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STRENGTHENING AMERICA'S COMMUNITIES: EXAMINING THE IMPACT OF FAITH-BASED HOUSING PARTNERSHIPS

HEARINGS

BEFORE THE

SUBCOMMITTEE ON
HOUSING AND COMMUNITY OPPORTUNITY

OF THE

COMMITTEE ON FINANCIAL SERVICES

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTH CONGRESS

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CONTENTS

	Page
Hearings held on:	
March 25, 2003	1
April 28, 2003	35
Appendixes:	
March 25, 2003	59
April 28, 2003	125

WITNESSES

TUESDAY, MARCH 25, 2003

Anthony, Rev. Wendell, Pastor, Fellowship Chapel, Detroit, Michigan	14
Caldwell, Rev. Kirbyjon, Pastor, Windsor Village United Methodist Church, Houston, Texas	15
Daniels, Bishop Sedgwick, Pastor, Holy Redeemer Institutional Church of God in Christ, Milwaukee, Wisconsin	18
Fairbanks, Dr. E. LeBron, President, Mount Vernon Nazarene University, Mount Vernon, Ohio	12
Feingold, Ellen, President, Jewish Community Housing for the Elderly, also appearing on behalf of the National Association of Homes and Services for the Aging and the Association of Jewish Aging Services, Boston, Massachusetts	16
Kmiec, Douglas W., J.D., Dean, Catholic University of America School of Law, Washington, DC	21
Walker, Rev. J. Brent, Executive Director, Baptist Joint Committee, Washington, DC	19

APPENDIX

Prepared statements:	
Oxley, Hon. Michael G.	60
Anthony, Rev. Wendell	61
Caldwell, Rev. Kirbyjon	64
Daniels, Bishop Sedgwick	68
Kmiec, Douglas W.	70
Fairbanks, Dr. E. LeBron	75
Feingold, Ellen	79
Walker, Rev. J. Brent	86

ADDITIONAL MATERIAL SUBMITTED FOR THE RECORD

Barney, Hon. Frank:	
Americans United for Separation of Church and State, prepared statement	98
"Providing shelter" *The Observer,* March 30, 2003	106
American Civil Liberties Union, prepared statement	109

WITNESSES

MONDAY, APRIL 28, 2003

Weicher, John, Assistant Secretary, Housing, Federal Housing Commissioner, U.S. Department of Housing and Urban Development, accompanied by Ryan Streeter, Director, Center for Faith-Based and Community Initiatives and Frank Jimenez, Chief of Staff	39

Page

APPENDIX

Prepared statements:
Weicher, John 126

Additional Material Submitted for the Record

Frank, Hon. Barney:
National Community Development Association, prepared statement 131

STRENGTHENING AMERICA'S COMMUNITIES: EXAMINING THE IMPACT OF FAITH BASED HOUSING PARTNERSHIPS

Tuesday, March 25, 2003

U.S. HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON HOUSING AND COMMUNITY OPPORTUNITY,
COMMITTEE ON FINANCIAL SERVICES,
Washington, D.C.

The subcommittee met, pursuant to call, at 3:04 p.m., in Room 2128, Rayburn House Office Building, Hon. Robert Ney [chairman of the subcommittee] presiding.

Present: Representatives Ney, Green, Waters, Watt, Clay, Miller, Scott, Davis, and Frank (ex officio).

Mr. NEY. [Presiding.] Good afternoon. The Subcommittee on Housing and Community Opportunity will come to order. I want to welcome members of the committee that are here—our Ranking Member Ms. Waters, Mr. Frank and Mr. Green.

Today's hearing is about the Department of Housing and Urban Development's January 6, 2003 proposed regulation that intended to provide more opportunities for faith-based organizations to assist in meeting the needs of the poor and distressed neighborhoods. Today, there are hundreds of faith-based organizations helping the homeless, providing decent affordable housing, and critical services for our nation's homeless seniors and disabled.

As President Bush said when he announced his faith-based initiative, government has a solemn responsibility to help meet the needs of poor Americans and distressed neighborhoods, but it does not have a monopoly on compassion. In 1996, Congress enacted charitable choice legislation that sought to expand the involvement of religious organizations in social service programs. In January, 2001, President Bush issued two executive orders to create a White House Office of Faith-Based and Community Initiatives, and five centers for Faith-Based and Community Initiatives in five Federal agencies.

Most recently, on December 12, 2002, the Administration announced several additional administrative measures to enhance its faith-based initiative administratively. In a limited way, faith-based organizations currently are allowed to participate in various Federal programs. However, the current regulations present a roadblock to full participation by faith-based organizations, hindering their ability to help those in need. The House-proposed rule would remove some of the barriers faith-based organizations now

encounter when trying to participate in helping provide important programs. The new HUD regulations would modify requirements for eight specific programs: housing opportunities for people with AIDS, emergency shelters grants, shelter-plus care, the supportive housing program, HOPE III, HOME, and CDBG.

I want to point out that Ohio has been among the states that have led the way in supporting charitable choice programs. In 2002, the Bliss Institute at the University of Akron and the Hudson Institute in Virginia jointly prepared a survey of government-funded faith-based programs in 15 states. The report notes that Ohio, California, Michigan and Texas lead the way in terms of dollars invested, while Ohio, Michigan and Wisconsin hold the most contracts.

The committee has invited a broad cross-section of representatives from faith-based organizations who have experience providing social services. I think that everyone here shares the intent of HUD in crafting this regulation, which is ensuring the delivery of Federally funded services to very low and low-income people. While we all may agree on that goal, there are certainly different views on how to achieve it.

Our witnesses today are here to share their experiences providing social services, as well as their views on whether or not the proposed rule will make the Federal funds more accessible to organizations such as theirs, and if not, what can be done to improve the proposal. I look forward to hearing from our witnesses. I want to take a moment to recognize that because of the diversity of faith-based organizations that flourish under our Constitution's protection, we were unable to accommodate every group that wanted to come and testify today.

Without objection, members will be allowed to submit their written statements for the record. Hearing no objection, they will be submitted for the record.

I yield to our ranking member, Ms. Waters, for her opening statement.

Ms. WATERS. Thank you very much, Chairman Ney.

I would like to thank you and, of course, our own ranking member, Congressman Barney Frank, for agreeing to have this very special and important hearing. I would like to also thank all of our witnesses who have come today. I know that most of them are extremely busy and the fact that they have given up their time to be with us is certainly appreciated by me and other members of this committee.

This hearing is extremely important for any number of reasons. The HUD, Department of Housing and Urban Development, is proposing new regulations to deal with the President's executive order relative to his faith-based initiative. The President has come up with a faith-based initiative because the President obviously believes that somehow our religious organizations are able to provide services to the communities that need it. What is interesting about the President's initiative is it does nothing to allow faith-based organizations to provide services to the community other than allow them to discriminate. Faith-based organizations can already, under 501(c)(3) operations where you separate the money that comes from the Federal government into the 501(c)(3) corporation, rather than

mixing the money in the collection plate. They can already under 501(c)(3)s provide any services that the Federal government funds, that they allow to go to organizations that provide these kinds of services.

Some of us are extremely concerned because the President's executive order absolutely violates Title VII and it flies in the face of President Johnson's executive order, which further supported Title VII in saying that if you receive Federal money, if you receive government money, you may not discriminate. This initiative by the President suggests that somehow religious organizations should be able to pick and choose who they hire. If they do not like somebody's skin color, if they do not like their gender, if they do not like the other organizations they are associated with, if they do not like the communities they live in—whatever—they would be allowed to undermine all of the civil rights work that many of our people have died for, to make sure that we do not have discrimination and the Federal government resources.

Further, the President has put no new money out there for this initiative. The Federal government would open up even further, even though it can be done now, the opportunity for our faith-based organizations to compete for CDBG monies. That is, the money that goes from the Federal government to the cities, the Community Development Block Grant monies that area already being used by many of the community organizations throughout the country. Faith-based organizations would be in competition with these organizations, with the ability to discriminate. Faith-based organizations can already apply for CDBG monies. I know because I assist faith-based organizations in applying for money to do everything from build senior citizens' housing to have child daycare programs.

And so this would simply do two things or three: number one, open up the ability to discriminate, which some of us are adamantly opposed to, we have worked too hard, we have fought too long to open up the ability to discriminate; and it would allow for a kind of proselytizing where you could have all kinds of religious symbols and relics et cetera, et cetera, and perhaps even discriminate against one religious organization against another.

Unanimous consent for one additional minute.

I noted in my research on this that I think it was Pat Robertson who said, he did not like the faith-based initiative because he did not think some religious organizations were Christian enough and they did not deserve to be funded. We have another ex-member of Congress, Mr. Bob Barr, who pointed out a religious organization that he did not like. He said they should not be allowed on military bases. So you open up the whole discussion of what is and what is not a good religious organization; what is an acceptable religious organization. Is it all right for the AMEs as opposed to the Pentecostals? Do they worship Christ the way we want them to? I do not think we want that kind of government involvement in religion.

Finally, let me say this. There are some religious organizations now that are under investigation. Even with the walls that we have built up requiring that the 501(c)(3)s be used in order to operate programs, they have gotten into trouble because they mixed the money from the 501(c)(3) with the collection plate money. I daresay

to you that many ministers who do not have the infrastructure, they do not have the grantsmanship capability, they do not have the assistance to go after this money and to implement these programs. They are opening themselves up for indictment by the very people who are telling you that they want you to get into this business in a certain kind of way. I would submit to you that the government needs to keep its hands out of the church, and the government needs to make sure that there is a wall that separates the 501(c)(3) from the collection plate. Every minister who cares about their ability to do what they want to do in practicing their religion should be opposed to this faith-based initiative.

With that, I yield back the balance of my time, and I thank you, Mr. Chairman.

Mr. NEY. The chair recognizes the gentleman from Wisconsin, Mr. Green.

Mr. GREEN. Thank you, Mr. Chairman. I appreciate your leadership in holding this hearing. I have, as you might gather, a very different approach than the last speaker.

I think we need to recognize that government and faith-based organizations share many of the same objectives. At their best, all strive to help the less fortunate, both work to strengthen our communities, and both obviously try to make a better future for families. I have always supported the idea of returning to the charitable ideas that built America—local organizations, staffed by local people working on the ground to serve and solve local problems.

We in government can do everything in our power to foster a healthy environment for community renewal. We can pass laws. We can implement all kinds of programs and services. We can and we should plow more funds into these areas. In the short term, our efforts will do some good, but there can be no real, long-lasting community renewal unless we succeed in reviving the spirit of individuals, families and neighborhoods. That is something that government cannot do. That takes the hard work of individuals and local organizations like the faith-based groups that are represented here today.

Each year in America, we spend billions of dollars providing social services. It just makes sense that we find the most effective way to deliver those services to the folks who really need them, whether that is through government or whether on some occasions that may be through private groups. Government should not and cannot retreat from its critical poverty relief mission, but at least in some cases, local faith-based organizations can do that mission more effectively than the Federal government, lift more lives and save more streets.

At one time, faith-based organizations were at the core of efforts to improve our communities. They were very effective and have a proven record of success. Gradually, they have been pushed aside by big government, which has all too often proven to be a far less helpful alternative. The pendulum is just now beginning to swing back, as charitable choice is implemented. Under the leadership of then-Governor Tommy G. Thompson of Wisconsin, Wisconsin was one of the leaders in implementing charitable choice initiatives. HUD's proposal follows President Bush's executive order to give faith-based organizations more opportunities to provide these serv-

ices for the sake of the people they help and for the future of our communities.

I look forward to hearing from today's witnesses about their experiences in the community and with government, and how we can ensure their continued participation in providing services to those who are most in need.

Finally, I am particularly honored to have Bishop Daniels of Milwaukee's Holy Redeemer Church of God in Christ here today to describe the profoundly beneficial impact his congregation and its affiliated entities have had on the largest city in my home State of Wisconsin. I have had the pleasure of meeting Bishop Daniels, most recently last July when President Bush visited the Holy Redeemer congregation to see first-hand what great work they are doing. Holy Redeemer serves the Milwaukee community through a network of social services, from housing to community development, foster care, shelters, and food pantries, to workforce readiness training, counseling, and even providing health services.

Holy Redeemer has a history of serving the community with a level of dedication that I believe makes them truly unique. Bishop Daniels, it is a pleasure to have you before this subcommittee. I am proud of what you are doing and I look forward to your testimony.

Mr. Chairman, I yield back.

Mr. NEY. The chair recognizes the gentleman from Massachusetts for three minutes, Mr. Frank.

Mr. FRANK. Thank you, Mr. Chairman.

First, I want to express my disappointment that we have no representative of HUD here today. We had assumed that the majority would have invited the Administration, as in my experience it always has on an oversight hearing over a particular Administration's program. In fact, the gentleman from California and I wrote a letter to the Secretary because we had assumed he had declined to send a representative. He told us he had not been invited. I should note that we have remedied that lack of, I think, courtesy to the department involved by exercising our right under rule 11 of the House. So all the members on the Democratic side have exercised our right to ask for secretarial hearings, which is a matter of right, and we will have a HUD representative. I think it is a grave error not to have HUD explain some of these issues. As I said, I am surprised that the majority assume, frankly, that it would be a good idea not to have HUD here.

I am particularly concerned about a couple of aspects of this. One, this program is now going to be available under the Community Development Block Grant Program. That means every governing body of every community of 50,000 or more in America will be given the Federal funds to give to whatever religion they wish. I want to know how HUD is going to be supervising that; how they will supervise, for example, the rule that says you can build a house of worship with a mix of private and public funds, but you cannot worship in the public funds part. I am just wondering how we are prepared to police that, not that I think it is a good idea to get into a situation where you have to do that throughout the country, through CDBG.

I also want to reinforce the point that was made so well by the ranking member, the gentlewoman from California. Beginning in

1954 with the case of Brown v. Board of Education, one of the great things about this Federal government has been its dedication to abolishing discrimination based on race, based on religion, based on gender, based on age, based on handicaps. There have been court opinions. There have been statutes. There have been regulations. There have been executive orders. The President's proposal appears to me to be a turning back of that clock. It sanctions discrimination. Indeed, we have previously held that while you might have a right to discriminate purely privately, the receipt of Federal funds gives you an even greater obligation not to discriminate. This proposal turns that on its head. People who receive Federal funds as we have interpreted this, and it has not been refuted, religious groups who receive Federal funds for secular purposes will be allowed to discriminate on religious grounds. That seems to me a terrible retreat from the principle of non-discrimination to which we have been committed.

Indeed, the Federal funds, instead of giving you an added burden not to discriminate, become a license to discriminate. I know there are people who say, well, you should never burden people. I am reminded of the great words of the gentlewoman from California's distinguished predecessor, Mr. Gus Hawkins, who said when we reenacted a bill that the Supreme Court had narrowed, we said if you take Federal funds, you cannot discriminate, and people complained about interference. If you dip your hands in the Federal till, do not complain when a little democracy rubs off on your fingers.

Now, what we are being told is you can dip your hands in the Federal till, and you come away immunized from the responsibility not to discriminate. I would like to ask particularly some of the representatives of the religious groups because—and I will finish in one minute, Mr. Chairman—as the gentlewoman from California quite correctly pointed out, there is nothing in the law now properly interpreted which says that religious groups cannot get the money. The point is that they have to abide by the rules everybody else abides by. Apparently, there are some religious groups that have said, and I have heard this from members in this Congress, we cannot take the money to provide homeless shelters or drug treatment programs or soup kitchens or other important social purposes unless we can hire only our own people. The notion that there is something wrong about religious people joining in non-religious activities with people of other religions is profoundly disturbing to me. I would think the world would have had too much of that, too much of the notion of religious separatism.

So I really need to have answered for me what is it about people of other religions that makes people want to discriminate against them in hiring for purely secular purposes?

With that, Mr. Chairman, I look forward to the hearing, and I would note again that we have delivered the letter, and I look forward to our having—and I am sorry, apparently there was a misunderstanding—but we will have a second day of hearings under the rule in which we will get a representative from HUD because there are some important questions to be answered.

Mr. NEY. The gentleman from Georgia, Mr. Scott?

Mr. SCOTT. Thank you very much, Chairman Ney and Ranking Member Waters and Ranking Member Frank. I want to thank you for holding this hearing today regarding HUD's proposed rule on faith-based organizations.

I also want to thank the panel of witnesses today for coming before us and giving your important testimony. I look forward to hearing from faith-based organizations about their experiences in working with governmental agencies to address community needs. I believe that we should look to find creative ways to help more individuals in need in our community. And I believe that we have got to also be very concerned about keeping our constitutional protections against discrimination. Therein lies the rub. Where is the balance and how can we help smaller faith-based groups participate in HUD programs?

I come from an area in this country that—a district that is urban, suburban, rural. I know, as many of my colleagues do, we run for office every other year, and we know the pivotal role that churches play in our communities. And certainly in many, many communities, but perhaps nowhere more significantly a role the church plays than in those African American communities, and many lower-income communities where the church is the central entity in that community, around which culture and educational, social development, community development takes place.

So on one level the church is very attractive as a means, as a vehicle to do a tremendous amount of good. I have a number of ministers who have reached out to me and say, "I want to participate in this faith-based initiative; my church can qualify here; I want to do some things; I want to help drug addiction; I want to improve the community; I want to build a community center; I want to do these things—can you help me get some of that faith-based initiatives grants and money, and how do we go about this?"

But yet, the nagging question comes back to me of this balance. There have been some very disturbing questions raised by our ranking member, Ms. Maxine Waters, and certainly our ranking member, Mr. Frank of Massachusetts. We have got the find answers to those questions. It certainly disturbs me that HUD saw fit not to have a representative come here.

Mr. NEY. The time of the gentleman has expired.

Mr. SCOTT. May I just wrap up with one final point, please?

Mr. NEY. The gentleman may.

Mr. SCOTT. Thank you so much.

I think governing those answers have got to be this big, big issue of how do we deal effectively with the separation of church and state. Having been one who has fought that battle to the Supreme Court, there are three legs upon which that separation rests, around which pivots, hopefully, this discussion, for it to be meaningful. One leg is that it must be religious-neutral. What we do must neither advance a religious cause, nor restrain it. The other is secular—that there be a secular purpose; and thirdly, that there is no religious entanglement.

I am looking for answers to questions today so that I can take back to my constituency and make the right decision, and I look forward to receiving those answers.

Thank you, Mr. Chairman, for expanding my time.

Mr. NEY. The time of the gentleman has expired.

The gentleman, Mr. Watt, from North Carolina?

Mr. WATT. Thank you, Mr. Chairman.

I appreciate the chairman convening this hearing. Like Mr. Frank, I am disappointed that we do not have a representative here from HUD to answer some of the difficult questions that are being raised. I want to thank all of these witnesses for being here, but I doubt that they are going to be able to address the concerns that we have about it, because I think uniformly they are interested in the same thing that we are interested in, which is how do you get services into communities and do it in an effective way that gets results.

I heard my wife say a couple of days ago to somebody that she was giving up aggravation and stress for Lent. So I am trying to make sure that I do not get aggravated and stressed about this issue because the truth is, I know that religious institutions, churches have been providing services in my community and our communities for years and years and years before this President ever came along talking about some kind of faith-based initiative. The only difference I can discern is that as soon as he started talking about the faith-based initiative and showing up in some of the churches in our communities, a bunch of my ministers starting lining up at the door saying to me, "I want some of that faith-based money." They were surprised when I told them that at the same time the President was announcing his faith-based initiative, he was actually cutting many of the programs that they had been accessing to provide housing to our communities and social services to our communities, and after school programs to our communities, and that there was no such thing as a faith-based fund. So I am not sure exactly what the fuss was all about.

So you should know first of all that I have concerns about this because the total amount of funds that are available to do this stuff is being cut by the President, at the same time he is talking about having some faith-based initiative. He is going to need a bunch of help from churches and other institutions to get the same amount of services because you have less money out there to do it with.

Second, I think this is going to open churches up.

Mr. NEY. The time of the gentleman has expired. Would you like to wrap up?

Mr. WATT. No, I think I will just—I am going to follow my wife's entreaty. I am going to give up this aggravation and stress for Lent. I mean, you know, we have made the point.

Mr. FRANK. Mr. Chairman, unanimous consent that as a great admirer of Mrs. Watt, could I ask that this part of the record be sent to her?

Mr. NEY. Absolutely.

[Laughter.]

I would also note if we would like to give up aggravation and stress for Lent, we will recess for a month. That would probably help the country, too.

Mr. WATT. I do not think they are going to let me do that, but if you want to make that motion, I will second it.

[Laughter.]

Mr. NEY. With that, the gentleman from Alabama, Mr. Davis?

Mr. DAVIS. Thank you, Mr. Chairman.

Let me thank all of you for coming today. At the risk of echoing some of what has been said, I want to pause for a minute on the point my friend from North Carolina just made. If you look at a lot of the programs that you all are trying to bring within the purview of faith-based organizations, they have an interesting characteristic in common. Almost every single one of them is under the President's budget axe right now. I am struck by that. I am struck by the Administration's withdrawing with one hand what it extends with the other hand. I would I suppose issue this invitation to all of you. The same passion and zeal that you bring to the cause of including faith-based organizations in various government programs, I hope that you will take that same passion down to 1600 Pennsylvania Avenue or to whatever is the street of HUD, to let them know that these programs are vitally important regardless of whether faith-based organizations are allowed to participate or not.

I compliment you for recognizing something that I do think is very important, that there is a moral dimension to the social commitment and the social fabric we have in this country. I happen to come from the third poorest congressional district in America, and I talk a great deal about religion and faith, but I do it in this sense. I do it in the sense that when Matthew says as you do unto the least of these, you do it unto me. That is the sense that ought to animate, frankly, a lot more of our political debate. To the extent that all of you recognize that, and I think that all of you do, I hope that is the message that you take down the street, that as you do unto the least of these, you do it unto me.

I want to make a larger point. As someone who was born in Montgomery, Alabama, the home of the Montgomery bus boycott, which was a classic instance of faith firing a movement in this country, I have this old-fashioned belief, frankly, that churches do very well when they are independent, and that churches do very well when they do not have to come hat in hand to the Federal government seeking anything. When Martin Luther King was standing in the well of that church in Montgomery, Alabama in 1954, he could not pick up the phone and call Dwight Eisenhower's Administration. I happen to think that in some ways he was the better for that, and that his cause was the better for that.

So as we talk about weakening even symbolically the wall between church and state, I think we ought to recognize this. Churches get their moral firepower in some ways from their sense of independence and from their sense that their cause does not require the Federal government's permission or the Federal government's largesse.

I would make just one last point. I am deeply concerned that the whole notion of faith-based access has taken on an air of political patronage. I cannot tell you how many preachers in my community endorse certain politicians because they thought they would get the faith-based hook-up. There is something wrong with that. There is something wrong with political patronage having a religious cloak around it. And there is something wrong with men of faith and women of faith feeling that they have to meet some informal political litmus test. That is an inevitable cost of this erosion of the

wall. It is an inevitable cost of what this Administration is doing when it comes to weakening that wall.

I yield back. I thank you, Mr. Chairman, for extending my time.

Mr. NEY. Mr. Miller of North Carolina.

Mr. MILLER. Thank you. I will not use my entire time.

Both my maternal grandmother and my maternal grandfather had died by the time my mother was age four. She was raised in a Baptist orphanage in Thomasville, North Carolina. I understand very well the great works that we do when we act on faith, when we do truly love our neighbors as ourselves. But I do share many of the concerns that other members of the committee have raised about these proposed rules, that there is no reason that when religious groups are receiving Federal funds that they should not be held to the same rules as everyone else.

Mr. NEY. I thank the gentleman, and I want to welcome all the witnesses to Washington, D.C., the U.S. Capital. Thank you in advance for your testimony that will be so important.

I would like to start with the introduction of Dr. E. LeBron Fairbanks, President of Mount Vernon Nazarene University, Mount Vernon, Ohio, which happens to be in Knox County in the 18th district in Ohio, of which I am from. I was at the university just this past week and met a lot of good people up there. It is a wonderful university. They were preparing, in fact, the students to go do a lot of charitable work. Some headed out to New York and other parts of the United States. I just really want to give our warm welcome to Dr. Fairbanks today. And for the introduction of the next witness, I will yield to our ranking member, Ms. Waters.

Ms. WATERS. Thank you very much, Mr. Chairman. I would certainly like to introduce my good friend, Reverend Wendell Anthony, who is the pastor of Fellowship Chapel, Detroit, Michigan. But before I do that, I am not introducing, but I certainly want to welcome Reverend Kirbyjon Caldwell, pastor of the Windsor Village United Methodist Church in Houston, Texas. He is a friend. He is a friend of my husband's, and I am welcome in his church. While we may disagree philosophically and politically on some things, I want you to know you are welcome, and indeed I appreciate your friendship.

The introduction that I am making today is of Reverend Wendell Anthony, an extraordinary minister. He is a native of St. Louis, Missouri. He was educated in the Detroit public school system from elementary through high school. He graduated from Wayne State University with a BA in political science, and Marygrove College with an MA in pastoral ministry. He also attended the University of Detroit for advanced study and Black theology. Reverend Anthony is a certified social worker with the state of Michigan.

I would like to just share with you that he is the current President of the Detroit branch of the NAACP, the largest branch in the country, with a current membership of more than 45,000 persons. He is a single father with two daughters, and he has received so many rewards and so much recognition for his work. I have been to his church on many occasions. He is the member of a lot of boards and councils inside the city of Detroit, including New Detroit, Incorporated; Michigan Coalition of Human Rights; and the Minority State Health Policy Advisory Council. I am also blessed

to be invited each year to the NAACP banquet where he has about 10,000 paying individuals in one room, and four head tables of different colors around the auditorium. It is the most amazing thing that you would see.

