of $656,128 for the elimination of these vital protections, it provides no analysis on how much was actually spent on notice and referral requirements, nor does it provide reasoning for its inflated estimate. At the same time, the Department recognizes that the removal of the notice and referral requirements could impose some costs on beneficiaries who would now need to find alternative providers on their own if they object to the religious character of a potential provider.[22] The

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[15] *Michigan v. E.P.A.,* 135 S. Ct. 2699, 2707 (2015).
[16] *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).
[17] *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 981 (2005) (citation omitted).
[18] 5 U.S.C.A. § 706(2)(B).
[19] President's Advisory Council on Faith-Based and Neighborhood Partnerships, A New Era of Partnerships: Report of Recommendations to the President 127 (2010), available at http://bit.ly/2A0yhXA. Members included: Nathan J. Diament, Director of Public Policy, Union of Orthodox Jewish Congregations of America; Dr. Frank Page, Vice-President of Evangelization, North American Mission Board, and Past President of the Southern Baptist Convention; Anthony R. Picarello, Jr., General Counsel, United States Conference of Catholic Bishops; The Reverend Larry J. Snyder, President and CEO, Catholic Charities USA; and Richard E. Stearns, President, World Vision United States.
[20] Exec. Order 13559, Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations, 81 Fed. Reg. 19353, April 4, 2016.
[21] Moreover, as discussed above, the Department's *Trinity Lutheran* analysis is deeply flawed and therefore insufficient justification.
[22] Proposed Rule, 85 Fed. Reg. at 8221.

Department's baseless estimates of cost savings do not justify the increased burden on beneficiaries nor the risk to their vital constitutional protections.

Similarly, while the Department purports to encourage religious organizations to participate in government programs, it is has not demonstrated that religious organizations are not participating because of these requirements, nor that there are insufficient providers participating to meet program needs.

Moreover, the Department did not examine the impact that eliminating these important religious freedom protections would have on third parties. Not only does this failure undermine the reasoned analysis required by the APA, but also this kind of special privileging of religious organizations also violates the Establishment Clause. Specifically, the Establishment Clause requires the consideration of any impact an accommodation or religious exemption would have on third parties. The First Amendment bars the government from crafting "affirmative" accommodations within its programs if the accommodations would harm any program beneficiaries.[23] The Constitution commands that "an accommodation must be measured so that it does not override other significant interests;"[24] "impose unjustified burdens on other[s];"[25] or have a "detrimental effect on any third party."[26] Therefore, any regulations established by the Department to accommodate religion must do so without significantly burdening third parties.

In fact, the Proposed Rule would unconstitutionally harm at least two groups of third parties. The first group is those harmed by the expansion of the religious exemptions in employment. Atheists, religious minorities, LGBTQ persons, and women would be most likely to suffer because they either reject dominant religious beliefs or act inconsistently with employers' interpretations of those beliefs. Those groups have also historically been some of the most likely to face employment discrimination. But even followers of dominant religious beliefs may be harmed by discrimination from government-funded religious employers who interpret their beliefs differently or who follow a different religion. In order to resist religious coercion, these groups might have to forego employment opportunities, higher pay, and promotions. This discrimination could take many forms, including refusing to hire employees, firing employees, mistreating employees, imposing onerous restrictions on employees' private practices,

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[23] U.S. Const. Amend. I; *Cutter v. Wilkinson*. 554 U.S. 709, 720, 722 (2005) (to comply with the Establishment Clause, courts "must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries" and must ensure that the accommodation is "measured so that it does not override other significant interests") (citing *Estate of Thornton v. Caldor*, 472 U.S. 703, 710 (1985)); *see also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 n.37 (2014); *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring).

[24] *Cutter v. Wilkinson*, 544 U.S. at 722.

[25] *Id.* at 726.

[26] *Id*. at 720, 722; *See also Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2781; *Estate of Thornton v. Caldor*, 472 U.S. at 710 ("unyielding weighting" of religious exercise "over all other interests…contravenes a fundamental principle" by having "a primary effect that impermissibly advances a particular religious practice."); *Texas Monthly, Inc. v. Bullock*, 480 U.S. 1, 18 n.8 (1989) (religious accommodations may not impose "substantial burdens on nonbeneficiaries"); *United States v. Lee*, 455 U.S. 252 (1982) ("the limits [followers of a particular sect] accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.").

denying them benefits, or paying employees less. For example, a Christian employer could penalize a female employee who got an abortion by refusing to increase her pay or firing her.