Lastly, let me just say this. He is responsible for a lot of ministries and programs, but I happened to be at his church when he started and organized the Rwanda relief effort, and with the Detroit branch of the NAACP, raised nearly $1 million in monies for transport of victuals, food, clothing, medical supplies and aid to Rwanda, Goma and Zaire. This an extraordinary man whose ministry has touched so many lives in so many ways. He is operating out of his church a number of programs that I saw listed here that I cannot put my finger on at this time, but I welcome him and I want you to know that we are particularly advantaged by his presence here today.

Thank you very much for being with us, Dr. Wendell Anthony.

Mr. NEY. I want to thank the gentlelady. Also, I was so caught up in the great job that Dr. Fairbanks does up there with the staff and the students, I did fail to mention that he also has been associated with Nazarene education programs in Switzerland, the Philippines and Ohio since 1978, and he serves as a Presidential mentor in the Executive Leadership Institute of the Council for Christian Colleges and Universities.

I would like at this time to introduce Reverend Kirbyjon Caldwell, pastor of Windsor Village United Methodist Church. That is in Houston, Texas. He is the senior pastor of the Windsor Village United Methodist Church. Over the past 20 years, Pastor Caldwell has grown the Windsor congregation from 25 members to the largest United Methodist Church in the nation. Reverend Caldwell attributes the evolution of Windsor Village to his belief that the church must embrace theology, identify societal problems, and deliver solutions holistically. I want to welcome the witness.

We will yield to the gentleman from Massachusetts to introduce the next witness.

Mr. FRANK. Thank you, Mr. Chairman.

Our next witness is no stranger to these deliberations. Her name is Ellen Feingold. She is from Newton, Massachusetts and she is a very experienced individual, both in the field of civil rights and is a leader of a faith-based organization that has been very well-funded by the Federal government, although not as well-funded as she would like, but there is a lot of that going around. But Ms. Feingold, who has a very distinguished career, was during the Carter Administration director of civil rights in the Department of Transportation, so she has a particular expertise in the discrimination area. She was the co-chair of the commission we recently had appointed by a bipartisan congressional effort, on senior housing. And most relevantly today, she runs Jewish Community Housing for the Elderly. It has the word "Jewish" in it, and it has never been denied any money for that reason. It is an organization set up by the Jewish community in greater Boston to deal with housing problems. She administers a large number of units. It has continued to be called the Jewish Community Housing for the Elderly. It does not discriminate, but it's very much a faith-based organization. Even more, as she will note, she represents the association of

housing groups, all of which are faith-based, and none of which have, she tells us, suffered any discrimination. So she brings a multiple of important perspectives to this hearing.

Mr. NEY. I want to thank the gentleman, and yield to Mr. Green for the introduction of the next witness.

Mr. GREEN. Thank you, Mr. Chairman.

As I made reference to in my opening remarks, I am very proud to have here today Bishop Sedgwick Daniels. He is the pastor of the Holy Redeemer Church of God in Christ in Milwaukee, Wisconsin. Since 1986, Holy Redeemer has served the Milwaukee community not just as a place of worship, but as a true multi-faceted community resource. The services provided by Holy Redeemer include education, housing and social services. It is a true treasure in our community, and I welcome him here with the subcommittee.

Mr. NEY. The next witness is the Reverend J. Brent Walker, who is the executive director of the Baptist Joint Committee in Washington, D.C. Reverend Walker served as the general counsel for the committee for 10 years before becoming its fifth executive director in more than 65 years. Reverend Walker is an ordained minister and an adjunct professor at Georgetown University Law Center. Welcome.

The last witness is Douglas Kmiec. He is the dean of the school of law at Catholic University of America in Washington, D.C. Dean Kmiec also taught at Notre Dame and Pepperdine University. The dean served as principal deputy and assistant attorney general, office of legal counsel, in the Department of Justice from 1985 to 1989. He also received the distinguished service award from the Department of Housing and Urban Development in 1983.

I want to welcome all the witnesses. Without objection, your written statements will be made part of the record. You will each be recognized for a five-minute summary of your testimony. I would also note and I would apologize, I do have a conflict and Mr. Green, the vice chairman, will be chairing the committee, but it is a very important step you are taking in being here today.

Dr. Fairbanks?

STATEMENT OF E. LEBRON FAIRBANKS, PRESIDENT, MOUNT VERNON NAZARENE UNIVERSITY, MOUNT VERNON, OHIO

Mr. FAIRBANKS. Mr. Chairman and committee members, greetings.

Mount Vernon Nazarene University is located on a beautiful 401-acre campus in Mount Vernon, Ohio, a city of 15,000 people located approximately 50 miles northeast of Columbus. The university was founded in 1968 on property purchased by community leaders and given to the new faith-based institution. The strong town-gown partnership is even more powerful and dynamic today. Enrollment this year in our numerous academic programs exceeds 2,300 students, a significant increase from the 191 students in the founding class. Consistent with our motto, "to seek to learn is to seek to serve." Mount Vernon Nazarene University educates students to embrace their chosen vocations of business, education, ministry, social work or medicine with a servant's heart.

As I understand the current HUD regulations, institutions like Mount Vernon Nazarene University are ineligible for any Federal

housing assistance due to our faith-based nature. For the institution I serve, adequate quality housing on campus for low-income families, especially single parent and married students is crucial and currently unavailable. Since many of our students come from the Appalachian region of Ohio, West Virginia and Eastern Kentucky, and are first-generation college students, they simply cannot afford the typical rental facilities off-campus. I applaud and support the efforts of the Department of Housing and Urban Development to broaden the eligibility for Federally funded low-cost housing to include faith-based organizations and institutions. We only desire to be able to compete on equal footing for Federal assistance with all other eligible organizations.

I want to respond to the three specific questions asked of this panel. Number one, the proposed regulations, if enacted, as I understand them, would provide significant assistance. I recommend a clear definition and statement be added for faith-based higher education institutions such as Mount Vernon Nazarene University.

Number two, the partnership between the Federal government and faith-based institutions could be substantially strengthened. In our situation, the lack of affordable housing leads some students to choose a college or university without the definitive and critical link between service and learning.

Number three, approving the proposed HUD rule would enable faith-based higher education institutions to serve more low-income individuals who yearn to become self-sufficient.

Let me offer you an illustration of one woman's desire for self-sufficiency. Shannon, a Mount Vernon Nazarene University student, was single with a small child living in a previously funded, but subsequently sold HUD housing development. The neighborhood had deteriorated and become dangerous. Shannon wanted to move, but could not afford alternative housing. Each day after student teaching, she picked up her child from day care and literally prayed, "please do not let anything happen to me or my baby; help me survive another night." Shannon's story could be repeated by other Mount Vernon Nazarene University students. I am pleased to report today that Shannon graduated with honors from our university and is a dedicated, influential teacher in the Mount Vernon school district, working with children of low-income families.

I believe passionately in faith-based higher education institutions. In the past 35 years, the 11,000 alumni of the institution I serve have been challenged to make a difference in their world. Other faith-based institutions can echo our experience. We solicit your assistance in significantly increasing our potential for influence by approving and strengthening the proposed HUD regulatory changes for faith-based organizations.

Thank you.

[The prepared statement of E. LeBron Fairbanks can be found on page 12 in the appendix.]

Mr. GREEN. Thank you for your testimony.

Reverend Anthony, welcome.

STATEMENT OF REVEREND WENDELL ANTHONY, PASTOR, FELLOWSHIP CHAPEL, DETROIT, MICHIGAN

Reverend ANTHONY. Thank you. To the committee and to those of my colleagues who have gathered here, let me thank you first of all for having me here to say a word about this most critical issue.

First of all, let me just indicate at the outset that faith-based initiatives is the very initiative that causes us to be churches and institutions of faith. An initiative of faith requires a lot of work. We walk by faith, and not by sight, particularly when the budget is short all we have is faith, in many instances. So from the very outset, faith is the root which causes this tree to grow.

I do want to just say, as we remember executive order 11246, which prohibits the Federal government from discriminating against Federal employees, government contractors and subcontractors and grantees that have construction contracts on the basis of race, creed, religion, color, national origin or sex, has a long and distinguished history in preserving the equal opportunity of our nation. It even dates back to President Franklin Delano Roosevelt and his work with human rights activist A. Philip Randolph. As we look at the proposed rule change presented by HUD, it would unfortunately give religious organizations a special right to ignore laws and the Constitution of the United States which guarantees the freedom of religious expression, as well as denominational preference. It is my fear that the current language in the HUD proposed law suggests that religious institutions may retain their independence from Federal, state or local governments. It can be misinterpreted to suggest that religious institutions are exempt from the non-discrimination laws.

It is also my concern, particularly coming from an area in our nation where we have a large community of Muslim Americans, many who practice Islam, who are not a part of the Christian tradition, that these laws and this new regulation can somehow be misconstrued to allow us to discriminate against those who do not share our particular theological view. Scriptures teach us that God is no respecter of any persons. I am also concerned that this rule would present a barrier to dollars that are already reduced in the Community Development Block Grant programs, particularly as it relates to the dissemination of monies that go for organizations in our communities.

Further, I am concerned about the direct funding to religious institutions that proselytize and provide religious instruction at facilities where beneficiaries of such programs may redeem coupons, certificates or vouchers. The direct funding could lead to a mixture and a merger of funds from the regular offering plate to those that come in through Federal programs. Additionally, this carrot and stick approach—the carrot, of course, being, one, to gain political favors and support on the basis of financial contributions; the stick being in auditing or eliminating from financial services of a church or institution that in fact does not carry the political line.

I would like to recommend to this committee, however, that we do consider the increase of funding to faith-based organizations that are small, that need resources, that need financial resources, that need available technical assistance. We created a CDC, com-

munity development corporation, to do housing, to do education. We are in the process of building a new church. We are in the process of doing single-family homes, senior homes, establishing a community center and a retail component. We created a community development corporation to do those things. While we relish money and need support, we do not relish the government coming into our business and calling us to task on issues that have nothing to do with what we are doing in terms of faith-based development.

We also believe that there is a great need to provide funding and to restructure lending practices to small and low-income families. They can have an appropriate credit review to review the process of scoring, to review the process of how one secures mortgages, because we run into that when we want to provide housing to people who have low income. They have a problem with getting the very housing that we want to provide to them. So we hope and we pray that the government would not interfere with the work of the church. The church has been doing it for many, many years after the government intervention. So often the government gives us a little to get in, but not enough to continue. We believe that if we fund the appropriate organizations, we can accomplish the strengthening of America and its families.

[The prepared statement of Wendell Anthony can be found on page 14 in the appendix.]

Mr. GREEN. [Presiding.] Thank you for your testimony.

Reverend Caldwell, welcome.

STATEMENT OF REVEREND KIRBYJON CALDWELL, PASTOR, WINDSOR VILLAGE UNITED METHODIST CHURCH

Reverend CALDWELL. Thank you, Acting Chairman Green, and to Ranking Members Waters and Frank, and the balance of the members of the committee. Thank you so much for inviting each of us to be here.

Congresswoman Waters mentioned the fact that I know her husband, and indeed her husband and I grew up in the same 'hood, if you would, affectionately known as Fitzwater, Texas—Houston, Texas—Fitzwater, Texas. And while growing up in Fitzwater, while I had no idea I would I would become a pastor, if I may say, the Lord placed on my spirit, yea, even at a young age, that more churches need to take the sanctuary to the streets, take the sanctuary to the streets. That has really been our approach at Windsor. We have over eight or nine different 501(c)(3)s, which are independently managed and run, independent from the church, one of which is a CDC. We develop houses. We develop programs for persons with AIDS, schools, et cetera, et cetera.

To be very honest with you, we have been doing this for almost 17 years, and all of a sudden, abracadabra, it becomes faith-based, complete with all the political hoopla associated with it. I think it is unfortunate because it seems as if we are getting substance and style confused. I am happy to hear all the comments from the members of the committee, because it has really enlightened me. I am not a politician. I am not a lawyer. I am just a little pastor trying to help the people. But to hear the program referred to as almost mandatory, as if you have to get involved, I think is a little bit misleading. If you do not like the policy of the faith-based deal,

then do not apply. Some folk have mentioned it is very Christian, and I really abhor that statement that was made by the gentleman you mentioned, Congresswoman. That was very unfortunate because based on my interpretation, the Administration is very clear that this is truly an ecumenical initiative, and in fact it is even for folk with no faith. You do not have to believe in anything or anybody, and you can still apply for funds.

I think that gets to the very core issue, which is, as I understand it, the Administration in general, HUD in particular wants to level the playing field so that whosoever will, if you could, could and would come. It is HUD's desire to (A), remove whatever regulatory or administrative barriers that may be present; and (B), enhance or increase the capacity for building more programs for more people on a more equitable basis.

I could go on and on and on, but I will close. I am not real sure how much time I have left, but anything we can do to improve the community and increase social entrepreneurship in helping the least, the last and the lost, without crossing the lines of the Constitution, I think we should get after it. Again, I am not a legislator. I leave it up to this sage and insight wisdom of those of you who are seated here how to work that out. But please, do not deny those who are trying to make a difference. Contrary to some popular opinion, Windsor and the 501(c)(3)s have not received a lot of money, in fact any money from the Administration, but we want to make certain—that is not to say we will not try to get some. But it is to say that I think there are more smaller entities in America that could really benefit, not just from the financial support, but from the technical support which the faith-based initiative offers, as I understand it, is ready, able and willing to lend.

Thank you very much.

[The prepared statement of Kirbyjon Caldwell can be found on page 15 in the appendix.]

Mr. GREEN. Thank you. You may not have the wisdom of a legislator, but I know we do not have your wisdom, and that is why we have invited you here. We appreciate your testimony.

Ms. Feingold, welcome.

STATEMENT OF ELLEN FEINGOLD, PRESIDENT, JEWISH COMMUNITY HOUSING FOR THE ELDERLY

Ms. FEINGOLD. Thank you so much for inviting me. I am so pleased to be here.

Jewish Community Housing for The Elderly has facilities that are in both Congressman Frank's and Congressman Capuano's district. I am sorry Congressman Capuano is not here to hear us. We have found no obstacles for a faith-based, a faith-committed organization in accessing Federal funds. We own and manage over 1,000 units of housing for low-income seniors. Their average age is over 80. Their average income is under $10,000. Over half of them are eligible for nursing homes, but they can stay in our buildings because of the services we are able to access for them. We are proud of our record of nondiscrimination, both in employment and also in the residents that come and live in our buildings.

In addition to representing my own organization, I am also representing the American Association of Homes and Services for the

Aging, with over 5,600 nonprofit organizations of whom 75 percent are faith-based. I am also representing the Association of Jewish Aging Services, obviously all of whose organizations are faith-based. We are talking about well over one million seniors living in the housing that these faith-based organizations are now providing with HUD money. It does not sound like a problem that needs solving. No member organization of either of these associations has ever complained of obstacles on the basis of their being faith-based organizations. We do bring an extra measure of commitment, quality and value to what we do, but we do it on a nonsectarian basis. Everybody is welcome.

When I was co-chair of the Commission on Affordable Housing and Health Care Facility Needs of Seniors in the 21st Century, the Seniors Commission heard testimony all over the country. We heard people praising the faith-based organizations that had created housing, but what we heard much more than that was, we need more. Where is the money to build more? The organizations are there. They are competent. They are committed. They are ready. There is no money to do it with. That is what we need to be focusing on.

Ultimately, the commission put out 50 recommendations that might make it better, easier to create more senior housing. Not one of them deals with the issue of obstacles to faith-based organizations because it was never presented to us as a problem and none of the members of the commission several of whom are in fact running faith-based organizations, saw it as a problem. We strongly oppose any actions that would lower the standards in any way for the facilities that are built with Federal funds. We oppose the use of funds to create spaces that are sectarian. We are well able to function within our faith in the spaces that come under our nonsectarian guidelines.

I brought with me something that I want to give to you. At Jewish Community Housing for the Elderly, we have a community Seder. Passover is coming. This is the Haggadah we use. For those of you who have never been to a seder, it is a service that recounts the Exodus. This Haggadah is in four languages—English, Hebrew, Russian and Chinese—because the participants in our seders, all of whom are voluntary, come in all colors, shapes, denominations and languages. The seder is obviously entirely funded with charitable funds, not with government funds. The books are produced with charitable funds, not government funds. It is one of the high points of the year. So is Chinese New Year, which our Chinese residents celebrate as a religious holiday. That is funded by private funds. We have no obstacles to respecting and celebrating the diversity of religions within our communities.

The stark issue, again, is the lack of funds. We would build more in a heartbeat if we had more money. The 202 program is, I believe Secretary Martinez alone has——

Mr. GREEN. Ms. Feingold, if you could wrap your testimony up.

Ms. FEINGOLD. I apologize. I just want to say that it is your constituents who call us and call you looking for more housing. We do not believe there is an obstacle. We do not believe this rule will make the slightest bit of difference. What will make a difference is more funding.

Thank you very much.

[The prepared statement of Ellen Feingold can be found on page 16 in the appendix.]

Mr. FRANK. Mr. Chairman, just briefly, I would just like to say a the end of this, it would now be appropriate if we asked Ms. Feingold only four questions.

Mr. GREEN. Okay.

[Laughter.]

Ms. FEINGOLD. That sounds like the seder.

Mr. GREEN. Bishop Daniels, welcome. Good to see you again.

STATEMENT OF BISHOP SEDGWICK DANIELS, PASTOR, HOLY REDEEMER INSTITUTIONAL CHURCH OF GOD IN CHRIST, MILWAUKEE, WISCONSIN

Bishop DANIELS. Thank you. Let me also say that I spoke with Bishop Patterson this morning, the presiding bishop of our church, who supports the comments that I shall make at this time.

Thank you, Mr. Acting Chairman, and distinguished members of this august body. I am pleased to be here today to testify to you with respect to the efforts of Holy Redeemer Church of God in Christ and its affiliated entities and connection with the development of efforts to improve the lives of citizens in our city, Milwaukee, Wisconsin.

Mr. Chairman, perhaps a little background may be helpful to you. We founded Holy Redeemer ministry 17 years ago with eight persons, and have grown this ministry to over 5,000 persons, representing people of every background and skill. Our organization has more than 39 affiliated entities which are involved in self-improvement activities such as the creation of a 140,000 square foot youth center in a neighborhood densely populated by low-income students; development of multiple public-private operations; school initiatives which have resulted in improvement of education for some of the most economically distressed youngsters in Milwaukee. We have now educated and are now educating more than 750 students daily, including students at risk and other students in our schools.

The development of a health clinic has been our focus on bringing the marvels of medicine directly to the community that we serve through a clinic located on our campus, which is affiliated with a faith-based organization called Covenant Health Care—a large health care provider in Wisconsin. Our campus is a redevelopment of a 10-acre site which was previously distressed and in fact was vacant. We have turned this site into a vibrant complex and campus serving literally thousands of people each day who receive a variety of services—meals, job training, health education and care, top-flight elementary and adult education.

Our mission, then, is to have a 24/7 outreach to this community. The demographic data for this community reflects that not only are we providing services, but this has resulted in the employment of hundreds of people. The success stories are indeed marvelous. One of the best examples is one of our school administrators, who through many efforts used welfare outreach services to college, educates herself, ultimately becoming a college graduate. And after several years of working as a teacher, she became one of our school

administrators on our campus. In fact, President George W. Bush visited our campus last year to get a first-hand view of the remarkable effects we are having on people and changing lives.

The examples go on and on with respect to how we have changed the lives of people. We have also been critically involved in the housing initiative in our community. When we consciously moved our campus to the economically depressed central city area, many were surprised that we did so and thought that we might move to a tranquil suburban environment. But we intentionally did not do so because we really knew where the needs were. One of the things we found was that many people had housing needs—elderly people, people who were in transition, people who were searching for the American homeownership dream. We therefore, with the cooperation of the city of Milwaukee and through the use of Federal tax credits, developed a premier low-rise elderly housing project, which has received many recognitions, including a special award from the Federal Home Loan Bank Board. The facility is over-subscribed and there is a tremendous demand for us to provide additional facilities for seniors.

We also obtained and rehabilitated many homes in the area where we are, for transitional needs of our people. Many of these people have used this program as a springboard to putting their lives back together, and they have moved on to very productive citizenship. In connection with the local bank, we have also instituted——

Mr. GREEN. Mr. Daniels, we need you to wrap up, please.

Bishop DANIELS. Very good. That is a good thing to tell a minister.

[Laughter.]

——our homeownership seminar and progressive program.

In summary, I think that it is important to know that people that have visited our campus have noted that we have been able to create an improved housing stock in our neighborhood, created an environment with literally hundreds of people from our neighborhood have meaningful life-supporting jobs. This is the commission to which we are called, and we hope that you through your legislative powers will recognize that such faith-based initiatives such as ours are vital in many communities throughout the country.

Thank you.

[The prepared statement of Sedgwick Daniels can be found on page 18 in the appendix.]

Mr. GREEN. Thank you very much.

Mr. Walker, welcome.

STATEMENT OF REVEREND J. BRENT WALKER, EXECUTIVE DIRECTOR, BAPTIST JOINT COMMITTEE, WASHINGTON, D.C.

Reverend WALKER. Thank you, Mr. Chairman, and members of the subcommittee for this opportunity to speak to you about a matter as important as religious liberty and the separation of church and state.

Although as the chairman mentioned, I serve as an adjunct professor at Georgetown University Law Center, I speak today only on behalf of the Baptist Joint Committee on Public Affairs. The Bap-

tist Joint Committee has always advocated a well-balanced and sensibly centrist approach to church-state issues. We take seriously both religion clauses in the First Amendment—no establishment and free exercise—as essential guarantees for our God-given religious liberty.

We appreciate the good works of religiously affiliated nonprofits, in careful cooperation with government entities such as HUD. But we believe that religion will be harmed, not helped, by efforts of government to fund pervasively religious enterprises or otherwise to advance religion. This is precisely what the Administration is trying to do through its proposed regulations. Government-funded religion is the wrong way to do right. Government's attempts to level the playing field, as the metaphor goes, usually results in religion getting leveled by government. Religion is different and it should be treated differently. It is treated differently in the First Amendment—sometimes deserving special accommodation under the free exercise clause; sometimes special or unique constraints under the establishment clause.

We are particularly concerned with three aspects of this proposal. One, the proposed rules open the door for government-funded religion. It is a settled constitutional principle that government may not fund pervasively sectarian or pervasively religious organizations and enterprises. The proposed rules ignore the pervasively sectarian doctrine. And even where an organization is not pervasively religious, but only religiously affiliated, it cannot use government funds to finance specifically religious activities. The proposed rules try to answer this constitutional requirement by prohibiting the funds from being used to support, quote, inherently religious activities, unquote. But the problem with this nebulous, novel and ill-defined concept is that the establishment clause prohibits activities which, while perhaps not inherently religious, may be administered in various religious ways and religious context in training seminars and counseling services and other activities.

Number two, the proposed rules allow for religious structures to be built with government funds that violate the establishment clause, as Congressman Frank mentioned. The rules specifically permit structures to be used for both religious and secular purposes, as long as the funding is proportionately reduced to equal the percentage of religious use. This approach creates the potential for excessive entanglement between church and state. It raises the specter of accounting problems and logistical difficulties and burdensome auditing and recordkeeping, and would most certainly create the need for perpetual monitoring. The rule change on government funding of religious structures opens a can of constitutional and administrative worms that will be inimical to the autonomy of religious organizations, and promote the very excessive entanglement which the First Amendment was designed to prohibit.

Third, the proposed rules permit discrimination on the basis of religion in hiring in government-funded programs. Now, we support title VII's exemption for churches, allowing them to discriminate on the basis of religion in their employment practices. But the proposed rules permit discrimination even in programs substantially funded by government. While allowing religious organizations to discriminate in the private sector is a welcomed accommodation of

religion, to subsidize religious discrimination is arguably unconstitutional and in any case an unconscionable advancement of religion. How odd for the Administration to use the language of nondiscrimination to promote a policy that leads to government-funded discrimination.

In summary then, government should not fund organizations that are pervasively religious. Government may fund religiously affiliated ones, organizations as you have heard that serve out of religious motivation to be sure, but not in a way that integrates religion into its programs, involves religious worship or instruction, education and proselytizing, or discriminates on the basis of religion in hiring or serving beneficiaries. Any religious programming by these groups should be separately offered and privately funded and voluntarily attended. To the degree the existing HUD regulations serve these ends, they should be retained. But to the extent the proposed HUD regulations vary from these principles, they should be rejected.

Thank you very much.

[The prepared statement of J. Brent Walker can be found on page 19 in the appendix.]

Mr. GREEN. Mr. Walker, thank you. Thanks so much.

Mr. Kmiec, welcome.

STATEMENT OF DOUGLAS W. KMIEC, J.D. DEAN, CATHOLIC UNIVERSITY OF AMERICA SCHOOL OF LAW, WASHINGTON, D.C.

Mr. KMIEC. Thank you, Mr. Chairman.

I am pleased to respond to the subcommittee's invitation. I have spent most of my life teaching or writing or thinking about constitutional questions. It was my privilege to serve as President Reagan's head of the office of legal counsel in the Department of Justice and to spend part of the first Bush Administration there as well. So I will address myself mostly, if not entirely, to those constitutional questions suggested by other witnesses and that may be raised by the members.

Let me begin with my conclusion, and that is that these regulations do not transgress the guarantee of freedom of religion found in the First Amendment of the United States Constitution. Instead, they do three things which are perfectly consistent with constitutional case law, as well as text, and that is first, they establish the principle of nondiscrimination. Government funds shall neither be distributed giving favoritism to nor discriminated against religious organizations. Significantly, this applies to both the Federal government and state and local governments that are often in partnership with the Department of Housing and Urban Development administering funds. Both are enjoined to treat religious organizations under the same eligibility requirements, and in my judgment not only is this fully constitutional, this is a principle that is unassailable and long overdue.

Second, it explicitly provides that funds supplied directly to a faith-based organization may not be used to support inherently religious activities such as worship, religious instruction and proselytization. Importantly, from the standpoint of religious freedom and nondiscrimination, the regulations make clear that even

though government funds cannot be used for these purposes, nothing precludes a faith-based organization from continuing inherently religious activities from nongovernmental sources. Analogously, the regulations ensure that faith-based organizations can retain their independence, something which I have heard other members of the panel speak eloquently to, allowing for example, the continued use of a religious organizational name, as well as the inclusion of religion in the organization's definition, practice and expression.

Similarly, if HUD funds are provided for acquisition, construction or rehabilitation, and these are provided for under the regulations for structures that are either wholly secularly or of mixed use, that government funding cannot exceed the pro-rata secular portion. That aspect of the regulation merits constitutional inquiry, and I know in the question and answer period we may spend some time with it. I think it deserves a close look.

Thirdly, no current or prospective beneficiary of a government-funded service shall be discriminated against on the basis of religion or religious belief. No genuine faith-based organization would ever think about discriminating against someone who is a beneficiary on the basis of their religious belief. The men and women who are at this table are at this table because they believe they were called by a higher power to serve their fellow man in specific and very necessary ways. They are not in the practice of turning people away, and the HUD regulations establish that and affirm that proposition.

In summary, Mr. Chairman, the HUD regulations eliminate a variety of constitutionally unwarranted regulations of the past. In the past, regulations have categorically excluded religious organizations with the demeaning terminology "pervasively sectarian organization." The Supreme Court of the United States in its most recent holdings has made clear that the terminology "pervasively religious or sectarian organization" is a demeaning one because it comes out of a 19th century hatred for religious believers and immigrants to our country. These regulations, importantly, separate us and put distance between that odious practice and the present day.

Thank you, Mr. Chairman. I would be happy to answer any questions.

[The prepared statement of Douglas W. Kmiec can be found on page 21 in the appendix]

Mr. GREEN. Thank you, Mr. Kmiec, for your testimony. I appreciate it very much.

Questions—Mr. Kmiec, let me begin with you. The standards that are in the proposed rule with respect to opening up service provision to organizations which may be faith-based, how does that compare to the standards that are in the existing welfare reform law passed by the Clinton Administration? Do you know? Can you answer that?

Mr. KMIEC. Well, I am not prepared to look at the specific Clinton proposals, but the one thing that is true is that what HUD has done here is follow a template that Congress has approved before several times in the context of charitable choice legislation. So to the extent that charitable choice worked its way into those specific

Clinton Administration regulations, I think these are quite comparable.

Mr. GREEN. Thank you. I would like to go back—Reverend Caldwell, we have had testimony from some of the other witnesses that there are no obstacles or hindrances to faith-based organizations or community organizations accessing Federal funds and providing services. You started off with some smaller organizations which have provided services. Have you encountered obstacles? Have you seen challenges in working with the Federal government?

Reverend CALDWELL. No, sir. We have not encountered any obstacles because we have not applied for any funds. But it has been the experience of some of my colleagues that they have encountered obstacles, and that is one reason I am here today.

Mr. GREEN. Let me ask you this, then, why is it that you have not applied?

Reverend CALDWELL. Well, my shortest and most intelligent answer is that in the past we have not wanted to get involved in the red tape, to be honest with you. We are not afraid or ashamed to be audited. I think any church worth its salt ought to be open to Mrs. Jones and Mr. Booker and the U.S. government. But the impression is that it has been multilayered, and we have just kind of gone it alone—period, new paragraph. We intend to apply for funds regardless of what happens to this particular legislation.

Excuse me, I erred. We did receive a $500,000 grant from OCS during the Clinton Administration to help build what is called the Power Center, where we took an old dilapidated K-Mart building and gutted it. It now provides employment for over 247 persons, has a $14.5 million annual economic impact cash flow on the community. It is an amazing example of how private enterprises and nonprofit entities can and I think must come together to make an indelibly divine difference in the community. But that was an application filed by our Pyramid CDC, not by the church.

Mr. GREEN. When you took a look at, or when you weighed the costs and the benefits of making application for Federal funds, and again largely have chosen not to do so, was one of your fears that in order to meet all the requirements and sort through the red tape, that you would have to hire additional people?

Reverend CALDWELL. That is absolutely correct. In addition to that, to be very honest with you, I had heard such nightmarish stories about the process, we simply chose not to get involved. Again, you should not go based on hearsay. But we have so many things going on. We have nine or ten different 501(c)(3)s, 14,000-member church, half of them think they are the pastor on any given good day, so we have a lot of dynamics happening, and the last thing we needed to do was to allocate an inordinate percentage of our intellectual and financial resources to go after a grant which we may not even get.

Mr. GREEN. Bishop Daniels, could you relate some of Holy Redeemer's experience in working with the Federal government in terms of Federal funds? Have you seen red tape and obstacles?

Bishop DANIELS. Oh, definitely. For instance, there are some hurdles that we are overcoming even as I speak now. There was an abandoned building next door where there was flight from a manufacturing company. We wanted to turn that into, as opposed to it

becoming a drug house and loitering et cetera, into a youth center. We were clearly told that if we were to receive any assistance through funds, whether it is city, that would be processed through CDBG and the State of Wisconsin and the Federal government, that it could not and would not by any stretch of the imagination be given to the church, and it could not be given. There were a number of hurdles that we had to overcome as a result of that. It was clear as we began to work through ultimately the title of that property had to be a separate organization altogether, to work to save the kids. What people do not understand is at 3 o'clock, all of those kids become our kids. It does not matter where they attend or what they do, we were just trying to get them off the streets and from killing one another, and getting them into constructive programs.

Mr. GREEN. Thank you very much.

The gentlelady from California is recognized.

Ms. WATERS. Yes, first of all let me thank all of our ministers and heads of organizations who are here today, and just really commend you on the programs that you already have and the work that you have already done, long before you heard about anything called a faith-based initiative. Let me just say to Reverend Kirbyjon Caldwell, 17 years, and how many nonprofits do you have over there?

Reverend CALDWELL. We have nine nonprofits.

Ms. WATERS. Nine nonprofits, 17 years, a CDC, and you did it without the government.

Reverend CALDWELL. So far.

Ms. WATERS. So far, you have done it without the government.

Reverend CALDWELL. Yes, ma'am.

Ms. WATERS. There were no obstacles to you setting up a 501(c)(3).

Reverend CALDWELL. That is correct.

Ms. WATERS. You can have a nonprofit corporation.

Reverend CALDWELL. That is correct.

Ms. WATERS. There is no obstacle to you applying for CDBG monies in the city of Houston.

Reverend CALDWELL. No obstacles locally?

Ms. WATERS. Yes.

Reverend CALDWELL. Not to my knowledge.

Ms. WATERS. That is Federal money that we send down to the cities for them to give out to the communities to do all these kinds of programs—senior citizens, child care, et cetera. There are no obstacles to you or any other religious organization in applying for those funds under your 501(c)(3). Is that correct?

Reverend CALDWELL. None to us. I cannot speak to the other organizations.

Ms. WATERS. Well, here is the point that I am making.

Reverend CALDWELL. Yes, ma'am.

Ms. WATERS. I think it was Mr. Kmiec who said that it is important to have this faith-based initiative to get rid of and establish the principle of nondiscrimination for religion. Title VII does that. The Constitution does that. You are not discriminated in any way, and you are protected by Title VII and government law. What I think has been the misunderstanding about this faith-based initia-

tive is this. Somebody is telling ministers that somehow you should be able to administer these programs without having to set up a 501(c)(3) or a separate organization; that you can commingle it with the church; and that you can use some of the laws that are on the books for religious organizations that allow you to hire within the religion in the same way when you use Federal money. That is where the rub, the disagreement comes in.

Much of what is being described is red tape that has nothing to do with discrimination against a religious organization. It does not matter. When you get money from the Federal government, you are going to go through some red tape. Nobody is going to reach in the government's pocket and hand anybody any money. You are going to go through some red tape. You are going to be scrutinized, and John Ashcroft is going to indict you if you spend the money outside of the regulations and the laws. And that we have to make very clear to everybody, that there will be no way even under faith-based initiative that you will be able not to be able to account in ways that we all would want to account. So we need to be clear about that. There is no discrimination now against religious organizations in competing for money.

The other thing is, does anyone here believe that there is a new pot of money called faith-based money? If so, raise your hand. Okay, we are clear about that. There is no new money called faith-based money. Technical assistance that was mentioned by Reverend Anthony, we can all agree on. We are not against religious organizations getting money. Again, we assist and we help people to set up CDCs and EDCs and even help to set up nonprofit organizations in order to do that. Do we all agree that a lot of churches could use some technical assistance in order to set up a 501(c)(3) or EDC or CDC in order to provide services, Reverend Anthony?

Reverend ANTHONY. Yes, congresswoman, we do. I come from Detroit, and what we are doing—I am affiliated with an organization called New Detroit, Incorporated. What is part of our charge is to assist groups to do just that; to develop 501(c)(3)s. I also come from an area where the faith-based initiative has been used by some in administrative offices as a carrot and a stick approach. By that, I mean if I look at the history of those in Michigan who have benefited from the state's version of faith-based initiative, it has been those who are particularly friendly to the past Administration. The past Administration that was in office for 12 years used that as a measure by which to access the African American community. I am very clear about that. We are very clear about that.

I do not think you will find any of us who oppose churches working with the government in partnership to do community development. We have always done that. The problem is I come from a state that has a $1.8 billion deficit, and within that confine we are looking now at churches to make up some of the areas where the government may not be able to provide services. Where are we going to get the money to do that? From our offerings, from our coffers? The problem that we run into is that we can do CDCs. Reverend Caldwell can do CDCs, but there are many other smaller churches and organizations that cannot. They need the assistance. Monies need to be provided through agencies that can assist them

in terms of developing their programs and professional staff development.

We get that all the time. There is an old African proverb that says even the smallest deed is better than the greatest intention. I think we may have a good intention, but what we need is some small deeds, those deeds being money and capital and sense.

The other concern that I have is I look at what we see coming from many religious leaders today who are in various denominations. As we look at what is happening in the world, I think that it sets a precedent for some individuals to mis-use that initiative. I do no think that the vast majority of folk may be subject to that, but I do think that it opens up the door for people to discriminate——

Mr. GREEN. I must ask you to wrap up.

Reverend ANTHONY. ——particularly as it relates to the area where I come from, which has a high degree of Muslim Americans who are not antithetical to America, but I know if certain folk get monies, they will not be able to participate in those programs.

Mr. GREEN. Thank you. The gentlelady's time has expired. The gentleman from Massachusetts, Mr. Frank.

Mr. FRANK. Mr. Kmiec, let me ask—you did not touch on the question of employment discrimination. As you read this, would the recipients be allowed to take the money for the secular purpose and agree to hire only members of their own religion?

Mr. KMIEC. I agree with Congresswoman Waters that it is a fundamental guarantee of religious organizations in our society to be able to maintain their character by the people they hire.

Mr. FRANK. So the answer is yes.

Mr. KMIEC. That is correct.

Mr. FRANK. Now, so you believe that as this is constructed, you said you agree with Congresswoman Walters. Well, a Congresswoman named "Walters" might have said that. I do not think Ms. Waters said it. The question is——

Mr. KMIEC. I believe Congresswoman Waters said quite eloquently——

Mr. FRANK. I am sorry. I only have five minutes, Mr. Kmiec. Excuse Mr. Kmiec, I only have five minutes. I have to ask you this. And I want to ask the other members who are in favor of this, I am troubled, I must say, by the notion that it somehow would erode or corrode or detract from a religious organization engaged in secular good works, because that is obviously what we are talking about here—that religious organizations engaged in good works that were funded with Federal money for secular purposes—I am troubled by the notion that it is wrong to ask them to associate with people of other religions. That just seems to me to be such a troubling notion. Let me ask, beginning with Mr. Fairbanks. Why would it be a problem if you were to do something purely secular, to hire people of other religions?

Mr. FAIRBANKS. Let me say that we are involved with our students in a variety of projects, and they are for sure not associated with religious groups.

Mr. FRANK. I have a specific question. Why would it be a distraction to you—how would it take away from your mission if you got

money to provide drug treatment or help for the homeless and you had to hire people of other religions? How would that hurt?

Mr. FAIRBANKS. If a person would affirm their belief in what we are intending to do with our mission, our vision, and embrace those, then we could——

Mr. FRANK. What do you mean by—you mean your general religious mission or your specific one for which you got the money? Let me pass on to Reverend Caldwell. Reverend Caldwell, do you believe that if you got Federal money to do drug treatment or youth work or any of these other things that were secular, that it would be a problem if you had to hire people of other religions?

Reverend CALDWELL. Mr. Congressman, we work with folk of big faith, little faith and no faith.

Mr. FRANK. So you are not asking for this. In other words, if we were to pass this without allowing discrimination in employment, that would not be a problem for you?

Reverend CALDWELL. Until I get it, I really do not know, but I do not think so. Let me quickly say——

Mr. FRANK. That is the only question I had to ask about. Let me just ask again now to Bishop Daniels, when you set up that youth center next door, and you had people maybe teaching the kids to play basketball or do other things, would they have to be only people of your religion? Would it detract from your mission if you had to hire people without regard to their religion?

Bishop DANIELS. No, it does not detract, but we cannot even get to that point.

Mr. FRANK. I understand that. Many of us are in favor of that. But let me ask, why do you think it is bad for religion to have to hire people of other religions, for running the youth center?

Bishop DANIELS. I did not say it was bad.

Mr. FRANK. I know you did not, but I am asking Professor Kmiec to explain his view that it is, apparently.

Mr. KMIEC. I think the way I would approach it, congressman, would be this. Every citizen of this country contributes to the general fund that this body has to allocate. We generally do not say when a taxpayer comes up——

Mr. FRANK. No, you are evading my question. I am sorry. We only have five minutes. I am asking you——

Mr. KMIEC. ——they generally do not say——

Mr. FRANK. Professor, you know better. You know what the rules are.

Mr. KMIEC. ——what religions are——

Mr. FRANK. Mr. Chairman, I ask you to tell the witness to stop the filibuster.

Mr. GREEN. Let's have some decorum here.

Mr. FRANK. The witness is not answering the question.

Mr. GREEN. I believe he is attempting to answer the question.

Mr. FRANK. No, he is not.

Mr. GREEN. He may not be answering the way you like it.

Mr. FRANK. No, he is not answering. The question is, what is wrong in asking a religion—how does it hurt a——

Mr. KMIEC. What is wrong with it, congressman, is that you are making religious believers into second-class citizens. We all contribute to the general funds of the United States of America. We

all have an interest in seeing them fairly apportioned. These individuals at this table have a special interest in the well-being and welfare of the——

Mr. FRANK. You are not answering my question.

Mr. KMIEC. I am answering your question directly——

Mr. FRANK. No, you are not.

Mr. KMIEC. If you wish to use a political polemic——

Mr. FRANK. You are evading the question. The question is, how does it hurt their ability to do that if a Christian has to hire Jews, if Jews have to hire Protestants, and Protestants have to hire Catholics—how does that hurt them in the performance of their mission?

Mr. KMIEC. Well, it hurts them in this sense. It fundamentally changes who they are. Congressman Scott said it very well in his opening remarks and questions, and I know he has serious questions about these constitutional issues as well. But one of the things he said very thoughtfully is that people come to religious leaders in their community because they trust them, because they do good, because they are the cement of families and the things of community. These people who are those religious leaders cannot just shed their religious——

Mr. FRANK. Excuse me, but——

Mr. GREEN. The gentleman's time has expired.

Mr. Scott of Georgia?

Mr. FRANK. Will the gentleman yield to me for 30 seconds, please?

Mr. GREEN. Mr. Scott?

Mr. SCOTT. Yes, I would be glad to yield.

Mr. FRANK. Thank you. I just want to point out how totally nonresponsive that answer was. Of course, these are good people. In fact, one, two said they did not have to discriminate. You are imputing to them, frankly, something I would not impute to them. You are telling us that for them to be able to do their mission and remain true to their religion, they have to say that there is something wrong with associating with people of other religions. I find that frankly much more anti-religious than any other criticisms I have heard, that somehow if you are going to be a religious institution, it is not enough to have co-religionists in your worship; it is not enough to have co-religionists in your religious community; but when you then decide to perform a secular function, being forced to associate with non-believers somehow detracts. I find that a very odd way to defend religious leaders.

I thank the gentleman for yielding.

Mr. SCOTT. Thank you very much. You are certainly welcome.

My concern is trying to figure out exactly why these proposed changes are being offered. It seems to me that these restrictions and these regulations were written into the HUD requirements for a very important reason, and that was to maintain that very important separation of church and state. Now, if you could answer for me, of what value and why would we want to remove the requirement that employment be religious neutral? Why would we want to require that the person being employed must be a member of that church or that organization or that religion, when in effect this is not private money, but all of the people's money from all of

the different religions made up in this wonderful United States? Why is that of benefit? Why do we need to do that? Why do we need to change this rule?

Mr. KMIEC. I do not really think we are changing the rule, in fairness, congressman. I think what we are doing is applying the principle of Title VII that as very carefully, as Congressman Waters pointed out before, navigated the two provisions that are in the Constitution. We have to remember that the Constitution does not have a separation of church and state. It has two simultaneous guarantees of free exercise of belief and practice, as well as, as the reverend said before me, protection against an establishment of religion. So my direct answer to your question, congressman, would be this. We do not ask other citizens to shed their most fundamental beliefs to participate in Federal programs. These citizens you have before you raise money from private sources as well as public sources. They ought to have both available to them to do good work. They should not have to fundamentally go through a metamorphosis and to deny who they are in order to qualify.

Mr. SCOTT. But aren't they able to do that now? For example, the rule that we are trying to remove states this. It says a primarily religious organization receiving funds under the program will not discriminate against any employee or applicant for employment under the program on the basis of religion, and will not limit employment or give preference in employment to persons on the basis of religion. It does not say you cannot do one or the other.

It seems to me that this is a very carefully worded, fair placement in the rules to allow you to do exactly what you want to do, but it also prevents you from discriminating. That is the rub here.

Mr. KMIEC. I certainly agree with regard to any of the other prohibited categories that we find, for example, in executive order 11246, and nothing that HUD has proposed here would invite any form of racial discrimination, national origin discrimination and so forth. But we have a special constitutional protection for freedom of belief. I think what HUD's regulations very thoughtfully are trying to do is to say, in regard to that special protection, we are saying to these people they do not have to change their character.

Congressman Waters, again, asked one of the witnesses if he had ever applied for a Community Development Block Grant. The fact of the matter is, as I understand it, the statutes that frame that program have a specific provision in it that say recipients, contractors thereunder, will not discriminate on the basis or draw distinctions on the basis of religion. Well, if the reverend wanted to accept those monies—he indicated that he never had—it would fundamentally change the nature of the organization that he represents.

Mr. SCOTT. Let me ask this, if I may, Mr. Chairman, what are some of the problems that you are experiencing now that requires us to mandate these changes? To my way of reading this, it clearly would remove——

Mr. GREEN. The gentleman's time has expired.

Mr. SCOTT. Ten seconds please—a much needed protection against discrimination. I cannot get an answer to why we are doing this. If we could get some answers, if we could get some reasons, if we could get some evidence that showed this is what we are trying to get to, to remove——

Mr. GREEN. The gentleman's has expired.

The gentleman from North Carolina, Mr. Watt, is recognized for five minutes.

Mr. WATT. Thank you, Mr. Chairman.

I am going to try assiduously to follow my wife's lesson.

Mr. KMIEC. I already violated that.

[Laughter.]

Mr. WATT. No, no. If you would just stay out of this, I think I can do it a lot easier.

[Laughter.]

Because I think I see everybody else on this panel kind of moving away from you. You have marginalized yourself so much that I cannot imagine that there is anybody else on this panel that agrees with what you say. If there is, I am going to give them a chance to tell me that, but I am going to do it without getting stressed out and aggravated.

Mr. KMIEC. Thank you for that vote of confidence.

Mr. WATT. Let me just pose this simple hypothetical. You have an after school program that the Federal government is trying to teach kids to read better. And the most qualified teacher to teach the child to read happens to be a person who is not affiliated with your denomination. You have somebody in your denomination, your church, your congregation that, if you just look at him, somebody outside your congregation is better qualified to teach that course—teach the child to read. Is there anybody on this panel other than Mr. Kmiec who believes that you ought to be allowed to discriminate against that better qualified teacher because they are not a member of your denomination or your congregation? Anybody else on this panel take that position?

Reverend WALKER. Assuming there is government funding.

Mr. WATT. Assuming government funding, yes.

Reverend WALKER. If they are living off the collection plate, certainly Title VII——

Mr. WATT. Right, right. Title VII applies to you in your religious activities. You know, you are exempt. You obviously are not going to hire a Jewish rabbi to preach at a Baptist Church. That is what that was designed to do.

Well, I mean, not on an ongoing basis. You invite him in as a guest minister, but I just want to know, is there anybody on this panel who thinks you ought to be able to discriminate against the most qualified person to teach that after school program.

Bishop DANIELS. Could I just respond?

Mr. WATT. Yes, sir.

Bishop DANIELS. I think that if you just contain it to the question of the most qualified person to teach is just one thing. But there is a whole other dynamic in faith-based in the real world, and that is very possibly the person that also teaches may also have to be the person that will have to open the door and close the door, and take care of the property and answer to. So there are a lot of components that may be included in that, rather than just that one——

Mr. WATT. So basically what you are saying is you would redefine the job and maybe make it more inclusive, so that the person that you were interviewing may not be the most qualified person after you added all that criteria. I understand that. I mean, I am

not trying to get you around that. But there is something that Mr. Kmiec said that I just fundamentally disagree with. This thing—shedding their fundamental beliefs—I mean, we quit allowing people who had racist views to carry out their fundamental beliefs. I mean, it is illegal. Do you understand what I am saying?

Mr. GREEN. The gentleman's time has expired.

The chair now recognizes the gentleman from Alabama, Mr. Davis, for five minutes.

Mr. DAVIS. Thank you, Mr. Chairman.

Let me pick up on the hypothetical from Mr. Watt. Let me go to his Catholic day care school that he talked about. Does anyone on this panel believe that if, let's say hypothetically, a Catholic day care school accepted money from the Federal government, but if say a Southern Baptist family from Alabama moved into the neighborhood and the child from the Southern Baptist family wanted to go to that Catholic day care center, does anybody think that if that institution was getting public money they ought to be able to keep that child out?

Okay. As we say in the courtroom, let the record reflect nobody agreed with that. So given that, now let's expand that hypothetical. Let's say that a whole bunch of Southern Baptists or a whole bunch of Jewish children moved into the neighborhood around a Catholic day care center. And let's say that we got to the point where the only folk in the Catholic day care center were Southern Baptists and Jews. Does anybody on the panel think that if that Catholic day care center was getting public money, they ought to be able to throw out the Baptists and the Jews. Does anybody think that?

Okay. Let the record reflect nobody thinks that. So given that, if it does not fundamentally change, Mr. Kmiec, the nature of an institution if a Catholic day care center ends up servicing only Jews and Southern Baptists, how does it change their character if they end up hiring Jews and Southern Baptists?

Mr. KMIEC. Universities and day care centers and religious organizations create themselves because they have a body of belief that they want to propagate. They think it is very important. I suspect that if there is a Catholic day care center, as there are in many urban inner-city areas in this country, that their populations frequently are non-Catholic; it has turned out that the private schools that have stayed in the inner-city areas in this country have been the Catholic schools, in many cases, and oftentimes their students do not share Catholic belief. But the fact of the matter is that the priests and the brothers and the sisters who stay involved in that teaching, stay involved in that teaching because they believe their faith has something specific to say, even if there are nonbelievers in front of them. But they would not stay in the business if you told them that they could not share their religious beliefs with those people who come to them, whatever the religious perspectives of the students may be.

Mr. DAVIS. Let me interrupt you just to make this point and move to my next question. I think what makes your position collapse when it relates to discrimination is a very basic point. If it does not change the character of an institution to make it serve people of a different faith, I find it impossible to see how the char-

acter of the institution is somehow contaminated if it has to absorb people of a different faith. Because you cannot make the Jews and Southern Baptists in that school believe whatever is being taught to them, but you still have to serve them. So if that, again, does not contaminate, I do not see why employment does.

Let me move to a totally separate point in the limited time that I have. What really bothers me about a lot of this is a very simple conundrum that I think a lot of the government would be faced with. As all of you know, it is difficult getting Federal grants under the best of circumstances. Now, if somebody does not get a Federal grant right now, they might think it is because they did not fill out their paperwork; they might think it is because of any number of reasons. If we move full-scale in the direction of these faith-based initiatives, if a given church does not get a grant, my concern is that that church will think that it somehow did not fit the state's test for religions, or that that church will think, well, we were not religious enough or holy enough. That perception that I think would exist with a lot of churches is, in my mind, one of the most pernicious things about this movement. Can any of you address that concern—the fact that even if we are not purporting to do it, we are possibly creating a perception that some churches are good enough and some churches are not; that some churches serve the state's mission and some churches do not. Can anybody address that issue?

Reverend ANTHONY. Congressman, I hear what you are saying, but I would come down in another perspective. I do not think it would be so much that we would think we are not holy enough, because politicians cannot determine our spirituality. I would simply say that many of us might think we are not political enough to the degree that the monies that have been allocated are connected to those who are friendly to those in Administrations that are doing the allocating. As for me and my house, we do have people there who are not of our faith and of our tradition. I think in many cases, churches may not even want folks who are members of the church because when it comes time to firing folk, you have to deal with their whole families. It creates a problem.

And often we share congregations and denominations with different preachers and that sort of thing, but in terms of on Sunday morning, I am preaching Jesus. So you know that when you come. Now, on Monday, Tuesday, Wednesday, Thursday, Friday and Saturday in terms of the church at work, that is through our community outreach center, that is through our housing program, whosoever will will come on Sunday morning, but you know what you are getting when you come there. So I think that the real rub is that may be those who take advantage of the fact that if you do not come down theologically the way I come, then you cannot play in the game. And that is where the problem is.