The second group of third parties harmed by the Proposed Rule is the group of beneficiaries of government-funded social services and those seeking such services. As a general matter people, both religious and nonreligious, object to being subject to religious programming in social services that conflict with their beliefs. Moreover, some beneficiaries, especially LGBTQ, atheist, or religious minorities, could not in good conscience take advantage of government services provided by religious organizations that they know discriminate against certain types of employees. Such beneficiaries may forgo needed services rather than receive them from a provider that they find objectionable. The Department failed to examine the cost to these beneficiaries, as well as the negative impact on program efficacy, because of the elimination of these religious freedom protections. Moreover, while the Department kept in place prohibitions on discrimination against beneficiaries based on religion or participation in religious activities, it did not examine whether such inappropriate behavior would increase if beneficiaries are not made aware of their rights.

American Atheists and other organizations serving nonreligious people frequently receive complaints from nonreligious beneficiaries of government-funded programs who object because they are denied services by religious service providers or because such providers violate their religious freedom. For example:

> In 2019, American Atheists worked with a man seeking services at St. Benedict's emergency shelter in Kentucky. St. Benedict requires all its residents to submit to a breathalyzer and drug testing once a month to receive housing. The costs of drug testing are paid for by WellCare, Kentucky's Medicaid equivalent. Although the case was mooted before any in-depth factual investigation was required, it appears that St. Benedict was at least receiving Medicaid funds and may have also received funds through HHS and/or the Department. Recipients of St. Benedict's services are enrolled in Medicaid and WellCare during the intake process.
>
> The man who contacted American Atheists was required to attend twelve-step addiction recovery support group meetings five times per week. It is a well-settled First Amendment law that twelve-step groups are pervasively religious and that a secular alternative must be made available to recipients who are required to attend addiction recovery support groups to receive government-funded benefits.[27] The complainant was able to find housing shortly after contacting American Atheists, so the case did not proceed further. However, had the recipient not found housing in a timely manner, American Atheists would have pursued appropriate remedies, including referral to an alternative secular provider. Similarly, the Freedom From Religion Foundation (FFRF) reports that they regularly hear from shelter residents who are required to participate in twelve-step programs to receive benefits.

Although this outcome was favorable, it is not clear that similar beneficiaries of the Department's programs would be able to access suitable services without the existing notice and referral requirements. While this example pertains to a nonreligious person, many religious individuals also

[27] *Inouye v. Kemna*, 504 F.3d 705, 712, 716 (9th Cir. 2007); *see also Hazle v. Crofoot*, 727 F.3d 983 (9th Cir. 2013).

object to being subject to religious programming in social services that conflict with their beliefs. However, such individuals may not be aware of or have access to organizational support to help them enforce their rights, forcing them to either endure these violations of their religious freedom or to forgo essential social services. For instance, a gay homeless teen might not seek shelter at a facility funded with HUD's Emergency Shelter Grant (ESG) program because the shelter is run by a religious organization that condemns her for being gay. Or a Muslim may forgo affordable housing funded by HUD's Housing Opportunities for Persons with AIDS (HOPWA) program because they feel uncomfortable at a facility with Christian iconography throughout, even though receipt of HOPWA funds requires that program content be secular.

Our research indicates there is significant discrimination against nonreligious people in health care, social services, and similar fields, which further demonstrates the impact of the Proposed Rule on this population and the need for robust referral procedures. In a recent study of nearly 34,000 nonreligious participants, 17.7% reported they had negative experiences when receiving mental health services because of their nonreligious identity, 15.2% had negative experiences in substance abuse services, 10.7% in other health services, 6.2% in public benefits, and 4.5% in housing.[28]

The provisions of the Department's Proposed Rule relating to indirect aid are unconstitutional and contrary to Supreme Court precedent.

We are extremely perturbed by the Department's Proposed Rule changes concerning what it frames as "indirect Federal Financial assistance," which demonstrate both a fundamental misunderstanding of the Supreme Court decisions the Department cites and a lack of concern about the religious coercion it is casually foisting upon beneficiaries. Under existing regulations, a religious grantee may not use its funding to pay for "explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization)."[29] Moreover, existing regulations provide that:

> If an organization engages in explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization), the explicitly religious activities must be offered separately, in time or location, from the programs or activities supported by direct Federal financial assistance and participation must be voluntary for the beneficiaries of the programs or activities that receive direct Federal financial assistance.[30]

However, the Department proposes to exempt religious providers that receive government funding indirectly through vouchers from these restrictions. The Department bases this proposed exemption on *Zelman v. Simmons-Harris,*[31] in which the Supreme Court determined a private school voucher program did not violate the Establishment Clause, because the "government aid reaches religious schools only as a result of the genuine and independent choices of private individuals." Under current regulations, the