Mr. GREEN. The gentleman's time has expired.

I thank all the witnesses for their testimony today, and for their answering questions. The chair notes that some members may have additional questions for this panel that they may wish to submit in writing. Without objection, the hearing record will remain open for 30 days for members to submit written questions to these witnesses and to place their responses in the record.

Mr. FRANK. Mr. Chairman, also we have some statements from others that we would like to place in the record as well.

Mr. GREEN. Without objection.

The hearing is adjourned.

[Whereupon, at 4:55 p.m., the subcommittee was adjourned.]

STRENGTHENING AMERICA'S COMMUNITIES: EXAMINING THE IMPACT OF FAITH-BASED HOUSING PARTNERSHIPS—DAY 2

Monday, April 28, 2003

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON HOUSING AND
COMMUNITY OPPORTUNITY,
COMMITTEE ON FINANCIAL SERVICES,
Washington, D.C.

The subcommittee met, pursuant to call, at 4:00 p.m., in Room 2220, Rayburn House Office Building, Hon. Robert W. Ney [chairman of the subcommittee] presiding.

Present: Representatives Ney, Renzi, Watt and Frank (ex officio).

Chairman NEY. Today the subcommittee will hold a second day of hearings to examine the effect of faith-based housing partnerships, specifically HUD's January 6th, 2003, proposed regulation that would provide more opportunities for faith-based organizations to address the needs of the poor and also distressed neighborhoods.

Although enacted into law in four previous statutes, charitable choice has been the subject of persistent discussion and debate. President Bush's initiative in the 107th Congress to rally the armies of compassion elevated the debate into the national spotlight. As the President stated when he announced his faith-based initiative, the government has a solemn responsibility to help the needs of poor Americans in distressed neighborhoods but does not have a monopoly on compassion.

Earlier this month, the Senate passed Senate Bill 476, which is aimed at making it easier for religious groups to compete for Federal grants and be responsive to the needs of their communities. The measure calls for $12.7 billion over 10 years in new tax incentives for charitable giving and additional spending for social services.

This legislative action follows in the wake of a series of initiatives announced by the Bush Administration which culminated in HUD's early January proposed rules change. The Department's proposed regulation would accomplish the following: A, permit the consideration of religion in employment practices by religious organizations; B, terminate the general requirement that provided services be free from religious influence; and, C, prohibit government consideration of applicant's religion when distributing funds.

When it comes to lessening the effects of poverty in addressing the needs of those who are suffering, some of the most creative and passionate volunteers are affiliated with faith-based organizations.

It should come as no surprise that faith-based organizations have the experience and knowledge to meet the social needs of their communities in a more compassionate manner than the Federal Government itself in Washington. They know their communities, they know the families that need assistance, and they know what housing and services are available in their neighborhoods.

In an effort to craft more bipartisan legislation, the Bush Administration agreed to the Senate's removal to any mention of religion in the bill.

I appreciate the Administration's willingness to work with Congress and look forward to continued cooperation as we consider this important endeavor.

I would also like to thank the members of the subcommittee for their commitment and passion towards this issue. No matter where they are at on the issue, they have been obviously passionate and committed, as well as witnesses, you today, all of you for your time in coming here.

With us today to discuss the Administration's view is Mr. John Weicher, Assistant Secretary for Housing, an FHA Commissioner at HUD, also more famously known as a former Ohio State University professor; as well as HUD's Chief of Staff, Frank Jimenez; and Anthony Streeter, the Director of Faith-Based Programs for HUD.

Welcome, gentlemen. We look forward to your testimony today.

I would like to recognize the gentleman from Massachusetts, Mr. Frank.

Mr. FRANK. Thank you, Mr. Chairman. I appreciate your calling this hearing. There was a misunderstanding as to whether or not we had wanted HUD to testify in the first round of this, and I appreciate the agreement of everyone to move forward today.

I would say that the fact that there aren't more members here is not a sign of lack of interest. It is a sign of a lack of roll call votes on the floor of the House. Members make plans, sometimes in advance. This hearing came afterwards.

I am glad to be joined by my colleague from North Carolina. I appreciate the Chairman making a point of being here. Trying to fit hearings in is tough,and I wish this didn't have to be on a day when there weren't votes, but I have no complaint about that. I had agreed to it, because it is hard to fit them in. I appreciate having this much.

A couple of points, and I will be also outlining some of the questions I hope you will answer.

First, I want to stipulate that we agree that having faith-based groups involved in the provision of services is very important. The position of many of us is that that has been going on.

I will be submitting for the record, and I ask unanimous consent, Mr. Chairman——

Chairman NEY. Without objection.

Mr. FRANK. ——to put in a couple of statements, one of which I think is quite relevant, from the National Community Development Association, the people who administer at the local level the CDBG programs. They make the point that there are in fact now literally thousands of faith-based groups across the country that do participate through CDBG.

The question is not whether or not faith-based groups participate.

[The following information can be found on page 131 in the appendix.]

Mr. FRANK. At our last hearing we also had people from the American Association of Homes and Services for the Aging, a majority of whom are religious-based.

And I was just invited, and couldn't make it because of scheduling, to an event honoring Monsignor Michael Groden who heads the Archdiocese Office on Housing in Boston.. They have been a superb user of Federal housing programs and have helped build a great deal of housing. This is the official archdiocese office.

So that is not the question. The question is, for many of us, do religious groups, to be able to participate, need to be able to discriminate with those Federal funds against nonmembers of their religion? That is a very critical question.

Another question has come up with regard specifically to the HUD rule, and that is the feasibility and advisability and maybe constitutionality of the commingling of funds, and that is one the things that I want to address here.

We are told that this program, as the President has announced it, assumes that people could get money and build a building that would be partly for religious purposes and partly for nonreligious purposes; and the amount that the building can be used in one way or the other would depend on the amount of money being put in.

Now, one question I have is, is that physical or temporal? That is, since some religious institutions only have worship 1 day a week, maybe 2 or 3 days a week, does that mean that you could take a building and build it, and if you prayed in it 1 day a week, then you could use the whole building 6 days a week for other purposes? Or is it a physical separation?

Another question is, how do we enforce some of these rules with regard to Community Development Block Grant entitlement communities? Frankly, some people have said that the Federal Government will be careful with the religious groups that it deals with, and that it won't deal with groups that might be problematic. But under the Community Development Block Grant I assume I understand correctly that an entitlement city under this rule could take the money and give it to any religious institution it wanted to. Does that mean that the Church of Scientology, the Nation of Islam and others would be eligible for the money and could then hire only its own members?

Finally, I was pleased to see Secretary Martinez say at a recent hearing here, actually, on the down payment assistance program, that he did not think that we were abridging anybody's civil rights. Well, I have some questions about that. We have an Executive Order, 11246, that goes back to Franklin Roosevelt and A. Philip Randolph that has been interpreted by people as applying to the Community Development Block Grant program, and the Executive Order here says it no longer does.

We also have this question: There is language in here that says the recipients will be independent from State and local governments. Does this purport to preempt or to say that State and local laws, we don't abide by them?

And then we have this issue: Congress could, by statute, preempt State and local laws. But is the Administration contending that the Executive Order—that the President, by himself, can affect the binding nature of State and local laws?

If we have State and local laws through which a grantee would ordinarily be subject, is it the position of the Administration that this Executive Order diminishes the force of those State and local laws? Because I think we run then into serious constitutional issues.

So those are the questions that I will be returning to.

Thank you, Mr. Chairman.

Chairman NEY. Thank you.

Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman.

I think every single one of the questions that my colleague from Massachusetts, Mr. Frank, has raised are important issues; and I certainly subscribe to them. But the ones I probably have the most serious concerns about have to do with the ability of religious organizations to discriminate in their employment practices and whether the effect of allowing them to discriminate on the basis of religion may, in effect, be a substitute for allowing them to discriminate on the basis of race.

In my part of the country, 11 o'clock on Sunday morning unfortunately is still the most segregated hour in America; and if you say to particular religions that—or churches, for that matter, even within the same religion, that in the conduct of your nonprofit governmental function you have the capacity to discriminate on the basis of religion, the effect of that is to be saying to them that you have the ability to discriminate on the basis of race.

I personally and the people that I represent and the people that have marched and fought and struggled against that kind of discrimination for years and years and years cannot abide that result. It is that simple for me.

I am not an opponent of faith-based initiatives. In the 22 years of legal practice that I had before I was elected to Congress in 1992, I was probably regarded, certainly within the State of North Carolina, perhaps nationally, as one of the lawyers who did more religious representation of institutions, church litigation, church reconciliation—you name it, I did a little bit of it. There are still institutions throughout my Congressional District—housing developments, nonprofit developments, senior citizen developments, health care developments—all of which originated with a 501(c)(3) organization that emanated from a church.

It is not something that I am alien to. I think it is absolutely important and necessary. But in none of those situations did they have the capacity through their 501(c)(3) organization to discriminate, either on the basis of religion or race.

I just think—we have taken this faith-based initiative and made it—and it has become a hot button needlessly, because the capacity was already there to do everything that one could do that a religious-based organization through a 501(c)(3) could do except discriminate and accept commingled funds.

Those are the two components of this that I think are unnecessary and unwise and possibly unconstitutional, and I don't know

why we have even got to get there to accomplish the governmental purpose that we have set out to accomplish, because we have been accomplishing it for all of these years.

So I am concerned about that. I appreciate the chairman giving me the opportunity to make an opening statement, and I will be asking questions to try to clarify these gentlemen's position on that and HUD's position on that and, presumptively, this Administration's position on that.

Thank you.

Chairman NEY. Thank the gentleman.

We have also been joined by the gentleman from Arizona, Mr. Renzi.

I want to again thank all of the members for coming here today to have the hearing.

If there is no further request for statements, we will begin with Mr. Weicher. Welcome.

STATEMENT OF JOHN C. WEICHER, ASSISTANT SECRETARY FOR HOUSING, HUD, ACCOMPANIED BY FRANK R. JIMENEZ, CHIEF OF STAFF, OFFICE OF THE SECRETARY, HUD, AND RYAN STREETER, DIRECTOR, CENTER FOR FAITH-BASED AND COMMUNITY INITIATIVES, HUD

Mr. WEICHER. Thank you, Mr. Chairman, Mr. Frank, Mr. Watt, Mr. Renzi, for the opportunity to join you this afternoon to discuss this major initiative of President Bush and Secretary Martinez. Because of our long history of partnering with faith-based and community organizations to provide housing and other important services, the initiative is especially relevant to HUD's work. I am here on behalf of the Department to present our views on the role of faith-based organizations.

With me are Ryan Streeter, Director of the HUD Center for Faith-Based and Community Initiatives, and HUD Chief of Staff Frank Jimenez, an alumnus of the University of Miami.

With the committee's permission——

Chairman NEY. Is that Florida or Ohio?

Mr. WEICHER. Wrong one, sir.

Chairman NEY. Well, we beat them.

Mr. WEICHER. With the committee's permission, I will be referring many questions to them as the principal persons with the most detailed knowledge on this subject in the Department.

The Administration's goals are clear and achievable: to provide the best possible quality in government-funded service; to support the essential work of all charities, whether secular or religious, regardless of their size; and to ensure a level playing field for all groups and organizations that are working to transform lives.

These community caretakers fulfill a critical need in this country. As President Bush said in October of last year, an America without faith-based organizations caring for people in need is an America without hope.

One of the President's first official acts was to sign Executive Order 13199, which created the White House Office of Faith-Based and Community Initiatives. He directed the Office to lead a determined attack on need by strengthening and expanding the role of faith-based and community organizations in addressing the Na-

tion's social problems. The Office reaches into every community of need, while giving special attention to homeless individuals, prisoners, at-risk youth, addicts, impoverished senior citizens and families moving from welfare to work.

Through Executive Order 13198, the President also created Centers for Faith-Based and Community Initiatives in several Federal agencies, including HUD. By order of the President, these agencies have conducted extensive reviews of regulations to identify barriers to participation by faith-based and other community organizations in our programs.

The HUD Center coordinates the work of the Department as we seek to eliminate these barriers so that faith-based and other community groups can compete for Federal funds on an equal footing with other charities.

We have discovered a number of common obstacles, beginning with a prevailing perception among Federal officials that collaboration with religious organizations is legally suspect.

Also, some programs essentially bar religious organizations from applying for funding. For instance, HOME funds may not be granted to religious organizations, quote, "for any activity including secular activities."

Also, there are inappropriate and extensive restrictions on religious activities, creating another barrier that restricts faith-based organizations from receiving HUD funding. I discuss some examples in my prepared statement.

Both President Bush and Secretary Martinez are working to remove these barriers.

The President took decisive action when he signed Executive Order 13279 on December 12th of last year. The order sets out clear principles ensuring that all eligible social service organizations are able to compete on an equal footing for Federal financial assistance. Under the order, Federal programs must be implemented in such a way that they do not violate the establishment clause and the free exercise clause of the first amendment to the Constitution.

HUD is actively implementing the order to ensure that our policies and programs create a level playing field for faith-based organizations.

As a first step, Secretary Martinez is actively encouraging the participation of grassroots organizations in all grant applications. These organizations touch many lives on the local level, yet are frequently overshadowed in the grant-making process by their larger and more visible cousins.

Our SuperNOFA for 2003 clearly states that these faith-based and other community organizations are eligible to apply. We are conducting Webcasts specifically designed to educate these providers about the SuperNOFA and the application process. We have installed a toll-free telephone number to help them understand the application process, and we continue to make grant applications easier for potential new partners to understand.

Education is key to helping faith-based and other community organizations successfully navigate the grant-making process. To ensure that this message is heard, we have appointed faith-based and community liaisons in each of HUD's 10 regional offices and 81

field offices. Their job is to reach out to faith-based and other community groups that lack experience in working with HUD.

HUD is coupling educational outreach with administrative reforms that are removing the barriers to effective partnerships with America's community of faith.

We have reviewed each of HUD's major programs to determine the degree to which they comply with the requirements of Executive Order 13279.

To tie these efforts together, HUD issued a proposed rule on January 6th of this year that will revise our regulations for eight programs and remove unwarranted regulatory barriers to the equal participation of faith-based organizations. The intent of the proposed rule is to ensure that HUD programs are open to all qualified organizations, regardless of their religious character. The rule would also clearly establish the proper uses of grant funds.

The public comment period for the proposed rule closed March 6th. We are in the process of carefully reviewing the comments we have received.

No matter how big or small the organization, no matter its level of experience in competing for Federal grants, no matter its religious affiliation or secular nature, HUD wants every potential partner to have the opportunity to compete for Federal resources. If a faith-based or other community organization wants to work with us, and if they can do the job, then we will welcome them with open arms and do everything we can to help them succeed in their communities. In this way, we will provide the best possible service to those who suffer in poverty and despair; and we will help to expand society's capacity to respond with compassion to human need.

Thank you, Mr. Chairman.

Chairman NEY. I want to thank the gentleman for his testimony. The other two gentlemen are available if the members have questions of them.

[The prepared statement of John Weicher can be found on page 39 in the appendix.]

Chairman NEY. My questions are going to be centered on the process. Because HUD will be one of the first, obviously, of the agencies to be coming out with rules. So what will be the process in order to finalize this rule?

Mr. WEICHER. It is the normal rulemaking process, Mr. Chairman.

As I mentioned, we have received comments on the rule. The comment period closed a little less than 2 months ago. We are required to review the comments to consider how we might modify the rule in light of the comments; and I might say that in my experience at HUD there is—any proposed rule is going to be revised in final if there are comments. That is just the norm.

Chairman NEY. So you would expect some changes?

Mr. WEICHER. I would, because we always wind up having changes.

Then we will—the final rule—we will draft the final rule, and the preamble to the final rule will explain how we reacted to each of the major kinds of comments we received in the comment period.

That rule is then reviewed by OMB. The formal review period for OMB is 90 days, and after their approval it is submitted to the Federal Register and becomes final.

Chairman NEY. Do you have any anticipated guesstimate of when it will be finalized?

Mr. WEICHER. No, Mr. Chairman. I can't really give you an estimate on that. We certainly will be moving on it as expeditiously as we can, but I can't really give you a date on it.

Chairman NEY. Thank you.

Mr. Frank.

Mr. FRANK. Mr. Weicher, I know this is not your primary area of responsibility. I appreciate that we have a group that includes it.

Under the Community Development Block Grant statute, as it now exists, Section 109, states: No person in the U.S. shall, on the ground of race, color, national origin, religion or sex, be excluded from participation in, be denied the benefits of, CDBG." Now that is the statute.

As I read the Executive Order with CDBG, it says that you cannot be denied the benefit of a program, but it leaves out employment. Is it the Administration's intention to allow grantees to discriminate based on religion under the CDBG program, that is, to decline to hire someone not of their religion, if they choose to?

Mr. WEICHER. Mr. Frank, with your permission, I will refer that question to Mr. Jimenez.

Mr. JIMENEZ. Thank you, Mr. Congressman. We are actually grateful for this opportunity——

Mr. FRANK. We have 5 minutes. So what is the specific answer?

Mr. JIMENEZ. The answer is no. Nothing in the proposed regulation or in the Executive Order attempts to override the CDBG statute on the point of religious hiring.

Mr. FRANK. Okay. So under the CDBG program, recipients could not discriminate in hiring based on religion, correct?

Mr. JIMENEZ. That is correct. That is because Congress has passed a more specific statute.

Mr. FRANK. Right. But in every other HUD program you could?

Mr. JIMENEZ. It is my understanding that there is one other specific statute governing the HOME program where Congress has in that specific statute, as with CDBG, revoked the freedom that it gave religious organizations in Title VII, the freedom to take religion into account when hiring.

Mr. FRANK. So the position of HUD then is that you recognize that where there is a statutory requirement that there be no discrimination based on religion, then there cannot be under this Executive Order, but in every other HUD program you could discriminate based on religion as a grantee?

Mr. JIMENEZ. Yes, sir. This proposed rule covers six other——

Mr. FRANK. So the answer is yes.

Secondly, with regard to preemption or diminution of State and local laws, what—there is language in here—it doesn't say specifically is that they don't apply. It says they will retain their independence from State and local laws. I must say that as we debated that, as I recall, a couple of years ago on the floor of the House and

in committee the general understanding was that that probably meant that they wouldn't have to comply with them.

What is the effect? If there is a State or local law requiring nondiscrimination based on sexual orientation or marital status or religion, does that apply or not apply?

Mr. JIMENEZ. Neither the proposed regulation nor the Executive Order, as you indicated, specifically addresses the issue of preemption.

Mr. FRANK. That is what I am asking you now. What do you think it means? How are you guys going to interpret it?

Mr. JIMENEZ. It is the Administration's position that—first of all, preemption questions are highly unlikely to arise because——

Mr. FRANK. They just did. Excuse me. I hate to contradict you. I just raised it.

Mr. JIMENEZ. In the real world outside of Congress.

Mr. FRANK. Let me just say that you are wrong. We have had this with regard to San Francisco. We have had it with regard to New York City. The notion that there won't be some conflict between local laws and Federal policy—in fact, we had a debate on the floor of the House about whether or not we would change the law because of a domestic partnership issue involving San Francisco. I think it was under some Federal program.

So I need to know the answer. What is your answer?

Mr. JIMENEZ. I believe you are correct. They will arise from time to time, just not regularly. But the answer is that preemption questions are to be decided be the courts on a case-by-case basis.

Mr. FRANK. They won't be decided by the courts unless someone gets them into the courts.

What is the Administration's position? You say the Administration is not going to take a position?

Mr. JIMENEZ. If a State or local ordinance specifically targets faith-based organizations——

Mr. FRANK. Mr. Jimenez, stop beating around the bush. You know better. If you don't want to answer the question, tell me. You are not here under subpoena. You can refuse to answer the question. But let's not waste time.

We are not talking, as you know, about laws that specifically target religious groups. We are talking about an antidiscrimination law of general applicability at the State or local level that a religious organization may feel impinges on it. Is it the Administration's position that they cannot abide by that because of the language here about their independence from State and local governments?

Mr. JIMENEZ. Neither the proposed regulation nor the Executive Order take a position on that question.

Mr. FRANK. So the Administration has no position on it?

Mr. JIMENEZ. No, sir. Not at this time.

Mr. FRANK. Let me ask Mr. Weicher. If I am a Mayor of a city, I ask HUD: What does it mean? Or if I ask the general counsel, what would you tell me?

Mr. WEICHER. Mr. Frank, it will be—when the issue is raised, it would be addressed by the Department and by the Administration. It would not be addressed by my office, of course, but it would be addressed.

Mr. FRANK. You are here as HUD's representative.

Mr. WEICHER. Yes. But, as you know, I am not a lawyer.

Mr. FRANK. That is very disappointing. Let me give you the answer I don't think you want to give. The answer is, yes, you want it to be preempted, but you are a little bit unclear about the ability to preempt a State law by Executive Order. I must say, when this arose in the context of the statute, it was clear that that same language was intended to be preemptive. And, because you are now dealing with a situation where you can't preempt you are going to duck the question.

But I people ought to be clear that that is the—that was the intention, that is essentially what you have in mind.

Mr. JIMENEZ. Sir, if it were specifically intended to be preemptive, there would have been language to that effect.

Mr. FRANK. No, because if you got too explicit you could run into some kinds of problems. It was specifically intended to be preemptive. But let me ask you, as a matter of policy, do you think it should or shouldn't be?

Mr. JIMENEZ. My personal opinion, I believe——

Mr. FRANK. No, not your personal opinion, HUD, the official Administration position. You are not here personally. You are here as a representative of the Administration.

Mr. JIMENEZ. As I said earlier, each case would have to be determined on the facts of each specific case. So we would make that determination on a case-by-case basis. We would look at the local or State ordinance in question, we would look at the terminology, the intended effect, the scope of the ordinance or the law, and then apply the law as we understand it at that time. But we don't see this rule or the Executive Order as having a blanket preemptive effect one way or the other.

Chairman NEY. The time of the gentleman has expired.

Mr. Renzi.

Mr. FRANK. It is a waste of time. Go ahead.

Mr. RENZI. Thank you.

Thank you all for your testimony.

Maybe following up a little bit with the ranking member, we have got 501(c)(3) organizations out there who currently, under Title VII, are allowed to hire based upon religious preferences. But when they receive the Federal moneys they can't deny services, they can't deny providing their best efforts to any organization, so they cannot discriminate based on religion; is that correct?

Mr. JIMENEZ. The proposed regulation makes very clear that, for all eight of the grant programs covered by the regulation, the recipient of the funds cannot take religion into account when determining who receives their services. So beneficiaries must have access to that organization's services regardless of religious belief or practice.

Mr. RENZI. So we are not going to discriminate on how the Federal monies are used. We are going to set up a law that allows them to use the money. Is there any oversight then that follows up a year or 2 years from now? Is there any kind of Federal accounting that says, okay, not only are we going to say you can't do that but we are going to come back later and make sure that you are not doing that?

Mr. JIMENEZ. The purpose and the intent of the regulation is to place faith-based organizations on an equal footing with secular organizations. HUD intends to treat faith-based organizations in the very same way that it treats secular organizations. That means that all grant recipients, secular and faith-based alike, will be required to sign general assurances of compliance with all applicable laws and regulations; and then, in addition, there will be the periodic compliance review that HUD performs on all grant recipients, not just secular or faith-based.

Mr. RENZI. So you will actually be able to know that up front, provide the language that says you can't do this, you are going to be able to do the oversight and watch how the monies are spent?

Mr. JIMENEZ. Yes, sir.

Mr. RENZI. So there really is no threat of discrimination here, particularly if we have that oversight feature?

Mr. JIMENEZ. Not at all, sir.

Mr. RENZI. Let me move to a question that I had. I was really privileged before I came to Congress to insure 1,700 non-profit organizations across the United States, insure more crisis centers for domestic violence against battered, abused women and children than any other insurance agent in the country; and I learned a lot from it.

When I would go to the conventions, in particular one in Seattle one year where the domestic violence center leaders were there, I saw a split as to whether or not there should be a reliance on Federal funding, nonprofit organizations getting on the Federal dole, maybe at times losing some of their—or losing, maybe not spending as much time or strength of effort in building their donor base, which is a lot of, I believe, if I am right, a lot of where these nonprofit organizations get their revenues from.

Is it—what is your feeling on—any of the panel—on setting up a Federal dole or setting up a Federal pipeline to help these organizations? Are there unintended consequences that they have become too reliant?

Mr. STREETER. That is really a decision that each of those organizations needs to make for itself. I think, for our purposes here, the interest we have is in—as Mr. Jimenez said, leveling the playing field for faith-based organizations.

We wanted to make sure that for all interested applicants it be as fair and open a competition as possible, and whether or not an organization would want to receive funding really depends on their willingness to compete.

Mr. RENZI. Well said.

Let me say this to you. The Habitat for Humanity has laid out a model that is exceptional. Our former President, Jimmy Carter, becoming one of the Nation's best leaders of Habitat for Humanity, a secular organization. If nonprofit 501(c)(3) organizations want to reflect that model, want to become those type of organizations in small communities that help build houses in 48 hours, these Federal funds will help them become mini Habitat for Humanities; am I right?

Mr. STREETER. Federal funds under the programs affected by this rule, you mean?

Mr. RENZI. Yes.

Mr. STREETER. Uh-huh.

Mr. RENZI. In other words, you could have non-government-based organizations, faith-based organizations become small Habitat for Humanities across the country where we could actually build more homes?

Mr. STREETER. That is right, as long as the organizations choose to build themselves that way. We are not designing any specific programs here for faith-based organizations. Rather, we are opening up the competition by changing the regulations so it is a level playing field.

Mr. RENZI. What other areas—or how—what creative ideas have you seen that these moneys could be used for good work? Where is the—my example is neutral. Where is the good housing going to be put to work?

Mr. STREETER. Well, every day there are people doing great things with very small budgets in communities all across the country. They work in all kinds of fields, providing shelter for the homeless, providing shelter and stable housing for the elderly and the disabled; and often that is done by those who have deep roots in the communities where the people are that they are serving. Those are grassroots organizations who, for a number of reasons, both faith-based and secular groups, have not been in our networks, have been intimidated by the regulations as they currently stand on the books.

Mr. RENZI. Well said. So if we are able to get Federal funds to those organizations, we are going to build more houses, we are going to be able to home and provide safe areas, warm comfort for homeless, we are going to feed more people, we are going to reach out, to take better care on the street, with the needy.

Mr. STREETER. It is our view that by increasing the field of competitors that the end result is a better quality service for the people in need.

Mr. RENZI. Thank you, sir. Thank you.

Chairman NEY. Thank you.

Mr. Watt.

Mr. WATT. Thank you, Mr. Chairman.

I neglected to say hello to my friend, Mr. Streeter. I met you in Charlotte. Good to see you again. I meant to say that when I first came in. I knew that I had seen you before, but it is great to see you again. I appreciate you all being here.

Let me just kind of get—I mean, I am reading something here that—and I wanted you all to maybe set me at ease that I shouldn't be concerned about what I am concerned about.

It is not the discrimination in the recipients of a particular service. I presume that that is something that you can enforce. But, under HOPE III, under housing opportunities for persons with AIDS, under Emergency Shelter Grant programs, ESG, under shelter plus care, and under Supportive Housing Program, SHP, and under youth bill, the Federal Regulations 24 CFR and the particular sections that related to each of those programs had a provision which said: A primarily religious organization receiving funds under the program will not discriminate against any employee or applicant for employment under the program on the basis of reli-

gion and will not limit employment or give preference in employment to persons on the basis of religion.

The proposed rules delete that language in 24 CFR. Now that may be because it was unnecessary because these organizations, religious organizations and all other organizations, can't discriminate in employment.

The problem is that religious organizations can discriminate in employment on the basis of religion. My concern—and all of black America's concern, to be honest with you—is that by eliminating those provisions you have invited churches to discriminate in their employment practices on the basis of religion; and the result of that is not only to allow them to discriminate on the basis of religion but that the result of their being able to discriminate on the basis of religion is synonymous, in 95 percent of religious America, with allowing them to discriminate on the basis of race.

Now the simple question I am raising is, should I not be concerned about that? Is that not the intent of this Administration or can religious organizations now discriminate under these proposed rules? If the proposed rules were adopted, would they be allowed to discriminate in the delivery of these services on the basis of religion? Would they be able to say, if you are not Jewish, you can't work here? We hire only Jewish employees because we are a Jewish church—in the delivery. Then what happens then if a non-Jewish person happens to be the most qualified person?

Or if it is a white church—and in my area of the country, still, most of most churches are either black or white—can they say, we hire only Baptists who are members of our church and therefore we hire no black people?

That is the question I am—you know, if you can set me at ease about that question, you know, I don't have any problem with this program. Now, somebody please set me at ease about this. Is that what you are intending, or put—if not, why did you terminate these provisions?

Mr. JIMENEZ. Mr. Congressman, I would be happy to attempt to answer your question. I know that you know this already, but for those in attendance today who may not know this let me just state for the record that our rule is very clear that all faith-based organizations are subject to the parts of Title VII that prohibit discrimination on the basis of race as well as gender, national origin——

Mr. WATT. You are playing games with me, Mr. Jimenez. You are playing games with me now. That does not answer my question.

Mr. JIMENEZ. I didn't finish with my answer, sir.

Mr. WATT. Go ahead.

Mr. JIMENEZ. But I think that needs to be said for the record, to put the minds of people here at ease who may think that our rule directly allows discrimination on the basis of race. It does not.

On your question about whether or not the rule allows faith-based organizations to take religion into account when hiring——

Mr. WATT. To discriminate on the basis of religion.

Mr. JIMENEZ. To take religion into account——

Mr. WATT. To discriminate.

Mr. JIMENEZ. ——hiring decisions. HUD is not breaking new ground here. To lay out the groundwork, Congress in 1964 gave all faith-based organizations the right to take religion into account

when hiring. Congress expanded that right in 1972. The Supreme Court upheld that right as constitutional in 1987.

Mr. WATT. So you are saying now that you take what the Supreme Court said to extend all of the way over into building a house out there; and if I am not a member of your church, even if I am the most qualified employee out there to build that house, you can refuse to hire me.

Mr. JIMENEZ. Actually, we are not taking the Supreme Court's lead so much as we are following Congress' lead. This rule covers eight different grant programs. Congress said that faith-based organizations cannot take religion into account when hiring for two of these programs. For the remaining six, the ones that you named, Congress has had the opportunity, ample opportunity to take back from faith-based organizations their freedom to take religion——

Mr. WATT. Mr. Jimenez, if that is the official position of this Administration, I am saying point blank to you and this Administration that that is a racist position. It is, and that will be the result of it, and I can't be any more blunt than that.

Now if you want to be labeled with that, if HUD wants to be labeled with this, if this Administration wants to be labeled with that, then so be it. But what you just said to me is that you think it is okay. You think everything I just described to you is okay. I think you are making a serious, serious misjudgment; and I think this Administration is.

I yield back the balance of my time.

Chairman NEY. What I will do is—the gentleman yields back the balance of his time. On my time here, I have got another question, but I will let you put your thoughts out.

Mr. JIMENEZ. Congressman Watt, just to be clear, any faith-based organization that uses its religious hiring freedom as a pretext for racial discrimination, in my opinion, in HUD's opinion, in this Administration's opinion, is doing something reprehensible and illegal. One cannot use the religious hiring freedom as a pretext for racial discrimination.

But, more importantly, I don't think when Congress—with respect to six of these eight grant programs, when Congress allowed the faith-based recipients of those funds to take religion into account in hiring, I don't think Congress thought that it was performing a racist act; and this Administration certainly doesn't believe that either.

Chairman NEY. Let me ask you this—we will go another round of questioning. What is your—to get it clear in my mind—I don't know the legal history of this, but what you are saying is that this has existed for X number of years, 1964, 1972. Was there any change in the last 10 years on this or——

Mr. JIMENEZ. I would be happy to lay it out for you.

This CDBG statute was authorized by the Congress in 1974.

In 1990, Congress amended that statute and said that faith-based recipients of CDBG funds don't have religious hiring freedoms.

In 1990, Congress first authorized the HOME program and, at the same time, said that faith-based recipients of Home funds do not enjoy religious hiring freedoms.

That is the first two of the eight grant programs covered by this rule. There are six others. Two of them were passed or first authorized by Congress in 1987. The remaining four were first authorized by Congress in 1990. Congress knew how to tell faith-based organization that they did not have religious hiring freedoms and Congress demonstrated how with respect to the first two grant programs.

But Congress deliberately did not do the same with respect to the other six. We are simply following Congress' lead, and we think Congress——

Chairman NEY. This existed before President Bush?

Mr. JIMENEZ. That is correct.

Mr. FRANK. Before one President Bush, not before the other.

Mr. NEY. And after 41, then President Clinton. So this has been there.

Mr. JIMENEZ. This has been the law.

Chairman NEY. Whether they were Democrat controlled or a Democrat or Republican President and they didn't change it?

Mr. JIMENEZ. Exactly.

Chairman NEY. So, therefore, would we consider them racist? I am trying to lay it out. Although people might want to change it. It might be the desire of Congress to change it.

Mr. JIMENEZ. If Congress wants to take some or all of the remaining six and say that faith-based organizations do not enjoy religious hiring freedoms, that is Congress' prerogative. I don't think the Administration is necessarily calling on Congress to do that, but Congress has that freedom if it wishes.

Chairman NEY. Let me ask the question—as this started, as I assume there were some barriers, that is why this issue came up. I think it came up like—I don't know, one of the Senators had supported this during the election process, and both sides of the aisle had come out with some type of idea to stop barriers, or groups just because they were of a certain religion, if I can recall on this issue.

What kind of barriers were out there? What kind of government—do you have any idea of what some of the government barriers were for these groups?

Mr. STREETER. I will be happy to answer that question, Mr. Chairman.

With respect to the proposed rule and the current regulations that are on the books, we had in seven of the eight programs here, for instance, prohibitions on anything bordering on religious influences. That generally tends to be implemented sort of at the lowest possible level. People would tend to shun faith-based organizations altogether if they have any doubt as to whether or not this organization was the kind of organization that should be funded under a given program. Two programs outright exclude faith-based organizations as a general rule.

Again, the way this translates on the street into a barrier is that a local official, whether it is a local CDBG official from a city or a HUD official in a field office, will be of the mind and have been of the mind that they ought to instruct faith-based organizations either not to apply or will tell others not to work with faith-based organizations. That has, in fact, happened. So that would be a barrier.

Overall, we just find that there is a problem with the tone in the regulations; and they make it very, very difficult for faith-based organizations to apply if there is any question. We have run into a number of cases where faith-based organizations have had problems on this front simply because they have been told they better not apply or, if they do, they need to completely strip their facilities of anything that looks religious and the like.

There are other barriers as well. I mean, there are barriers in the grants process, which doesn't necessarily apply to this proposed rule, but there are barriers as well in terms of the complexity of the documents that are required to file in terms of the application process as a whole and the documents that support it. We have been engaged in an effort to simplify that as well so that it is easier for smaller grass roots organizations to understand.

Chairman NEY. Thanks.

Mr. Frank.

Mr. FRANK. That part is not controversial. I note in the Executive Order in Part 3 it is repetitive. It applies to eight programs. The parts that say you can't be penalized for your religious character, which is in Part 1, the parts that say you shouldn't be penalized for religious name, those are noncontroversial. In fact, they are often not followed, and they should not have been followed, and they should have been changed.

So that is not controversial, much of what you said. What is controversial is what Mr. Watt mentioned.

Now, Mr. Jimenez, I know you just forgot—I am sure it was on your mind, but you forgot to mention that those six programs you talked about where you said Congress in fact did not include in discrimination language, but from almost the beginning regulations were promulgated, beginning with President Bush and then President Clinton, which did in fact say no religious discrimination.

So my sense has been here is that Congress didn't feel the need to do that because all of them did have that language in there. So two had it statutorily, but the other six programs you talk about have, from their beginning, had language promulgated by regulation which said you couldn't discriminate. That was President Bush and President Clinton.

And you didn't then answer Mr. Watt's question. You gave a history of it. But, in fact, previously, while they didn't have that—they weren't prohibited by statute from religious discrimination, they were prohibited by regulation.

Mr. JIMENEZ. That is absolutely correct.

Mr. FRANK. Thank you.

What then about the substantive question Mr. Watt asked?

Let me put it to you this way. Under CDBG, you are the experts in this program. A Mayor who decides to give the money to the Nation of Islam to protect housing authority security—that happened before, in fact. I remember a number of my Republican colleagues were quite exercised about it. Under these regulations, a Mayor who decides to give the Nation of Islam money to protect his or her housing tenants, that is perfectly okay, and the Nation of Islam may employ only its congregants; is that correct?

Mr. JIMENEZ. Well, it is a two-part question, as I hear it. The first part was whether or not they could give services or permit only adherents to be beneficiaries, and the answer is no.

Mr. FRANK. Not beneficiaries. We are talking only about employees. You know that, Mr. Jimenez. You are not being honest with us intellectually. I am disappointed in that. You know we are talking about employees. We are asking about whether a Mayor can give money to the Nation of Islam to provide security services and hire only congregants of the Nation of Islam? Is that——

Mr. JIMENEZ. I am being completely honest. I thought I heard in your answer something about beneficiaries. However, as far as taking religion into account when hiring——

Mr. FRANK. No, answer the question. It is a simple question. The Nation of Islam, under these rules, are they an eligible grantee and can they then hire only people who are members of the Nation of Islam?

Mr. JIMENEZ. If the Nation of Islam is a legitimate religious organization. I don't know enough about the Nation of Islam to comment on that.

Mr. FRANK. I had hoped maybe you would answer a question honestly. I think you are not.

Next one. How about Scientology? Suppose a Mayor somewhere gives a grant to the Church of Scientology, which has been recognized as a religion. You say legitimate religion. I assume the test here is—let me ask. Is there a test other than the one we use, the IRS' tax exemption? Is there some other test that is going to be involved here as to whether you are a legitimate religion? That would make us very nervous. How do you decide?

Mr. JIMENEZ. The only test that this Administration applies is whether or not the services provided by the faith-based organization work.

Mr. FRANK. No, Mr. Jimenez, you are changing the subject, and you know it. You said you don't know if the Nation of Islam is a legitimate religion. I understood they were a legitimate religion by the applicable test: They got a tax exemption, and they are recognized by the IRS. Are you suggesting that there is some additional test as to whether or not you are a legitimate religion to qualify?

Mr. JIMENEZ. I don't know if there is something else about the Nation of Islam that could disqualify them from the program.

Mr. FRANK. I am asking you procedurally now. Your determination not to answer tough questions is impressive, but it doesn't get you away from the tough issues. In this program, it says faith-based organizations. We are talking now not about HUD but about the entitlement communities. I am the Mayor of an entitlement community. Under this program, if it is legally recognized as a religion by State and Federal law, are they then automatically eligible for grants under the CDBG faith-based program and can hire only their own?

Mr. JIMENEZ. If there were no other disqualifying factors, any faith-based organization——

Mr. FRANK. What disqualifying factors would there be?

Mr. JIMENEZ. I am not familiar enough.

Mr. FRANK. I get it. I think the fact that you don't answer——

Mr. JIMENEZ. Sir, I will answer your question as directly as I can.

Mr. FRANK. What about Scientology?

Mr. JIMENEZ. If they have—sir, if they provide a service that fits within the HUD criteria of providing either services for the homeless——

Mr. FRANK. Not CDBG—but let me ask you another question. In terms of the money that goes to build the house of worship for dual purpose that can be partially a house of worship, is that measured physically or temporally? Can I say, okay, 22 percent of the building was built with public funds, and it can be used 22 percent of the time for religious purposes, or 22 percent of the building or 11 percent half of the time? I mean, what are the rules that apply? Can it be temporal? Can I say 22 percent of the money came from the Federal Government. The building can be used 78 percent of the time, the whole building, for religious purposes? Is that accurate?

Mr. JIMENEZ. Yes. That was our intention.

Mr. FRANK. Okay.

Mr. JIMENEZ. There is more here that I think that you would like to hear, with all due respect, Mr. Congressman. On that particular part of the HUD rule, it was never HUD's intent to subsidize, even partly, principal places of worship. Upon issuing the proposed rule and hearing comments about the rule——

Mr. FRANK. You are changing it?

Mr. JIMENEZ. Well, we are closely considering all comments that have been received.

Mr. FRANK. I am glad you are closely considering all comments.

Mr. JIMENEZ. We are considering several options of amending the language.

Mr. FRANK. The part that says CDBG funds may be used for the acquisition, construction or rehabilitation of structures, where a structure is used for both eligible and inherently religious activities, they may not exceed the cost of those portions, et cetera, that is under serious consideration to be changed?

Mr. JIMENEZ. That is. We think that there is a way of clarifying our intent and easing some of the concerns about that language, and we are presently entertaining options.

Mr. FRANK. Last question.

Mr. FRANK. Last question, to go back to the point that Mr. Watt and I have been trying so hard to get an answer, the fact that the effect of religious-based hiring might be racially exclusionary, Orthodox Jews in Brooklyn, Mormons somewhere else, the Nation of Islam in Baltimore, is that, in and of itself, a disqualifying factor in your mind and in the minds of the Administration?

Mr. JIMENEZ. If racial discrimination is intended?

Mr. FRANK. No, not if it is intended. You know that we are not talking about intended. You are not being honest. You know that is not what we are talking about. We are talking about the fact that there aren't very many black Orthodox Jews. There aren't very many white members of the Nation of Islam. If the effect in this is to get a segregated impact, is that in any way a problem from the Administration standpoint?

Mr. JIMENEZ. We agree with Congress that the freedom to take religion into account in hiring is a freedom that should generally——

Mr. FRANK. Would you answer my question? Does the fact that it might have a racially discriminatory or exclusionary aspect, is that troubling? I didn't ask you whether or not you agree.

Mr. JIMENEZ. I think it is troubling on a personal basis, but I think on a legal basis——

Mr. FRANK. On the Administration basis, from the Administration standpoint, is it irrelevant as a policy matter?

Mr. JIMENEZ. I think it is irrelevant as a legal matter. As a policy matter, I think it is relevant. But there are many things in this country that are troubling, and I think we should all as people——

Mr. FRANK. Are you doing anything about it, if it is troubling as a policy matter?

Mr. JIMENEZ. Is the question whether or not we are doing anything to end de facto segregation?

Mr. FRANK. That isn't what I asked.

Chairman NEY. The time of the gentleman has expired.

Mr. Renzi.

Mr. RENZI. Thank you, Mr. Chairman.

When we talk about the true effect or the true intent here, isn't it really honorable though that what we are trying to do is that we have got faith-based organizations that are already established in the community, who have already proven themselves worthy of good deeds in the community, who currently, legally are allowed to discriminate based upon hiring practices as to faith? These are established Title VII freedoms. These organizations are now in a position where they can expand services or provide services and that those services, the populations that they will actually serve are the disadvantaged, are the most needy, are at times the Hispanics in Arizona. And so, if we are able to get the Federal funds to these organizations who are currently doing good with their work, then the most needy, the most disadvantaged of all races and colors and creeds and genders will be the ones who benefit. Isn't that really the honorable intent and not to discriminate as this discussion has been taking?

Mr. JIMENEZ. All along this Administration has been very clear. The focus should be primarily the people in need, the people who are suffering, the people who need services.

We have found in our experience that many faith-based organizations themselves either represent a disproportionately minority population or serve a disproportionately minority clientele. These changes are going to make it easier for faith-based organizations to help the people all throughout America and especially in inner cities and other places.

Mr. RENZI. You mean to tell me, you actually have people of faith who are actually helping people of color, sir, in a disproportionate aspect as to the amount of white people who are working for them? You mean we actually have faith-based organizations who are, right now, disproportionate as to the numbers of employees? So if you were to take the number of employees that they have in the organization and you look at where their dollars are going, where the real help is going, you are seeing that they are actually helping

people of color, people of need, people of poverty, is that what you are telling me?

Mr. JIMENEZ. Absolutely. And that is what we see in our experience everyday. And I might also add, the religious hiring freedom that was given by Congress when Title VII of the Civil Rights Act of 1964 was passed, that freedom is not a controversial one. It was affirmed in '64, reaffirmed in '72 with broad, bipartisan support in Congress. It was unanimously upheld as constitutional by the Supreme Court in 1987.

This is not a controversial freedom.

Mr. RENZI. Thank you.

Chairman NEY. Mr. Watt?

Mr. WATT. Let me just direct this to Mr. Renzi, since he seems to be directing all his comments toward me.

Mr. RENZI. Not directed towards you, but directed towards the goodness of the programs.

Mr. WATT. And just make it clear to you, from my perspective, the ends don't justify any means. When you fought as hard to eliminate discrimination and segregation and racism as I have, even sometimes when you get good ends, you've still got to look at the means through which that happens. And we will have that conversation in private if you would like, if you would like to pursue it, but let me get back to this.

Mr. Weicher, you have let them run your interference for you, and I don't mean that in any negative sense. But it is your statement that was the statement that we started with, and your statement on Page 2 says—describes the President's order of December 12, Executive Order 13279, that sets out clear principles, and I am quoting, "Ensuring that all eligible social service organizations are able to compete on an equal footing for Federal financial assistance." and then the next paragraph, you say, "HUD is simply"—well, you say, "HUD"—I am quoting, "HUD is actively implementing the order to ensure that our policies and programs create a level playing field for faith-based organizations.

Now, I take it that a level playing field would be a playing field that either allows discrimination or doesn't allow discrimination, Habitat for Humanity, none of the 501(c)(3)organizations have the ability to discriminate on the basis of race. How is it that giving churches, who are grant recipients, the right to discriminate on the basis of race or religion creates some level playing field? There is something unequal about that as far as I am concerned.

If I set up a 501(c)(3) organization, I am bound by the civil rights laws of this country. I can't discriminate on the basis of race or religion.

Mr. RENZI. Yes, you can. Sorry to interrupt you, sir. Yes, you can, but that is the point, under Title VII, you can discriminate.

Chairman NEY. Would the gentleman like to yield or not?

Mr. WATT. Why don't I just ask my questions to Mr. Renzi, since he knows so damn much about this. And I wouldn't like to be interrupted either.

Chairman NEY. You can continue.

Mr. WATT. Now, churches have the right to discriminate in their religious activities, 501(c)(3) organizations do not. Is that correct or not correct, Mr. Weicher?

Mr. WEICHER. Mr. Watt, as I was saying to Mr. Frank, I am not a lawyer, and I am not an expert.

Mr. WATT. Why did they send you over here to deliver this?

Mr. FRANK. Will the gentleman yield? I can answer that.

Because when we wrote the letter, we said that we would want someone at the assistant-secretary level or above, and Mr. Weicher seemed to be the only assistant secretary in town today.

Mr. WATT. Okay. At least there is some rational explanation.

Mr. FRANK. If the gentleman would let me yield further.

And they think the Administration was not interested in giving answers to some of these questions at a level where they might sort of have trouble backing away later.

Mr. WATT. All right, Mr. Jimenez.

Chairman NEY. Would the gentleman yield?

Go ahead.

Mr. WATT. I am stuck with you, although I can't get an answer out of anybody on this panel. I am just trying to get an answer. I am not adverse to you.

Mr. JIMENEZ. The question again is——

Mr. WATT. How does this create a level playing field, I guess, is the question that I started off asking, before I was so generously interrupted by my colleague.

Chairman NEY. We will generously give you some overtime.

Mr. JIMENEZ. The Administration feels strongly that faith-based organizations should have the same access to HUD grants.

Mr. WATT. As do I.

Mr. JIMENEZ. Except that before this rule, faith-based organizations had to jump through hoops that secular organizations didn't have to.

Mr. WATT. And I don't think they should either, Mr. Jimenez. We are on the same side of that issue.

But the issue that we don't seem to be on the same side of is whether there can be discrimination in employment based on religion or—and, therefore, as a substitute based on race—in the use of Federal funds, not the—not in the pulpit.

I am the staunchest supporter you would like to have to not putting a Baptist minister in a Jewish synagogue. I mean, I wouldn't think of anything that ridiculous, which is why the religious exemption is in Title VII, but it never was in Title VII to allow churches to deliver services that are basically governmental services, social services, into the community: Housing, after school programs.

And for this Administration to somehow take the silence of Congress on that as a license to go into the community and tell churches that you can discriminate, is just unforgivable in my opinion.

Mr. JIMENEZ. Sir, I think I can answer your question.

It is not just the religious services that faith-based organizations provide. In 1972, Congress expanded the religious hiring freedom that faith-based organizations enjoy under Title VII. And they extended it to all employees of the faith-based organization, whether or not they perform inherently religious functions. And it was that expanded freedom that the Supreme Court upheld unanimously in 1987.

I might also add that Charitable Choice has been on the books since 1996 and it governs——

Mr. WATT. I am sure this is in response to a question I asked, Mr. Jimenez. I can't get a damn thing out of you all when I ask you a question, and you keep trying to give me stuff when I don't ask you a question. Everybody keeps trying to give me information when I don't ask a question. I can't get any answers out of anybody when I ask a question. I mean, I am disturbed by that.

If this Administration would send somebody over here who can answer the questions and stand up for the Administration and say what their policy is, which is that they intend to encourage religious discrimination in these programs, which is very apparent from the three gentlemen that they sent over here, I think is an abomination. And I think it is going to backfire on you. I think it is going to backfire on you from a social perspective, and all of this stuff that you were doing in the community in advance of finalizing the regulations, which is just politics, trying to get into every black church in the country, that is going to backfire on you, too.

I yield back. I yield the rest of my time to Mr. Renzi.

Chairman NEY. And I will answer any question if you ask me one.

Mr. RENZI. Thank you, Mr. Watt.

Chairman NEY. Anybody else have any desire to ask a question?

Mr. WATT. I don't want to beat them up. I would like to get some answers.

Mr. JIMENEZ. I would be happy to answer a question.

Mr. FRANK. One statement.

Mr. Jimenez mentioned the 1972 Amendments, which did extend the freedom from religion. But those who cite that cite, to quote from Sam Ervin at the time, in which he says, "The hands of Caesar have no place in the institution of God." Well, we are in a situation where the hands of Caesar are carrying money, and it is qualitatively different. It may be right or wrong.

But, in fact, to invoke Sam Ervin's quote when he said, "The hands of Caesar have no place in the institution of God," when we have now decided that we are going to provide Federal money to carry out Federal purposes to these institutions, it is clearly not an automatic extension.

So I would say that the invocation of the '72 Act does not meet the arguments that my colleague raised. And again the very justification that I see, citing Sam Ervin, it is a little bit different, I think a lot different, because once you have said—it is one thing to say we are doing this to give complete independence in the Federal Government. It is another to say, well, now the Federal Government is giving us money to tell us how to spend it.

Mr. JIMENEZ. This would not be the first time, sir.

Mr. FRANK. I am talking about the '72 Act. One thing on the '96, yes, that is true, that was done as part of the Welfare Bill. The Welfare Bill was very controversial. But it is also the case that when Bill Clinton signed it, he announced he was not going to enforce it. So it was not something that has, in fact, been in effect for very much time.

Chairman NEY. Any other questions of the witness?

I want to thank, again, the members for coming. And thank the witnesses for their interest and for coming here to the hearing today.

[Whereupon, at 5:15 p.m., the subcommittee was adjourned.]