[28] Unpublished data from the US Secular Survey, American Atheists, 2019. Publication forthcoming.
[29] 24 C.F.R. 5.109(d)1
[30] 24 C.F.R. 5.109(e)
[31] 536 U.S. 639 (2002) [hereinafter "Zelman"].

exemption for indirect aid is only applicable if "the beneficiary has at least one adequate secular option for use of the voucher, certificate, or other similar means of government-funded payment."[32]

The Department now proposes to amend its definition of "indirect Federal Financial assistance" in order to remove even this modest safeguard to protect the religious freedom of beneficiaries in voucher programs. *Zelman*, like its predecessor cases, turned on a question of fact: was the beneficiary able to make a genuine, independent choice whether or not to receive services from a religious organization? This Establishment Clause analysis required in *Zelman* an evaluation of all the options available to program beneficiaries, including the availability of services directly provided by the government and secular options. The Court elaborates thusly, "the Establishment Clause question is whether Ohio is coercing parents into sending their children to religious schools, and that question must be answered by evaluating all options Ohio provides Cleveland schoolchildren, only one of which is to obtain a program scholarship and then choose a religious school."[33] The voucher program in *Zelman* had six options, only one of which was religious. Having five public or nonreligious options is the reason the Supreme Court found that the program provided a genuine, independent choice. *Zelman* does not justify the possibility of a single religious provider as the only option for a public voucher, because the additional secular options were essential to the ruling.[34]

By definition, the inability to reject a religious provider in favor of a secular option means voucher recipients have no genuine, independent choice. Therefore, not providing a secular option for beneficiaries means that the government would be adding a religious test to government services, leaving them with no choice or forcing them into a program that includes explicitly religious content or requirements.[35] Unlike in the education context, in the context of the Department's programs, there is no clear, comparable and available public, charter, magnet, or private social service structure in place to ensure real choice. Moreover, the beneficiaries served by many of the Department's programs are in a very different position that the student and parents in *Zelman*. Individuals who are homeless, in poverty, or otherwise vulnerable frequently will not have the agency to conduct the evaluation of their options necessary to make a genuine and independent choice. By designing a program in such a way that only religious providers are available as options, it is the government, not the beneficiary, that is determining that the government aid reaches inherently religious programs. In this instance, it is impossible for the "government program through which the beneficiary receives the voucher, certificate, or similar means of government-funded payment" to be "neutral toward religion," as required by *Zelman*.

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[32] 24 C.F.R. 5.109(b)

[33] *Zelman,* at 655-6.

[34] The case language the Department cites pertaining to the percentage or number of religious versus secular providers is inapposite here. In every location in Cleveland, there was at least one secular provider available as well as the public schools. Because the Proposed Rule would apply this proposed definition beyond this limited school context, these assumptions do not hold.

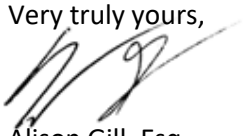
[35] In other contexts where the government conditions benefit indirectly on participation in religious activities, such as in the field of addiction recovery, the courts have readily struck down these requirements. *See, e.g., Hazle v. Crofoot,* 727 F.3d 983 (9th Cir. 2013); *Inouye v. Kemna,* 504 F.3d 705 (9th Cir. 2007).

Lastly, we note that the Department failed to provide any sort of justification or reasoning for this dramatic departure from well-established law and stripping away of religious freedom protections. The Department cites to *Trinity Lutheran* and RFRA, but it fails to clarify how *Trinity Lutheran* or RFRA applies when existing regulations neither prevent religious organizations from participating in these programs nor impose any specific burden upon them. Again, the Department proposes this rule change heedless of cost to beneficiaries, in violation of the Establishment Clause. No beneficiary of "direct" or "indirect" programming should be turned away from a government-funded program based on religion, a religious belief, a refusal to hold a religious belief, or refusal to attend or participate in religious activities.

Conclusion

Because the Proposed Rule is irreconcilable with the First Amendment, needlessly harmful to program beneficiaries, and it undermines vital religious freedom protections, it should be withdrawn in its entirety. Moreover, we join with other organizations to urge the Department to suspend rulemaking on this matter until such time as the COVID-19 crisis is resolved. This is not the time for the Department to be considering rules changes that will reduce access to services and put more Americans at risk. If you should have any questions regarding American Atheists' opposition to the Proposed Rule, please contact me at 908.276.7300 x309 or by email at agill@atheists.org.

Very truly yours,



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