A P P E N D I X

March 25, 2003

Opening Statement
Chairman Michael G. Oxley
Committee on Financial Services

Subcommittee on Housing and Community Opportunity Hearing on Strengthening America's Communities: Examining the Impact of Faith-Based Housing Partnerships

Tuesday, March 25, 2003

Today we are here to examine the Administration's proposed regulation to encourage the participation of faith-based organizations in certain Department of Housing and Urban Development programs. As part of President Bush's initiative to encourage government partnerships with faith-based and community groups, HUD issued a new rule on January 6 of this year. This rule is designed to assist faith-based organizations' ability to be responsive to the needs of their communities.

Religious organizations have long participated in federally funded social service programs, including HUD's housing community development initiatives. But the extent of their involvement and their ability to fulfill their faith-related mission can be affected by the terms of the regulations. The current regulations include requirements that they provide assistance free from religious influence and limits on religion-based employment practices. Often times, faith-based organizations are forced to establish separate wholly secular entities to act as the intermediary with HUD.

We should do everything we can to make sure that our faith-based organizations have equal opportunities and access to the federal programs that will allow them to assist those that truly need our help.

When it comes to lessening the effects of poverty and addressing the needs of those that are suffering, some of the most creative and passionate volunteers are affiliated with faith-based organizations. It should come as no surprise that faith-based groups have the experience and knowledge to meet the social needs of their communities in a more compassionate manner than the federal government here in Washington. They know their communities, they know which families need assistance and they know what housing and services are available in their neighborhoods.

Our witnesses today are part of the compassionate army that is working hard everyday to assist the poor, the sick and the homeless. We are anxious to hear how best to assist you in addressing those needs.

I want to extend a special welcome to Dr. Fairbanks, President of Mount Vernon Nazarene University in Mount Vernon, Ohio. We are pleased that you could join us today and look forward to your testimony.

STATEMENT ON PARTICIPATION IN HUD PROGRAMS BY FAITH-BASED ORGANIZATIONS

Prepared by: Reverend Wendell Anthony
Pastor, Fellowship Chapel, Detroit, Michigan
President, Detroit Branch NAACP
March 25, 2003

To the Honorable Bob Ney, Chairman of the Subcommittee on Housing and Community Opportunity and the members of this most important body, Ladies & Gentlemen; thank you for the opportunity to testify before this committee on a subject that is most important to the future of our nation. As pastor of Fellowship Chapel in the city of Detroit and as president of the Detroit Branch NAACP (the largest branch of the NAACP in our nation), Strengthening America's Communities through Faith-Based Community Development embodies a critical concern for our constituents. The proposed rule on participation in HUD programs by faith-based organizations raises serious concerns for both the religious freedom and civil rights of our nation.

Executive Order 11246, which prohibits the Federal Government from discriminating against federal employees, government contractors and subcontractors and grantees that have construction contracts on the basis of race, creed, religion, color, national origin, or sex has a long and distinguished history in preserving the equal opportunity of our nation. It dates back to former president Franklin Delano Roosevelt and his work with civil rights activist A. Phillip Randolph. It has served as a hallmark to protect American citizens regardless of their status against discrimination in various forms. The Following are some of my concerns as it relates to faith-based funding:

The proposed rule change presented by HUD would unfortunately give religious organizations a special right to ignore laws and the Constitution of the United States which guarantees the Freedom of Religious expression as well as denominational preference.

It is my fear that the current language in the HUD-proposed rule that suggests that religious institutions may retain their independence from federal, state or local governments can be misinterpreted to suggest

that religious institutions are exempt from the non-discrimination laws. It is also my concern, particularly at this time in our nation's history, that religious institutions receiving funds from these sources may well choose to discriminate against African Americans who do not support their theological view, Muslim-Americans who practice Islam and Jewish Americans, particularly as our nation is at war in the Persian Gulf. It would also increase the tension between those who possess a conservative religious belief versus those who practice a more liberal theological view. I certainly support faith-based development in rebuilding our communities. This has long been a practice of churches, temples, mosques and synagogues to move from the church in worship, to the church at work. Yet, I am reminded according to our collective faith that, "God is no respecter of any persons." Colossians 3:25. In other words, discrimination is intolerable from the vantage point of serving God in the process of uplifting his people.

I am concerned that this rule would present a barrier to dollars that are already reduced in the Community Development Block Grants program, one of the key agencies established to do community development. This could possibly lead to a diversion of funds that have been sorely needed to develop affordable housing, rehabilitation and renovation at a time when these programs are being eliminated. In the quest for financial assistance to do community development, this will lead to a greater challenge of cities and townships to provide services to local communities.

I am concerned about the direct funding to religious institutions which proselytize and provide religious instruction in their facilities where beneficiaries of such programs may redeem coupons, certificates or vouchers. The direct funding of religious institutions may also create an intermixing of funding dollars with the regular funds raised during the churches regular business. This can lead to inappropriate auditing of funds from worshipers and program participants and the possible misuse of federal dollars, as well as places religious institutions in jeopardy of losing their 501(c)3 status.

There is also the political reality of the attempt by some to use the "stick and carrot" approach to faith-based development. It provides a doorway to access the minority community as a way to gain political favors and support on the basis of financial contributions (the carrot) and auditing or eliminating financial support (the stick). This is not the way in which we believe services to our community can best be achieved.

I do have several recommendations that I believe would help strengthen America's communities. This is particularly important in that in the State of Michigan, Governor Jennifer Granholm has announced a $1.8 billion deficit, which will eliminate many of the programs associated with community

development at the local level. An even greater burden will now be placed upon the faith-based community to increase its work in providing whole and healthy communities. The availability of financial aid for community development must be increased. The government should maintain a clear and distinct policy of separation of church and state.

The government should continue to fund and provide services separate and apart from any religious activity in a coherent and an identifiable manner. Certainly, the proposed rule needs to state very clearly that religious organizations and institutions do not have the right to discriminate against any participant on the basis of religious affiliation. Likewise, the forced or suggested adherence to religious study or tradition should not be a prerequisite for participation in any part of the programs provided by faith-based organizations.

Faith-based organizations require and need technical assistance to strengthen the application process and their knowledge base of available programs. There is also a need to strengthen the process to evaluate and monitor such programs and to assist with professional staff development. Many small institutions who have the great zeal and desire to rebuild communities, simply do not have the resources and the knowledge to accomplish the same. HUD can provide a great service and spread the wealth by providing assistance to these institutions.

There is a need to increase funding to provide greater instruction in maintaining communities, improving housing quality, and establishing model communities throughout our nation. Finally, the careful consideration and restructuring of lending practices to small and low-income families must be reviewed where credit ratings and inappropriate scoring prevents applicants from home ownership, as well as securing mortgages. These are some suggestions which I believe can assist in the Strengthening of America's Communities and improving the quality of life throughout our nation.

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STATEMENT OF KIRBYJON H. CALDWELL

PASTOR, WINDSOR VILLAGE UNITED METHODIST CHURCH,
HOUSTON, TEXAS

BEFORE THE

UNITED STATES HOUSE

COMMITTEE ON FINANCIAL SERVICES

MARCH 25, 2003

Over the past two years, President Bush has clearly demonstrated his commitment to elevating the importance of religious values and faith-based organizations in the battle to alleviate social ills. The President reminds us that Americans need to look into our hearts to see how we can help those that are most in need – be they at-risk youth, the elderly, homeless individuals, substance abusers or welfare-to-work families.

America is richly blessed with a long tradition and honorable commitment to assisting families and individuals who have not fully shared in our nation's prosperity. Yet, despite a multitude of programs and renewed commitments by the Federal and state governments to battle social distress, too many of our neighbors still suffer from poverty and despair amidst our abundance.

The American people are a caring people. As President Bush put it: "There is no great society which is not a caring society."

While Americans see a vital, yet limited role for government, they also want to see their Federal dollars making a real difference in the lives of the disadvantaged. And they believe that government should help the needy achieve independence and live responsible, productive lives.

They are not calling for "big government," they are calling for a more efficient and compassionate government that is a trustworthy steward of their hard-earned tax dollars.

While it is true that government has a solemn responsibility to help its citizens in need, it does not have a monopoly on compassion. Social entrepreneurs and dedicated volunteers are on the front lines of our nation's communities seeking to lift people's lives in ways that are beyond government's ability. Because of this, community groups and faith-based organizations have become an indispensable part of the social services network of the United States and they offer literally scores of social services to those in need.

In addition to churches, synagogues, and mosques, faith-based organizations include nonprofit organizations, grassroots groups, and any number of neighborhood groups formed to respond to a crisis or to lead community renewal. Faith-based groups everywhere, either acting on their own or as partners with other service providers and government programs, serve the underserved, and help to strengthen families and rebuild communities.

All too often, however, the government has inadvertently hampered the efforts of faith-based organizations to assist Federal agencies in carrying out their missions. Federal policy and programs have often disregarded faith-based groups as valuable resources for providing social assistance and have imposed federal, state, and local-level barriers to the participation of religious organizations in social service programs. This overzealous interpretation of the separation of church and state has only served to hurt those in our society who are most in need.

The President believes that there should be an equal opportunity for *all* organizations - both faith-based and nonreligious - to participate as partners in Federal programs.

To strengthen the work of what President Bush terms our nation's "armies of compassion" - those civic, social, charitable, and religious groups that exist in our neighborhoods - the President created the White House Office of Faith-Based and Community Initiatives within days of taking office in January 2001.

This Office today exists as a resource to, and an advocate for, faith-based and community organizations. Its mission is to help these groups attract resources, gain access to federal programs, and overcome hurdles when learning how to work with government. The Offices does this by:

- Working closely with Congress to secure the passage of legislation that would create a level playing field upon which private and charitable groups, including religious organizations, can compete for federal funding;
- Removing the barriers that prevent charities from doing their important work;
- Providing incentives for increased charitable giving in America; and
- Committing funds to increase the capacity of our nation's grassroots leaders.

At the same time the Office was created, the Administration also opened five cabinet-level Centers for Faith-Based and Community Initiatives, which today are located in the Departments of Housing and Urban Development, Labor, Health and Human Services, Justice, and Education.

Each Center is doing great work to promote the President's initiative.

Unfortunately, decades of government hostility or indifference toward faith-based institutions has pushed many groups to the margins of social-welfare policy, thereby depriving people of assistance that is often more effective and more compassionate. In fact, many community service organizations have been denied Federal resources just because they have a religious affiliation or a rabbi or priest on their board. They are shunned because they have a religious symbol on their wall, or a mission statement inspired by their faith.

These organizations often are the lifeblood and last resort for people in need and their size can range from a struggling church soup kitchen to a global program such as Habitat for Humanity. Consequently, far too many of these groups have been overlooked as legitimate partners in our nation's efforts to help those left behind.

With the stroke of a pen last December, however, President Bush signaled to the American people that government would no longer discriminate against groups that are guided by their belief in God as they help their neighbors. Instead, the Administration is inviting them to the table to be part of the solution to our nation's problems.

Pure and simple: It is my understanding that HUD advocates an "open door policy" for faith-based organizations to provide social services to public housing residents. The content of spiritual programs should not and will not be distorted to satisfy some overzealous bureaucrat. Instead of fearing faith, government should embrace and encourage the good work of faith in our society.

Local charitable programs should be judged on one central question: do they work? If they work in part because they are anchored in faith, the government should not complain - the government should encourage them.

HUD appears to be breaking down the barriers to working with faith-based groups. The Department will not cross constitutional limits, but it is streamlining its regulations to let these organizations keep their independence and religious identity.

The objective is to make it easer for faith-based and other grassroots community organizations to join in HUD's mission. The goal is simple: HUD wants more organizations to provide more services to help more people.

It is my understanding that HUD intends to respond to organizations no matter how big they are or how much experience they have. The bottom line is: if a faith-based or community group can do the job, then HUD will talk with them and help them succeed in their communities.

There is a two-part process here: removing regulatory and administrative barriers to participation and supporting capacity-building activities for faith-based and community groups. Both parts are important to achieve our national goal of finding efficient and cost-effective ways to help the most people possible.

The goal, whether at HUD or another agency, should be to help expand society's capacity to respond with efficiency and compassion to human needs. The Bush Administration is seeking compassionate results, not just compassionate intentions.

BISHOP SEDGWICK DANIELS' TESTIMONY TO
U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON FINANCIAL SERVICES

March 25, 2003

Dear Mr. Chairman:

I am pleased to be here today to testify to you with respect to the efforts of Holy Redeemer Church of God in Christ and its affiliated entities in connection with the development of efforts to improve the lives of citizens in our city, Milwaukee, Wisconsin.

Mr. Chairman, perhaps a little background may be helpful to you. We founded the Holy Redeemer ministry 16 years ago with eight persons and have now grown this ministry to over 5,000 persons representing people of every background and skill. Our organization has 28 affiliated entities which are involved in self-improvement activities such as the creation of a 100,000 square-foot-plus youth center in a neighborhood densely populated by low-income students; development of multiple public/private operating school initiatives which have resulted in improvement of education for some of the most economically distressed youngsters in Milwaukee (we now educate more than 750 students); the development of a heath clinic focused on bringing the marvels of medicine directly to the community through a clinic located on our campus, which is affiliated with the faith-based organization of Covenant Health, a large health-care provider in Wisconsin.

Our campus is a redevelopment of a 10-acre site which was previously distressed and, in fact, vacant. We have turned this site into a vibrant campus, serving literally thousands of people each day who receive a variety of services - meals, job training, health education and care, and top-flight elementary and adult education. Our mission, then, is to have a 24/7 outreach to this community. The demographic data for this community reflects that not only are we providing services, but this has resulted in the employment of hundreds of people. The success stories are indeed marvelous. One of the best examples is one of our school administrators who, through many efforts, used welfare outreach services to college-educate herself, ultimately becoming a college graduate, and after several years of working as a teacher, she became one of our school administrators on the campus. In fact, President George W. Bush visited our campus last year to get a first-hand view of the remarkable effects we're having on people. The examples go on and on with respect to how we have changed the lives of people.

We have also been critically involved in the housing initiatives in this community. When we consciously moved our campus to this economically depressed central-city area, many were surprised that we did not move to a more tranquil suburban environment. We intentionally did not do so because we knew where the needs were. One of the things we found was that many people had housing needs -- elderly people, people who were in transition and people who were searching for the American home-ownership dream. We, therefore, with the cooperation of the City of

Milwaukee, and through the use of federal tax credits, developed a premier low-rise elderly housing project which has received many recognitions, including a special award from the Federal Home Loan Bank Board. The facility is oversubscribed and there is a tremendous demand for us to provide additional facilities for seniors. We also obtained and rehabilitated homes in the area to allow for transitional needs of people. Many of these people have used this as a springboard to putting their lives back together, and they have moved on to very productive citizenship. In connection with a local bank, we have also instituted a home-ownership seminar program so that many of the community residents (who are now renters) will be educated as to the value of home ownership. We are in the process of exploring various initiatives to assist with home ownership education and down payment assistance. The net effect is that our housing initiatives have taken a neighborhood which was psychologically and physiologically depressed and helped to convert it to a neighborhood that is now excited and proud of our campus serving as the engine for community and housing development. People who visit the campus are amazed at its impact on the neighborhood. This is a reflection of the true purpose of our ministry. While there are many initiatives which have good purposes, we are happy to report that no initiative in this particular community has had more of an economic effect. We have educated thousands of youngsters in first-rate educational institutions. We have created and improved the housing stock in our neighborhood, and we have created an environment in which literally hundreds of people from this neighborhood are employed in meaningful and life-supporting jobs. This is the commission to which we are called, and we hope that you, through your legislative powers, will recognize that such faith-based initiatives such as ours are vital in many communities in the country.

Testimony of
Douglas W. Kmiec
Dean, The Catholic University of America School of Law
before the
Subcommittee on Housing and Community Opportunity
March 25, 2003

Mr. Chairman

I am pleased to respond to the Subcommittee's invitation to testify concerning the proposed rules of the Department of Housing & Urban Development (HUD)to facilitate greater use of federal programs and funds by faith-based organizations (FBOs). It was my privilege to serve as the former head of the Office of Legal Counsel under President Reagan and the senior President Bush. For close to a quarter century, I have taught, practiced and written about constitutional law. For this reason, I will limit my testimony to the constitutional issues, if any, posed by these regulations. That is not to say that the constitutional issues are separate from the issue of removing barriers to the participation of FBOs. They are not. Indeed, it has been a profound misunderstanding of the nature of our Constitution's protection of religious liberty that, in the past, often led to the erection of artificial barriers, and therefore, deprived our government of the services of many who dedicate their lives, as a matter of religious conviction, to the well-being of others.

Let me begin with the conclusion: These proposed regulations do not transgress the guarantee of freedom of religion found in the First Amendment to the U.S. Constitution. To the contrary, these regulations continue the effort of the Bush administration to eliminate the unjustified discrimination against religious persons and organizations in the administration of social services funded by the government.

The proposed regulations apply to eight HUD programs that, among other things, promote home ownership, supply emergency and other shelter, create housing opportunities for those with AIDS, award community development grants, or involve young people. Under each program, the regulations have several essential elements:

1. Establishing the principle of nondiscrimination. Government funds shall be distributed neither giving favoritism to, nor discriminating against, religious organizations. Significantly, this applies to both the federal government and state and local governments that are often in partnership with HUD administering funds. Both are enjoined to treat religious organizations "under the same eligibility requirements."

This is unassailable and long overdue.

2. Explicitly providing that funds supplied directly to an FBO may not be used to support inherently religious activities, such as worship, religious instruction, or proselytization.

Importantly, from the standpoint of religious freedom and nondiscrimination, the regulations make clear that even though government funds cannot be used for these purposes,

nothing precludes the FBO from continuing – from non governmental sources – inherently religious activities. Analogously, the regulations ensure that FBOs can retain their independence, allowing for example the continued use of a religious organizational name and not banishing the inclusion of religion in the organization's "definition, practice and expression," so long as that is continued without government funding.

This is facially constitutional. Does it pose an administrative responsibility that must be carefully observed in application? Yes. Supreme Court case law requires reasonable assurance that direct government funding is employed for secular purpose. It does not require that a religious organization forsake religion to participate.

This is a constitutional breakthrough. For generations, a misinterpretation of the religion clauses were used to discriminate against religious social service organizations, even to the point of denigrating them as "pervasively sectarian organizations." The jurisprudence of the Supreme Court presently reveals that such prior exclusion and discrimination to be mistaken and wrongful. HUD's proposed rules eliminate these barriers.

Properly, as a matter of administration and observance of principles of non-establishment and non-endorsement, an FBO should conduct privately-funded religious activities separately from the secular services funded by HUD, and the regulations so provide. Analogously, if HUD funds are provided for "acquisition construction, or rehabilitation" these must be for structures that are either wholly secular, or if of mixed use, government funding cannot exceed the pro rata secular portion.

Again, this requires proper administration. HUD has provided in this regulation the needed distinctions to ensure constitutionality. In application, these distinctions need to be reasonably observed to avoid constitutional litigation over the issue of improper endorsement.

Note: As a matter of constitutional law and practice, it is preferable in as many cases as it is feasible for HUD to administer its funding programs through voucher-like mechanisms. As the HUD regulations properly observe, where HUD funds reach an FBO as a result of a genuine and independent private choice of a beneficiary, the religious body need not observe the various religious/secular distinctions incorporated for directed funding. Insofar as policy analysts believe that FBOs are more effective in the delivery of social service when this separation is not present, it would make both policy and constitutional sense to deliver HUD programs through this indirect alternative.

3. No current or prospective beneficiary of a government funded service shall be discriminated against on the basis of religion or religious belief. No genuine FBO would ever think otherwise. This affirms that and stands in league with the constitutional principal of free exercise.

All three of the above elements have been given approval by Congress in the past in Charitable Choice legislation. In addition, the regulations specifically incorporate the protection of religious organizations who become HUD grantees to draw distinctions on the basis of religion in employment. A similar provision is found in the President's Executive Order 13279,

which makes it clear that a previous Executive Order 11246 pertaining to nondiscrimination by government contractors does not preclude this latitude for the unfettered exercise of religious belief and practice by social security providers. This has long been ensured as a basic civil right of religious organizations under Title VII of the Civil Rights Act of 1964, and nothing in the regulations would weaken this protection for FBOs receiving HUD funding. While Title VII and its well-conceived religious exemption is a regulatory statute, the courts have found it fully applicable and available to organizations receiving public funds. And the free exercise clause, itself, has often been held to supply a ministerial exemption for ecclesiastical personnel. It should be carefully observed moreover that the protection of religious freedom does not exempt an FBO from Title VII's protection against racial, color, national origin, or gender discrimination.

The proposed regulations do not directly deal with disregard of this civil right of religious organizations by state and local laws which may unthinkingly preclude this aspect of religious exercise. HUD could argue that any state or local entity administering HUD funds could not preclude FBOs from observing religious character in staffing on the basis of the regulation's general statement that "state and local governments . . .are prohibited from discriminating against organizations on the basis of religion or their religious character," but perhaps even more specific words are needed. Either the general admonition or a specific one would be clearly enforceable under the Supremacy Clause.

In sum, the HUD regulations eliminate a variety of constitutionally unwarranted regulations of the past that: (a) categorically excluded religious organizations; (b) imposed the costly and unnecessary expense of creating a separate secular organization; (c) precluded monies for mixed religious and nonreligious use projects; (d) forced religious organizations desiring to be HUD participants to forego religious belief and practice in matters of hiring of their own personnel; and (e) fundamentally, sought to banish all evidence of the religious character of the entity seeking to participate. These prior regulations were odious. They did not advance freedom of religion so much as freedom *from* religion, which stands the constitutional protection on its head.

The primary constitutional arguments against the HUD approach is that it requires the good faith of grantees to observe constitutional distinctions. Of course, it does, but this does not distinguish it from virtually all other government funding programs. HUD has established the constitutional rule. It is clear from the regulations that they will require FBOs as all other grantees to "carry out eligible activities in accordance with all program requirements and all other requirements governing the conduct of HUD-funded activities, including those prohibiting the use of direct HUD funds to engage in inherently religious activities." Those who bemoan that this is insufficient often seem to have a latent desire to continue the discrimination against religious organization. This is not warranted. As Justice O'Connor in her concurrence with Justice Breyer in *Mitchell v. Helms* 530 U.S. 793 (2000) made clear, it is not the possibility of diversion that results in unconstitutional application, it is its actuality.

Justice O'Connor wrote: "To establish a First Amendment violation, plaintiffs must prove that the aid in question actually is, or has been, used for religious purposes." *Mitchell, supra.* No longer will funds provided to religious entities be assumed to be misused. In *Mitchell*, the

assurances against divertibility was the grantee's promise and a periodic review of compliance under generally-applied eligibility criteria, just as HUD proposes. Four members of the Court in *Mitchell* would have required even less.

For **direct** assistance, *Mitchell* requires that the aid be "secular, neutral, and nonideological," and that its primary effect not result in government indoctrination, define recipients by reference to religion, or lead to excessive entanglement. The HUD regulations meet these criteria on their face.

A note of caution: the HUD programs involve direct grants of money, rather than in-kind assistance – e.g., computers, textbooks, school bus rides, etc. The Court in *Mitchell* observed that there are special dangers when government makes direct money payments. It can be anticipated that opponents of the President's faith based initiative will desire to litigate this issue in an effort to maintain the discriminatory exclusion of religious providers of the past. Insofar as HUD has carefully limited the use of program funds to secular purposes on the face of the regulations, any such challenge would likely have merit largely in the context of an as-applied challenge. The fact that the Court sees "special dangers," however should not be construed to imply a constitutional prohibition. It should, rather, simply invite careful administration.

A plurality of the Court (the Chief Justice, Justices Scalia, Kennedy and Thomas) emphasize the non-prohibitory nature of the *Mitchell* opinion by giving stress to formal neutrality. If the aid is secular and it is distributed in a religiously neutral fashion, the constitutional standard is fulfilled.

Of course, the greater latitude given to FBOs receiving funding **indirectly** is well-supported by the Court's decision in *Zelman v. Simmons-Harris* 122 S.Ct. 2460 (2002). That latitude depends upon the existence of true private choice among other comparable alternatives. HUD properly and constitutionally acknowledges, consistently with *Zelman*, that funds supplied by indirect choice of the beneficiary can be used for all of the FBOs functions, including those that are religious.

None of the HUD programs on their face seem, at this point, to employ the voucher-type alternative, but should they in the future, HUD would be well advised to have the secular and religious providers in place in advance, and not merely provide a notice to a program beneficiary that he or she may object to the religious nature of a provided service. Establishing the range of choices in advance will ensure the absence of impermissible (even implied) endorsement, and most closely resemble the *Zelman* facts approved by the Court.

In a recent case, the direct/indirect distinction was pivotal to a lower court. In *Freedom from Religious Foundation v. McCallum*, 179 F.Supp. 2d 950 (W.D. Wis. 2002), the district court found the directly given federal subsidy being improperly used for an alcohol addiction program ("Faith Works") with interwoven faith elements. The decision illustrates the analytical tension that exists between a limitation not to use federal funds for religious purposes and federal regulation that appropriately tries to avoid changing the religious character of a grantee. It is a difficult balance, but failure to keep it is administrative failure, not a constitutional one. As the court found, the limitations on religious use of public money cannot be allowed to exist only on

paper. So too, in *ACLU of Louisiana v. Foster*, 2002 U.S. Dist. Lexis 13778 (E.D. La. 2002), the constitutional violation stemmed from public funds being administratively allowed for the purchase of religious materials.

A related issue in the same case illustrates the advantages of pursuing a voucher-like alternative. In *McCallum II*, 214 F.Supp. 2d 905 (W.D. Wis. 2002), a federal court upheld the provision of state money where Faith Works was reimbursed for the cost of services only after it was picked by a program beneficiary from a list of similar programs. Having found that the addicted offenders participated in the religiously-based program only as a result of their free choice, the faith elements of the recovery program raised no constitutional issue.

HUD's regulation places religious organizations on an equal footing with other potential grantees. If administered properly and on their own terms, constitutional questions will surely arise in application. But the regulations themselves – establishing a vital precept of nondiscrimination – are constitutionally sound.

Comments to the

House of Representatives

Subcommittee

On

Housing and Community Opportunity

Committee on Financial Services

Dr. E. Lebron Fairbanks

Mount Vernon Nazarene University

March 25, 2003

The Honorable Chairman Robert Ney and committee members,

Greetings from Mount Vernon Nazarene University. I am grateful for the opportunity to share with you this afternoon.

Mount Vernon Nazarene University is located on a beautiful 400-acre campus in Mount Vernon, Ohio, a city of 15,000 people located approximately 50 miles northeast of Columbus. Mount Vernon serves as the county seat of Knox County, whose median household income is $29,801.

With the help of community leaders, our University was founded in 1968. These community leaders saw the potential for a partnership that could be built between the city and an educational community with a faith-based focus; a relationship that would assist both bodies in learning and service. Mount Vernon Nazarene University is a regional teaching university -- one of the eight liberal arts higher education institutions supported by the Church of the Nazarene here in the United States. The International Church of the Nazarene, a protestant denomination with Methodist roots, sponsors fifty-seven educational institutions worldwide. Mount Vernon Nazarene University has grown from 191 students in the fall of 1968 to over 2300 students enrolled today. We have expanded our academic offerings beyond the traditional undergraduate residency program to include non-traditional undergraduate and graduate programs offered at five sites in central Ohio. We are thrilled with our enrollment with students from Ohio, West Virginia and Eastern Kentucky. We are encouraged with enrollment growth; we are ecstatic regarding our academic reputation for graduating outstanding students in teacher education, business and pre-medicine programs.

We are intentional and passionate in our efforts to educate and train students to serve others, a mission since our founding days. The motto of Mount Vernon Nazarene University is 'to seek to learn, is to seek to serve'. We specifically educate students in a faith-based Christian environment to be successful business leaders, educators, social workers, healthcare professionals and ministers who embrace their chosen vocation with a servant's heart.

Living on or near our campus is essential to the learning experience of an academic community of faith. At present we do not have adequate funds to build single parent or married student housing on campus. Since many of our students come from the Appalachian region of Ohio, West Virginia and Eastern Kentucky, and are first generation college students, they simply cannot afford the typical rental facilities off campus. Additionally, adequate quality housing for low-income families is not available in our community. As I understand the current HUD regulations, we are ineligible for any federal assistance due to the faith-based nature of our institution.

I seek to model servant leadership to an outstanding campus community committed to making our local community and country a better place to live and work. I applaud and support the efforts of the Department of Housing and Urban Development to remove rules against discrimination in employment practices in their programs. I also support the elimination of the general requirement that services be provided in the absence of religious influence.

To answer your specific questions today:

Does the proposed HUD rule assist faith-based organizations in providing housing and needed services to low-income families?

The proposed regulations, if enacted, would provide significant assistance. However, further clarification is needed when a combination of federal AND state funds are requested. Furthermore, I recommend a clearer definition be added for faith-based higher educational institutions such as Mount Vernon Nazarene University.

Do faith-based programs reach people who are not currently receiving government funded housing services?

Yes, but the partnership between the federal government and faith-based institutions like Mount Vernon Nazarene University could be substantially strengthened. In our situation, the lack of affordable housing leads some students to choose a college or university without the definitive and critical link between service and learning.

How can faith-based programs more effectively assist low-income families become self-sufficient?

We believe in our process and product. Students graduate from Mount Vernon Nazarene University, and other faith-based institutions like ours, prepared and equipped for life-long service to others. Approving the proposed HUD rule would enable faith-based higher education institutions to serve more low-income individuals who yearn to become self-sufficient.

Let me offer you an illustration of one woman's desire for self-sufficiency:

Shannon, a Mount Vernon Nazarene University student, was single with a small child living in a previously funded but subsequently sold HUD housing development. The neighborhood had deteriorated and become dangerous. Shannon wanted to move but could not afford alternative housing. Each day, after student teaching, she picked up her child from daycare and prayed, "Please do not let anything happen to me or my baby, help us survive another night." Shannon's story could be repeated many times over by other Mount Vernon Nazarene University students. I am pleased to report today that Shannon graduated with honors from our university and is a dedicated, influential teacher in the Mount Vernon school district.

Scripture teaches us:

> 'You are the light of the world. A city on a hill cannot be hidden. Neither do people light a lamp and put it under a bowl. Instead they put it on its stand, and it gives light to everyone in the house. In the same way, let your light shine before men, that they might see your good deeds and praise your Father in heaven.'

I believe passionately in faith-based higher education institutions. In the past thirty-five years, the 11,000 alumni of the institution I serve have been challenged to make a difference in the world. Other faith-based institutions can echo our experience. We solicit your assistance in significantly increasing our potential for influence by approving and strengthening the proposed HUD regulatory changes for faith-based organizations.

Thank you for the privilege of sharing with this esteemed body my perspectives based on twenty-five years of experience in higher education.

I am grateful.

AAHSA

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Testimony of
Ellen Feingold
President
Jewish Community Housing for the Elderly

House Financial Services Subcommittee on
Housing and Community Opportunity

March 25, 2003

Thank you for the opportunity to testify on The Impact of Faith-Based Housing Partnerships and particularly HUD's proposed rule to facilitate greater use of federal programs and funds by faith-based organizations.

I am Ellen Feingold, President of Jewish Community Housing for the Elderly in Boston and Newton, Massachusetts (JCHE). Our facilities are in both Representative Frank and Representative Capuano's districts, and our residents are enthusiastic constituents of their Congressmen. JCHE developed, owns and manages over 1,000 units of non-sectarian housing for low-income elderly of all backgrounds. The average age of our tenants is over 80 and their average income under $10,000. Almost half of our residents are eligible for nursing homes, but because of the broad menu of services that we make available to them, they are able to continue to live in their own apartments. We are proud of our record of non-discrimination with respect to both residents and employees.

I am here representing JCHE, the American Association of Homes and Services for the Aging (AAHSA), and the Association for Jewish Aging Services (AJAS).

The American Association of Homes and Services for the Aging (AAHSA) is a national organization whose more than 5,600 not-for-profit providers serve over 1 million individuals on a daily basis. Approximately 75 percent of AAHSA members are affiliated with religious organizations; others are sponsored by private foundations, fraternal organizations, government agencies, and community groups. AAHSA is the largest organization representing nonprofit sponsors of senior housing, who own and manage over 300,000 units of market rate and federally assisted housing - including the largest number of sponsors of HUD Section 202 elderly housing facilities.

The Association of Jewish Aging Services (AJAS) is also a national association with 175 member organizations, all of which are faith-based. AJAS members have over 16,000 housing units and are active participants in HUD programs.

No member organization of either AAHSA or AJAS has ever complained of obstacles to their participation in HUD programs because of their faith-based origination. Our members agree that faith-based organizations must be nonsectarian in their activities and must meet all the appropriate obligations placed on recipients of federal funds. Our members uniformly feel that the current system of grants and contracts under the Section 202 program generally works well now and should maintain its impartiality among sponsors of various faiths and between faith-based and non-sectarian, community-based nonprofit organizations.

JCHE's five buildings are all financed and subsidized under federal and state programs. At the end of 2002, we held mortgages and Section 202 advances totaling $23,200,000. The rents of all but 25 of our 1,050 units are subsidized under Section 8 or Project Rental Assistance Contracts, which provided our residents with $7,800,000 in 2002. In that year, we also received $95,000 for resident services coordinators, $102,000 for a Congregate Housing Services Program, and $250,000 in interest reduction payments. In addition, each year we raise $400,000 to $500,000 in charitable funds to provide supportive services and other activities that enable our residents to age in dignity living in their own apartments. We now house 1,300 very old, very poor people; over the years, JCHE probably has provided good, supportive homes for as many as 6,200 elder households. I do not believe there have been any obstacles placed in JCHE's way toward

achieving this accomplishment. Indeed, our government officials take as much pride in these accomplishments as we do.

Organizations like mine do our work based on our commitment to the values of our faith. We bring an extra measure to this work that enhances the quality of the housing we provide and the lives of our residents. We do this in a non-sectarian manner, respectful of the values and beliefs of all who live and work in our government funded buildings. We believe strongly that government should neither favor nor disfavor the work of religious organizations - that separation of church and state protects churches, synagogues and mosques from government intrusion.

AAHSA's and AJAS's faith- and community-based members have been successfully securing HUD funds from a variety of HUD programs for decades. These funds have been leveraged in communities nationwide to house low income seniors and often to provide services they need to continue to live in their homes. These sponsors provide examples of the most successful, trouble-free use of HUD funds. We strongly urge Congress to acknowledge the success of current HUD program structures by supporting the programs as they exist today instead of adding or subtracting requirements specifically for faith-based programs.

Seniors Commission

As Co-Chair of the Congressionally-mandated Commission on Affordable Housing and Health Facility Needs for Seniors in the 21st Century, which completed its report in 2002, I can tell you first-hand that we spent many hours listening to witnesses across the country extol the contributions and importance of faith-based organizations in addressing seniors' needs and pleading for more of the housing they provide. After more than a year of research, public hearings across the country and the submission of numerous written testimonies, the Commission arrived at more than 50 recommendations to improve housing and health care facility options for seniors. None of these recommendations include changing HUD policies to make it easier for faith-based organizations to participate in HUD programs. Why? Because from our perspective there are no real barriers to participation in the current program structures.

In a section of the report titled, "Barriers to Successful Supportive Housing Solutions," the Seniors Commission reviews four categories of barriers. None have any relation to perceived or real obstacles faced by faith-based organizations seeking to participate in HUD programs.

I encourage the members of this committee to review our many recommendations for proposals that can make a real difference in the lives of low income seniors in search of affordable housing.

Organizational Structure

We believe that creation of a separate 501(c)(3) is necessary, and we would oppose anything that would create a preference for any faith-based group over other qualified nonprofits. The creation of a separate 501(c)(3) has value for both HUD and the project sponsor. By establishing a separate single asset corporation, HUD is able to recapture the property in the rare event of a default on the HUD loan. Moreover, the separate owner corporation protects the housing development and its residents should the faith-based sponsor incur fiscal or other liabilities. The establishment of a separate owner corporation, which is financially independent, accords the faith-based sponsor a level of protection against legal liability and any government intrusion in the activities of a religious organization. The faith-based sponsor remains centrally involved, however, in the endeavor as its members can be, and generally are, on the Board of Directors of the owner corporation.

Section 202

As has been stated by HUD Secretary Martinez at Congressional hearings, the elderly housing programs sponsored by faith-based organizations are exemplary. The primary program, and the only one currently available to nonprofits for new development targeted to housing low income seniors, is the Section 202 capital advance with project rental assistance contract (PRAC) program or 202/PRAC.

Faith-based organizations already play an enormous role in HUD's Section 202 Housing for the Elderly program. HUD estimates (*HUD on the R.I.S.E.,* 2001) that 40 percent of Section 202 sponsors are faith-based. The program was enacted in 1959 and since then has created more than 325,000 units of safe, decent and affordable housing for low income seniors. A conservative

estimate brings the physical value of those units to more than $24 billion ($75,000 per unit). Faith-based organizations steward this public investment successfully; there have been only a small handful of foreclosures in the program's 40-year history.

The Section 202 program provides religious-based sponsors with funding to construct housing, which must be equally open to all persons of all faiths/denominations. Construction of a space to serve exclusively as a chapel, for example, is not and should not be allowed. Common areas may be used, however, for resident programming that can include faith-based programs, provided programs for all faiths are allowed to be conducted on site. Requiring resident participation in faith-based programming is prohibited. Our members support these requirements and function quite comfortably within them.

At JCHE, for example, we hold a Passover Seder in one of our large rooms to which all tenants from our diverse tenant groups are invited. The Seder is entirely paid for by charitable funds that we raise. For the event, we have developed a 4-language Hagaddah which I've brought for your pleasure. In addition to the Exodus story that is the centerpiece of the Seder, residents from China and the former Soviet Union recount stories of their own personal Exoduses from oppression to freedom. Again, this event is faith-based in origin, is participated in by all who wish, and is entirely paid for by charitable contributions. There are other events such as Chinese New Year and the Chinese Moon Festival (both are considered religious festivals by our Chinese tenants) that are also supported by JCHE's charitable contributions.

Utilize a Great Variety of HUD Programs

Our faith-based member organizations' mission of service is grounded in independent religious values and community commitment. They offer excellent examples of how nonprofit faith- and community-based providers sharing a common objective of providing affordable and suitable housing to low income seniors can achieve wonderful results. Beyond the Section 202 program, our members participate in a range of HUD programs such as Section 236, Section 221(d)(3), HOME, CDBG, Section 811 and Section 8 rental assistance. Our members also participate in the low income housing tax credit and mortgage revenue bond programs.

Often, many of these programs must be used together with a Section 202 grant in order to cover the cost of development. Two, three, four and sometimes as many as seven additional funding sources are often needed to augment the Section 202 grant before the project is completed. Our members turn to the limited variety of funding sources available to piece together financing and services for their developments. Again, AAHSA and AJAS members, more than 75% of which are faith-based, have not encountered obstacles to federal funding because of their faith-based nature. These programs work well for both faith-based and secular members.

Participation by AAHSA's and AJAS's faith-based members in these programs has never resulted from special or favorable treatment. Rather, our members' great successes are due to the delivery of the highest quality housing, services and a moral commitment to their communities, regardless of religious affiliation. This is a commitment our faith-based members take seriously and from which they derive the energy needed to bring them to the next funding round, the next application and the next victory. Through these programs, our members provide much needed housing where low income seniors can live comfortably, with the supports that make it possible to age in place with dignity and maximize their independence.

Real Issue – Lack of Adequate Funding

The Seniors Commission identified 6.1 million very and extremely low income seniors with priority housing problems not now living in subsidized housing. AARP finds nine seniors on waiting lists for every available Section 202 unit that will become available each year. The stark issue for all of our members, faith-based or not, is not how to access HUD programs – we have figured that out - but the wholly inadequate funding levels available for affordable senior housing each fiscal year.

A major concern for faith-based and other groups alike is the desperate shortage of funding available and the lack of national priority or attention to the need for adequate affordable housing across the country. Your constituents constantly call us and they call your staffs, asking for help in finding affordable, supportive housing. Current funding for the Section 202 program is far too small to accommodate the numerous qualified applications received each year, let alone begin to address the affordable housing option needs of the growing population of seniors. If the

Administration is seeking to encourage greater participation in the provision of supportive housing services by faith-based and other community-based providers, then the pool of funds for which these groups compete must be expanded.

Relaxation of Standards

We would oppose strongly any action to lower standards of participation, performance, nondiscrimination or professionalism that accompany the use of federal funds. Federal standards and requirements, applicable to every federal grantee equally, are vital to maintain the quality of existing programs. Any effort to compromise quality in the name of easing participation we believe is misguided. Current programs do not inhibit access to federal funds by faith-based organizations. Both the integrity of federal programs and the quality of faith-based provision of services can only be maintained if everyone is held to the same quality standards.

Conclusion

Again, thank you for the opportunity to appear before you this afternoon. We are proud of the broad-based participation in HUD programs our members enjoy. We look forward to a time when more can be accomplished by these limited yet critical programs. This will not happen by changing the participation or quality rules for faith-based organizations. Rather, the resources available to expand these very successful programs must be increased.

Please direct questions on this testimony to Ellen Feingold, JCHE, efeingold@jche.org or (617)912-8401 or Linda Couch, AAHSA, lcouch@aahsa.org or (202)508-9476.

TESTIMONY

OF

J. BRENT WALKER

ON BEHALF OF

THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS

BEFORE THE

SUBCOMMITTEE ON HOUSING AND COMMUNITY OPPORTUNITY

OF THE

HOUSE FINANCIAL SERVICES COMMITTEE

UNITED STATES HOUSE OF REPRESENTATIVES

REGARDING PROPOSED CHANGES TO HUD RULES

TUESDAY, MARCH 25, 2003

Introduction

Thank you, Mr. Chairman and members of the Subcommittee, for this opportunity to speak to you on a matter as important as religious liberty.

I am J. Brent Walker, executive director of the Baptist Joint Committee on Public Affairs (BJC). I am an ordained Baptist minister. I also serve as an adjunct professor of law at Georgetown University Law Center, where I teach an advanced seminar in church-state law. I speak today, however, only on behalf of the BJC.[1]

The BJC serves the below-listed Baptist bodies,[2] focusing exclusively on public policy issues concerning religious liberty and its constitutional corollary, the separation of church and state. For sixty-eight years, the BJC has advocated for a well-balanced, sensibly centrist approach to church-state issues. We take seriously both religion clauses in the First Amendment – No Establishment and Free Exercise – as essential guarantors of God-given religious liberty.

No principle is more important to Baptists and the BJC than religious liberty and separation of church and state. We embrace the words of John Leland, a colonial Virginia Baptist evangelist, who said: "The fondness of magistrates to foster Christianity has caused it more harm than all the persecutions ever did." That is why for the past eight years the BJC has fought various initiatives that would allow government to fund religious ministries. We specifically opposed H.R.7.

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[1] My curriculum vitae is attached as Exhibit A. Neither I nor the BJC has received a federal grant or contract in the current or preceding two fiscal years.

[2] Alliance of Baptists, American Baptist Churches in the U.S.A., Baptist General Association of Virginia, Baptist General Conference, Baptist General Convention of Texas, Baptist State Convention of North Carolina, Cooperative Baptist Fellowship, National Baptist Convention of America, National Baptist Convention U.S.A. Inc., National Missionary Baptist Convention, North American Baptist Conference, Progressive National Baptist Convention Inc., Religious Liberty Council, and Seventh Day Baptist General Conference.

The Problems with Government Funding Religion

We join others in applauding President Bush's recognition of religion's vital role in addressing social ills. We also appreciate the good works of non-profit organizations, including religiously affiliated ones, in careful cooperation with government entities, such as the Department of Housing and Urban Development. But we believe religion will be harmed, not helped, by efforts to direct government money to fund pervasively religious enterprises or otherwise to advance religion.

This is precisely what the administration is trying to do through its faith-based initiative and its proposed amendments to the HUD regulations. As the BJC has said for several years, government-funded religion is the wrong way to do right. Attempts to "level the playing field" to promote religion usually result in religion getting leveled.

The problems with government-funded religion are many.

First, it raises grave constitutional concerns. The United States Supreme Court has long said that governmental financial aid to pervasively sectarian organizations, even for ostensibly secular purposes, violates the Establishment Clause of the First Amendment. Pervasively religious entities–ones that are so fundamentally religious that they cannot or will not separate secular and religious functions – should be disqualified from receiving government grants because to fund them is to fund religion. The Supreme Court has also condemned funding religious activity even if done in a non-pervasively religious environment.

Second, it violates the rights of taxpayers. Just as funding pervasively religious organizations or specific religious activities violates the First Amendment's Establishment Clause, using taxes to advance religion violates the First Amendment's

free exercise principles. Although the Supreme Court has never ruled that taxpayers have standing to assert a free exercise challenge to a funding scheme, this is exactly what Thomas Jefferson had in mind when he said that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical." It was over 200 years ago, and it is today. Government should not be allowed to use your tax money to promote my religion.

Third, it results in excessive entanglement between government and religion. It is an iron law of American politics that government regulates what it funds. This is what a Virginia pastor friend of mine meant when he asked government not to give us any "pats on the back." For all too often a friendly pat by Uncle Sam turns into a hostile shove by Big Brother. There is nothing more detrimental to the autonomy of religious organizations than regulation at the hand of government officials.

Fourth, it dampens religion's prophetic voice. Religion has historically stood outside of government's control, serving as a critic of government. How can religion continue to raise a prophetic fist against government when it has the other hand open to receive a government handout? It cannot.

As Dr. Martin Luther King, Jr., arguably the twentieth century's best example of religion's prophetic voice, warned:

> The church must be reminded that it is not the master or the servant of the state, but rather the conscience of the state. It must be the guide and the critic of the state, and never its tool. If the church does not recapture its prophetic zeal, it will become an irrelevant social club without moral or spiritual authority.[3]

[3] King, Jr. Martin Luther, *Strength to Love*, 1963.

Fifth, it encourages unhealthful rivalry and competition among religious groups. We enjoy religious peace in this country despite our dizzying diversity, for the most part, because government has stayed out of religion.

Government funding drags religion into the highly competitive governmental appropriations process. Government does not have the money to fund every religious group in this country. It will have to pick and choose. All too often, the majority faith in a particular area will prevail. But regardless of who wins, the process will not be pretty.

This is just a summary of a few examples of the problems with government funding of religion.[4]

Problems with Proposed Rules to HUD Programs Concerning Faith-Based Organizations

These criticisms of the faith-based initiatives, and "charitable choice" in particular apply to the proposed HUD rule changes. While these difficult and sensitive issues deserve debate by Congress, the administration is going forward aggressively in ways that tread dangerously on constitutional principles and threaten the autonomy of religious organizations and religious freedom generally.

The BJC is particularly concerned about three aspects of this proposal. A more comprehensive critique can be found in other publications.[5]

1. The Proposed HUD Rules Open the Door for Government-Funded Religion.

[4] For an elaboration of these principles, see testimony of J. Brent Walker regarding "Implementation of Existing Charitable Choice Programs," before Subcommittee on Constitution, April 24, 2001.
[5] See, Ira Lupu and Robert Tuttle, "Developments in the Faith-Based and Community Initiatives: Comments on Notices of Proposed Rule Making and Guidance Document," *The Roundtable on Religion in Social Welfare Policy*, January 2003. See also, Comments on Proposed Rule on "Participation in HUD programs by Faith-based Organizations; Providing for Equal Treatment of All HUD Program Participants," filed by members of this body, March 3, 2003.

It is settled that government may not fund pervasively sectarian or pervasively religious organizations and enterprises.[6] These institutions and enterprises are ones in which "religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission."[7] Although four current members of the Supreme Court have questioned the "pervasively sectarian" doctrine, it remains good law and an important concept in Establishment Clause jurisprudence.

The proposed HUD rules ignore the pervasively sectarian doctrine with regard to the eight programs covered. In fact, the proposed rules militate in the opposite direction. The proposed rules pick up language from the CARE bill to the effect that faith-based organizations are not required to remove "religious art, icons, scriptures, or other religious symbols"; and may "retain religious terms in its organization's name, select its board member on a religious basis, and include religious references in its organization's mission statements and other governing documents."

It is true that, if an organization is *otherwise qualified* (i.e., is not pervasively sectarian), the mere presence of icons, a religious name, board makeup or a faith-based mission statement by *themselves* do not vitiate that qualification. However, the proposed rules are written in a way that downplay the "otherwise qualified" concept and appear to open the door for pervasively sectarian organizations to participate in the HUD programs.

Even where an organization is not pervasively religious, but only "religiously affiliated," it cannot use government funds to finance "specifically religious activities."[8]

The proposed rules try to answer this constitutional requirement by prohibiting the funds from being used to support "inherently religious activities, such as worship,

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[6] *Bowen v. Kendrick* 487 U.S. 589 (1988), *Hunt v. McNair* 413 U.S. 734 (1973).
[7] *Hunt* at 743.

religious instruction, or proselytization." As is ably and persuasively argued by Professors Lupu and Tuttle, the novel category of "inherently religious activities" is highly problematic.

Although mentioned in several concurring opinions, the "inherently religious" language has been included in only one majority opinion.[9] Nowhere does the Court in *Bowen* indicate that the Establishment Clause prohibits *only* "inherently religious activities." Indeed, the Court in *Hunt* made it clear that the Establishment Clause is violated when an organization funds a "specifically religious activity" – even in a "substantially secular setting."[10] The Court in *Hunt* does not employ the concept of "inherently religious."

The problem with this nebulous, ill-defined concept of "inherently religious" is that the Establishment Clause prohibits activities which, while perhaps not "inherently religious," may be administered in various religious ways and contexts (e.g., training seminars, counseling services, and other activities).

Additional language in the proposed rules belie attempts to respect settled constitutional strictures. Despite prohibitions on funding "inherently religious doctrines" and the requirement that such activities be privately funded, separately offered, and voluntarily attended, the proposed rules allow a religious organization to "retain its independence" from government and "retain its authority over its internal governance."

These bold caveats send a strong message to religious organizations that constitutional and statutory limits on government-funded religion need not be taken seriously or, at a minimum, create further ambiguity on where the lines are to be drawn.

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[8] *Ibid.*
[9] *Bowen* at 605.

Thus, as to both pervasively sectarian and religious affiliated providers, the proposed rule opens the door for government-funded religion that goes beyond what is allowed by the Supreme Court.

2. The Proposed HUD Rules Allow for Religious Structures to be Constructed with Government Funds that Violate the Establishment Clause.

While the proposed rules acknowledge that HUD funds cannot be used to pay for a structure to be used for "inherently religious activities," the rules allow such funding for structures used for other purposes. The rules specifically permit structures to be used for both secular and religious purposes, as long as the funding is proportionately reduced to equal the percentage of religious use.

This attempt to prorate the funding, first of all, raises severe constitutional concerns. Supreme Court decisions ban government construction grants that are used to fund buildings dedicated to religious uses.[11] Although the Supreme Court's Establishment Clause jurisprudence has been modified since the early 1970s, this principle has not been changed or compromised.

In addition, this approach creates the potential for excessive entanglement between church and state. It raises the specter of horrendous accounting problems, logistical difficulties, and burdensome auditing and record keeping. Moreover, it would almost certainly create the need for perpetual monitoring concerning the use of the buildings by government or administrative agencies.

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[10] *Hunt, at 743.*
[11] *Tilton v. Richardson*, 403 U.S. 672 (1971); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973).

This problem is exacerbated, as Professors Lupu and Tuttle point out, by "shifting allocations over time, between funding-eligible and funding-ineligible uses." Buildings last a long time. Staff come and go and programs change and are eliminated. What happens if, over time, the faith-based organization wants to increase its percentage of religious use? This would result in an unconstitutional funding, as was the case in *Tilton*, or even more monitoring of the internal affairs of the faith-based organization, or both.

In any case, the rule change on government funding of religious structures opens the can of constitutional and administrative worms that will be inimical to the autonomy of religious organizations and promote the very "excessive entanglement" which the First Amendment was designed to prohibit.

3. The Proposed HUD Rules Permit Discrimination on the Basis of Religion in Hiring in Government-Funded Programs.

We support Title VII's exemption for churches and other religious organizations allowing them to discriminate on the basis of religion in their employment practices. This exemption, when applied to privately funded activities and enterprises, appropriately protects the church's autonomy and its ability to perform its mission. Courts have interpreted this exemption not only to apply to clergy, but also to all of the religious organization's employees including support staff, and not only to religious affiliations, but also to religious beliefs and practices.[12] We support this expansive understanding of religious accommodation under Title VII.

However, the proposed rules purport to allow this kind of discrimination even in programs substantially funded by government money. While allowing religious organizations to discriminate in the private sector is a welcomed accommodation of

religion, to subsidize religious discrimination with tax dollars is arguably unconstitutional, and in any case, an unconscionable advancement of religion that simultaneously turns back the clock on civil rights.

Although the Supreme Court has never dealt with the issue of whether a religious organization may continue to discriminate on the basis of religion when funded by tax dollars, at least one federal district court has ruled that such funding violates the Establishment Clause.[13] At the very least, this new provision will invite a flood of litigation and ill will as, indeed, this subcommittee is aware. This was perhaps the most divisive issue presented in H.R. 7 in the 107th Congress.

The proposed changes to the HUD rules acknowledge (albeit inadequately as pointed out above), that government funds cannot be used to support "inherently religious activities" or to discriminate against program beneficiaries. Why then should they want or need to discriminate on the basis of religion in hiring? I can think of no reason other than to press the envelope of permissible religious activities beyond the nebulous confines of the limitations contained in the proposed rules.

Personal Experience

I have worked for the BJC for over thirteen years – first as associate general counsel, then as general counsel, and now as executive director. We receive calls every day from constituents, media, and other interested parties with questions, concerns, and issues on a variety of church-state matters. I do not recall a single problem being brought to my attention concerning the manner in which the HUD rules and regulations presently operate.

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[12] *Amos v. Bishop*, 483 U.S. 327 (1987).
[13] *Dodge v Salvation Army*, 48 EMPL. PRAC. DEC. P38, 619 (S.D. Miss. 1989) (Unpublished).

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[13] *Dodge v Salvation Army*, 48 EMPL. PRAC. DEC. P38, 619 (S.D. Miss. 1989) (Unpublished).

J. Brent Walker

J. Brent Walker is executive director of the Baptist Joint Committee and both a member of the Supreme Court Bar and an ordained minister. A native of Charleston, W. Va., Walker holds B.A. and M.A. degrees from the University of Florida. He also earned a law degree from Stetson University College of Law.

Walker was a partner in the law firm of Carlton, Fields in Tampa, Fla. Walker left the firm in 1986 to enter Southern Baptist Theological Seminary, Louisville, Ky., where he earned a master of divinity degree in 1989 and was named the most outstanding graduate. He was pastor of the Richland Baptist Church, Falmouth, Ky., and regularly speaks in churches. In addition to his duties as executive director of the Baptist Joint Committee, he serves as an adjunct professor of law at the Georgetown University Law Center.

Walker has been published widely and routinely provides commentary on church-state issues in the national media. He has been quoted by numerous national publications and has appeared on CNN's *Talk Back Live,* NBC's *Today Show,* MSNBC, Fox Morning News, Fox News Channel's *The O'Reilly Factor* and National Public Radio's *Morning Edition* and *All Things Considered.*

His wife, Nancy, is pastor for congregational care at Columbia Baptist Church in Falls Church, Va. They have two college-age children. Ryan is a recent graduate of James Madison University and Layton is a student at Mary Washington College.

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April 22, 2003

The Honorable Barney Frank
Ranking Member
House Committee on Financial Services
Washington, D.C. 20515

Dear Ranking Member Frank:

On behalf of Americans United for Separation of Church and State, I am writing to request that the attached materials be included as part of the record for the March 25, 2003 Subcommittee on Housing and Community Opportunity hearing entitled "Strengthening America's Communities: Examining the Impact of Faith-Based Housing Partnerships." I appreciate your consideration of this request.

Attached please find Americans United's comments to the Department of Housing and Urban Development's recent proposed rule changes regarding the participation of faith-based organizations in HUD programs. ["Participation in HUD Programs by Faith-Based Organizations; Providing for Equal Treatment of All HUD Program Participants; Proposed Rule (Doc. No. FR-4782-P-01;FR Doc. 03-133; RIN 2501-AC89)"] We are deeply troubled by HUD's proposed changes to regulations governing the participation of faith-based organizations in a number of HUD programs. As currently proposed, these changes will likely result in unconstitutional use of federal funds and violate longstanding civil rights protections in our nation's housing programs. These changes are unfortunate given that HUD has a long history of partnering with faith-based organizations in a way that does not violate the separation of church and state or the civil rights of employees who are paid with federal funds.

We are pleased that both the Subcommittee and the Full Committee are examining these issues very carefully. We hope that our enclosed comments regarding this matter assist the Committee with its review of the serious constitutional and civil rights implications of these proposed changes.

Sincerely,

Barry W. Lynn

Reverend Barry W. Lynn
Executive Director

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March 7, 2003

VIA HAND-DELIVERY

Office of the Rules Docket Clerk
Office of General Counsel
Room 10276
Department of Housing and Urban Development
451 Seventh Street, SW
Washington, DC 20410-0500

Re: Participation in HUD Programs by Faith-Based Organizations; Providing for Equal Treatment of All HUD Program Participants; Proposed Rule (Doc. No. FR-4782-P-01; FR Doc. 03-133; RIN 2501-AC89)

Dear Sir or Madam:

On behalf of Americans United for Separation of Church and State, I am writing to submit comments regarding "Participation in HUD Programs by Faith Based Organizations; Providing for Equal Treatment of All HUD Program Participants; Proposed Rule" (hereinafter "Proposed Rule"), which was published by the Department of Housing and Urban Development in the Federal Register on January 6, 2003. We are submitting comments because the Proposed Rule is likely to result in unconstitutional uses of federal funds.

The voucher program authorized by the Proposed Rule lacks adequate constitutional safeguards. The recent Supreme Court decision in *Zelman v. Simmons Harris*, __ U.S. __, 122 S. Ct. 2460 (2002), which allowed the use of vouchers at religious schools, established a strict set of requirements that must be met in order to find a voucher program constitutional. According to the Court, a voucher program must be completely neutral with respect to religion, use of vouchers at a religious institution must be a wholly genuine and independent private choice, the vouchers must pass directly through the hands of the beneficiaries, the voucher program must not provide incentives to choose a religious institution over a non-religious one, the program must provide genuine, legitimate secular options, and there must be a secular purpose for the program. *Id.*

The Proposed Rule reflects little if any concern for these criteria. It does not limit vouchers and other similar forms of redeemable disbursement to those markets in which wide-ranging secular options are available. In fact, the Proposed Rule does not even require a beneficiary who objects to a religious participating organization to be provided with an alternative, secular provider. Because the Proposed Rule fails to require that a secular program be made available to objectors, and does not limit vouchers to those areas in which an array of secular

options are available, it fails to meet the requirements necessary to allow vouchers or other forms of redeemable government aid to be used by religiously-infused organizations participating in HUD programs.

In addition, the Supplementary Information describing the Proposed Rule (hereinafter "Supplementary Information") states that faith-based organizations participating in HUD programs are not required to separate their inherently religious activities from the HUD-funded services they offer "where HUD funds are provided to a religious organization as a result of a genuine and independent private choice of a beneficiary." This language is confusing, as it is unclear whether it applies to programs attended exclusively by voucherized beneficiaries, or extends to programs in which some but not all beneficiaries are using forms of redeemable disbursement. The Proposed Rule should be amended to make clear that religious activities must be "separate, in time or location" when one or more of the program participants is not receiving voucherized assistance.

The Proposed Rule allows public funds to be given to pervasively sectarian organizations. The Proposed Rule disallows religious organizations from using public funds to support "inherently religious activities, such as worship, religious instruction, or proselytization," but places no limitations on the kinds of religious organizations that can receive public funds. The lack of such a limitation violates the constitutional principle that government may not fund programs that are "so permeated by religion that [their] secular side cannot be separated from the sectarian" (*Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 759 (1976)), or "in which religion is so pervasive that a substantial portion of [their] functions are subsumed in the religious mission" (*Bowen v. Kendrick*, 487 U.S. 589, 610 (1988)). Although the United States Supreme Court has repudiated the "pervasively sectarian" standard for in-kind provisions to religious institutions, a majority of the Court has indicated that the standard remains in place with respect to the provision of monetary funds. *See Mitchell v. Helms*, 530 U.S. 793, 848, 855-56 (2000) (O'Connor, J., concurring) (noting, in upholding program, that no public "funds ever reach the coffers of a religious [institution] and that there are "special dangers associated with direct money grants to religious institutions" because such "aid falls precariously close to the original object of the Establishment Clause's prohibition").[1] The Proposed Rule should be amended to prohibit the award of funds to religious organizations that fall into this category.

The requirement that religious activities must be offered "separately, in time or location" from government-funded services must be strengthened. The Proposed Rule states that religious activities must be offered "separately, in time or location" from HUD-funded programs or services. This would allow a faith-based participating organization to compartmentalize the delivery of services into, for example, fifteen-minute increments of time, and to alternate between religious and non-religious segments of the program, or to immediately follow the non-religious portion of a program with a religious element, without distinguishing

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[1] Because there was no majority opinion in *Mitchell,* and Justice O'Connor joined the judgment on the narrowest grounds, federal appellate courts have agreed that the holdings of *Mitchell* are set forth in Justice O'Connor's opinion. *See Columbia Union College v. Oliver*, 254 F.3d 496, 504 & n.1 (4th Cir. 2001); *DeStefano v. Emergency Hous. Group, Inc.*, 247 F.3d 397, 419 (2d Cir. 2001); *Johnson v. Economic Dev. Corp.*, 241 F.3d 501, 510 n.2 (6th Cir. 2001).

between the two. The Proposed Rule should be amended to close this "loophole."

The Proposed Rule disregards local laws pertaining to diversity. The Proposed Rule fails to recognize that some state and local governments require a participating organization to maintain a diverse board that reflects the composition of its community. The Proposed Rule, which states that "a religious organization that participates in HUD programs will retain its independence," may be construed to exempt religious organizations from diversity requirements imposed by state and local laws. Accordingly, the Proposed Rule should be modified to make clear that it does not preempt state and local diversity requirements.

The Proposed Rule fails to preserves state and local laws. The Proposed Rule contains no preemption clause designed to preserve the application of state and local laws generally, and it specifically fails to recognize the applicability of state and local laws and regulations that relate to discrimination in employment. The Proposed Rule should be modified to include a non-preemption clause that makes clear that state and local governments will be allowed to enforce provisions that restrict or prohibit the use of funds by religious organizations.

The Proposed Rule lacks an oversight mechanism to prevent religious use of government funds. When government funds are given to faith-based institutions, safeguards adequate to prevent religious use of the funds must be in place. *See Mitchell v. Helms*, 530 U.S. 793, 861-63, 867 (2000) (O'Connor, J., concurring); *Tilton v. Richardson*, 403 U.S. 672, 683 (1971); *Freedom From Religion Foundation v. Bugher*, 149 F.3d 606, 612 (7th Cir. 2001).[2] While the Proposed Rule requires that "[a]ll organizations, including religious ones, [] carry out eligible activities in accordance with all program requirements and other applicable requirements governing the conduct of HUD-funded activities, including those prohibiting the use of direct HUD funds to engage in inherently religious activities," it contains no provisions for spot-checks and/or reporting requirements to ensure that government funds are not used to support religious activities or practices. The Proposed Rule does not require religious organizations, for example, to account for the expenditure of funds or to undergo regular audits. Furthermore, it does not require that HUD funds be maintained in a separate account from other organizational funds or that a separate 501(c)(3) organization be established to receive HUD funds, further impeding oversight over the use of public funds.

The Proposed Rule fails to adequately protect the religious liberty of program beneficiaries. The Proposed Rule states that "participation [in inherently religious activities] must be voluntary for the beneficiaries of the HUD-funded programs or services." However, it does not mandate that beneficiaries be informed of this choice. The Proposed Rule should be modified to require religious participating organizations to inform program beneficiaries at the outset of their receipt of services that participation in the organization's religious activities is voluntary. Religious participating organizations should be required to reassure program beneficiaries that they will receive HUD-funded assistance even if they do not participate in the

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[2] This is even more important here, where the funds are actually disbursed by state and local entities, rather than by HUD itself, thereby further diminishing HUD's ability to oversee the use of those funds.

religious activities, and that their decision will have no bearing on the services they receive.

Moreover, the Supplementary Information prohibits a participating organization from discriminating against a beneficiary who refuses to "actively participate in a religious practice," but allows the imposition of penalties for failure to *passively* participate. The Constitution prohibits the government from coercing persons, even subtly or indirectly, to undergo religious indoctrination or to participate (even as bystanders) in religious services. *See, e.g., Santa Fe Independent School District v. Doe*, 530 U.S. 290, 310-12 (2000); *Lee v. Weisman*, 505 U.S. 577, 592-96 (1992). This rule of law applies to government-funded social service providers, barring them from coercing or pressuring benefit recipients to take part, even passively, in religious activity. *See DeStefano v. Emergency Hous. Group, Inc.*, 247 F.3d 397, 412 (2d Cir. 2001); *Center Township of Marion County v. Coe*, 572 N.E.2d 1350, 1353 (Ind. Ct. App. 1991). Under these decisions, it is unlawful, for example, for a religious organization to require a HUD program beneficiary to sit through or be present at a prayer service, bible study or other religious activity, even if the beneficiary is not required to "actively participate" in that activity. The Supplementary Information should be modified to remove the word "actively" so it does not mislead organizations into believing that they may condition a beneficiary's receipt of benefits on *attendance* -- whether active or passive -- at religious activities.

Furthermore, the Proposed Rule contains no requirements pertaining to Notice, Referral, and Provision of Alternative Services for beneficiaries who object to the religious character of a HUD participating organization. The Proposed Rule should be modified to require that a *non-religious* alternative must be made available to beneficiaries who object to a religious participating organization. In addition, a beneficiary in need is very unlikely to object to a program if he or she has no knowledge of the right to an alternative. Accordingly, the Proposed Rule should require that notice of the availability of an alternative provider be given to all beneficiaries at the outset of their receipt of services.

The Proposed Rule improperly allows religious art, icon, scriptures and other symbols to be displayed in areas where HUD-funded services are delivered. Courts have held that religious icons and symbols, even when they are paid for with private funds, cannot be displayed in areas in which government programs take place because they send a message that the government endorses religion. *See Spacco v. Bridgewater Sch. Dep't*, 722 F. Supp. 834, 843 n.1 (D. Mass. 1989) (holding that church could not be leased for use by charter school when religious icons were present in areas accessible to students); *Porta v. Klagholz*, 19 F. Supp.2d 290 (D. N.J. 1998) (holding that charter school could lease church facility where religious iconography was not displayed in areas used by students); *cf. Lynch v. Donnelly*, 465 U.S. 668, 677-680 (1984) (recognizing that art and iconography convey religious themes and messages). Allowing recipient organizations to display such icons and symbols in areas used for publicly-funded programs will necessarily lead to the unconstitutional indoctrination of beneficiaries. The Proposed Rule should be changed to state that religious iconography cannot be displayed in areas where HUD-funded services are offered.

The Proposed Rule does not prohibit religion-based employment discrimination. Longstanding principles of constitutional law prohibit the government from funding positions that are filled based on discriminatory criteria. The Supreme Court held in *Norwood v. Harrison*, 413 U.S. 455, 465-66 (1973), that "the Constitution does not permit the state to aid discrimination." The Supreme Court has further held that "[i]t is . . . axiomatic that a state may

not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492-93 (1989) (quoting *Norwood*, 413 U.S. at 466). Governmental discrimination based on religion is prohibited by three separate clauses of the Constitution -- the Establishment Clause (*see County of Allegheny v. ACLU*, 492 U.S. 573, 590 (1989)), the Free Exercise Clause (*see McDaniel v. Paty*, 435 U.S. 618, 629 (1978)), and the Equal Protection Clause (*see Burlington Northern Railroad Co. v. Ford*, 504 U.S. 648, 651 (1992)).

Accordingly, the courts have uniformly struck down government-funded religious discrimination. In *Dodge v. Salvation Army*, 48 Empl. Prac. Dec. & 38,619, 1989 WL 53857 (S.D. Miss. Jan. 9, 1989), the court ruled that the Establishment Clause prohibits the government from financing a position with a private employer if the employer discriminates based on religion. In *Robinson v. Price*, 553 F.2d 918, 920 (5th Cir. 1977), *appeal after remand*, 615 F.2d 1097, 1099-1100 (5th Cir. 1980), the Fifth Circuit held that a violation of the Free Exercise Clause would be shown if facts presented at trial demonstrated that a state-funded non-profit organization discriminated based on religion in firing an employee. And, in *Voswinkel v. City of Charlotte*, 495 F. Supp. 588, 595-96 (W.D.N.C. 1980), the court ruled that a city could not constitutionally pay a portion of the salary of a church chaplain who would minister to policemen, because a religious test was used to select the chaplain.

With respect to CDBG, the Proposed Rule runs afoul not only of the Constitution, but of the authorizing statute as well. 42 U.S.C. § 5309(a) expressly prohibits all fund recipients from discriminating against employees on the basis of religion, and cannot be overridden by either Executive Order or HUD regulation. The interpretation given to Executive Order 11246 in the Supplementary Information is similarly inconsistent with § 5309(a) of the authorizing statute.

For all of these reasons, the Proposed Rule should be amended to prevent religion-based employment discrimination with government funds.

The Proposed Rule unconstitutionally allows the use of public funds for structures used for religious activities. In seven of the eight HUD programs covered by the Proposed Rule,[3] HUD funds may be expended on a structure that is used "for both eligible and inherently religious activities," provided that the HUD funds do not "exceed the cost of those portions of the acquisition, construction, or rehabilitation that are attributable to eligible activities."[4] This is

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[3] Shelter Plus Care, 24 C.F.R. § 582, does not entail the acquisition, construction, rehabilitation, renovation or conversion of property, and is thus not subject to this provision.

[4] This provision of the Proposed Rule is hopelessly vague because it fails to provide a method by which this computation is to be made. It is unclear, for example, whether an organization is to evaluate, in any given week, the amount of *time* or *space* that is spent on religious versus secular programming. And how is an organization to make this computation when HUD funds are used to improve a structure for which the use changes over time? These various permutations should be addressed by the Rule.

a drastic departure from previous HUD regulations[5] and governing legal precedent.

The Supreme Court has allowed public funds to be used by religious institutions for capital improvements only when the structures are wholly limited to secular use. In *Tilton v. Richardson*, 403 U.S. 672 (1971), the Court held that a public subsidy used to construct buildings at sectarian academic institutions was constitutional so long as the buildings were subject to a permanent prohibition on religious use. The Court struck down a twenty-year limitation on this prohibition, holding that the public funds would otherwise have the effect, at the end of the twenty-year period, of advancing religion. *Id.* at 683. Similarly, in *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, (1973), the Court recognized that "sectarian schools perform secular, educational functions as well as religious functions," *id.* at 775, but nonetheless held that no public funds could be used for maintenance and repair of sectarian school facilities. *Id.* at 777. The Court stated that "[i]f the State may not erect buildings in which religious activities are to take place, it may not maintain such buildings or renovate them when they fall into disrepair." *Id.* The Court rejected the argument that award of public funds was proportionally limited in use to the "purely secular facility upkeep in sectarian schools," finding that "a mere statistical judgment will not suffice as a guarantee that state funds will not be used to finance religious education." *Id.* at 777-78. The Proposed Rule should be modified to comport with governing precedent, which disallows the expenditure of public funds on any facility that is put to religious use, in whole or in part.

* * * * *

The Proposed Rule fails in several respects to comply with constitutional requirements relevant to funding of faith-based organizations. Beneficiaries of HUD-funded programs are among the most needy and vulnerable members of society. Programs designed for their assistance should not erode established civil rights and religious liberties. It is therefore imperative that the Proposed Rule, as well as all appropriate informational and legal program materials and documents, be modified to (1) include greater restrictions on voucherized programs; (2) prohibit funding of programs in which the secular activities cannot be separated from the religious ones; (3) strengthen the requirement that religious activities be offered "separately, in time or location;" (4) protect diversity requirements; (5) preserve state and local laws; (6) provide for adequate oversight to ensure that government funds are not put to religious use; (7) incorporate greater protections for benefit recipients; (8) prohibit government funds from supporting programs that take place in areas where religious iconography is displayed; (9) prohibit recipient organizations from discriminating against employees based on religion; and (10) prohibit public funds from supporting structures where religious activities occur.

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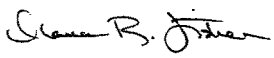
[5] Current HUD regulations already permit religious organizations to participate in HUD-funded programs, but do so in a manner that is consistent with constitutional requirements. *See, e.g.*, 24 C.F.R. § 570.200 (CDBG regulations permitting religious organizations to use CDBG funds for building improvements pursuant to specific constitutional safeguards). To date, these regulations have disallowed the used of HUD funds to support religious structures. *See, e.g.*, Congressional Research Service Memorandum entitled *"Proposed Regulations Regarding Participation of Faith-Based Organizations in Certain HUD Programs,"* at 11-12 (Jan. 21, 2003).

Please feel free to contact me with any questions regarding these comments. Your attention to this matter is greatly appreciated.

Sincerely,



Ilana R. Fisher
Litigation Counsel

cc: Mel Martinez, Secretary of Housing and Urban Development
Roy A. Bernardi, Assistant Secretary of Community Planning and Development

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THE OBSERVER

Providing shelter

By Sam Allis, Globe Staff, 3/30/2003

The Archdiocese of Boston is in financial free fall; yet, mysteriously, its affordable housing program is booming. The Planning Office for Urban Affairs Inc. -- the formal name of the church outfit responsible for affordable housing -- is one of the more active private developers in the city of this sorely-needed stock, and it plans to increase production. At the moment, we're talking 355 affordable units under construction in the city and another 50 to be built on the grounds of St. Aidan's Church, now closed, in Brookline.

But how can this be? The specter of Chapter 11, triggered by lawsuits from its sex scandal, haunts the church.

The Planning Office, it turns out, is a legally separate nonprofit corporation that runs its own show. (It received a mere $10,000 from the archdiocese last year toward a budget over $800,000.) It has depended primarily on annual fund-raisers to support its efforts, hosted until recently by Cardinal Bernard Law.

But fund-raisers are a lousy way to run a business. You never know just what will be coming in, so it's hard to plan effectively for the future. (The event has brought in somewhere over $400,000 in past years.) Last year, for example, there was no fund-raiser.

Enter Lisa Alberghini, hired in 2001 by the office founder, Monsignor Michael Groden, to sharpen its business model and expand its mission. "Our intention is to run things without an annual fund-raiser," says Alberghini, who runs the day-to-day operation with a staff of six. "We're becoming self-sustaining. By the end of this year, we'll be there."

Her affordable-housing template is built on profits from condominiums sold at market rate to help finance the rest and reduce the loan burden. Such strategy was never contemplated when the program was created in 1968 by Groden under the late Cardinal Richard Cushing.

Alberghini, who for 18 years ran the Boston office of The Community Builders -- a huge, national affordable-housing nonprofit -- also brings a new emphasis on middle-income housing in addition to the traditional low-income fare.

"Increasingly, that's what we're focusing on -- moderate-income home ownership," she says. (Both moderate and low-income are based on the last year's federal median income -- $72,800 for a family of four. Moderate ranges from 80 percent to 120 percent of that figure, while low-income is at or below 60 percent of it.)

Thirty of St. Aidan's 59 units, for example, will be moderate-income. Forty percent of the new, 184-unit Rollins Square Church project in the South End is designated for the same group.

God knows, moderate-income people need it. "The whole middle is left on its own," says Bob Kuehn, a private developer who partnered with the Planning Office to build the 183-unit West End Place near the FleetCenter that opened in 1997, 48 units of which were moderate-income with another 58 low-income. "They're struggling the most."

"The South End is increasingly stratified between million-dollar condos and public housing," says Alberghini. "Middle-income people are being shut out of there." The project includes a 275-car underground garage. Given that parking in the South End is now essentially an abstraction, the spaces are going like Doritos at $60,000 a pop.

There are another 40 units of affordable housing for the elderly at the Riley House in Hyde Park. Fifty of the 59 units at the Brookline project will be affordable. Also under construction with developer Ed Fish is a 289-unit project on the grounds of a former hospital, St. John of God in Brighton, where 60 percent of the units will be affordable housing.

These affordable percentages dwarf those of regular commercial developers, who routinely designate a quarter of the total package for affordable units.

St. John of God will be the most complicated mix to date, comprising 83 condos to be sold at market rate to help cover the costs of 102 units of assisted living; 72 nursing home units; the refurbished 20-bed Seton Manor, the oldest continuously operated AIDS-HIV residential facility in the state; and 12 units for retired priests.

In the future, the Planning Office will mix its own projects -- like Rollins Square and St. Aidan's -- with others partnered with private developers, like West End Place and St. John of God. Rollins Square -- a $64 million project with a $52 million loan from FleetBoston -- is the biggest that the Planning Office has tackled alone and, by all accounts, a success as it nears completion.

"They've done it and they've done it well," says Sheila Dillon, who oversees all private affordable housing for the city of Boston. Mayor Tom enino has helped, steering $3.6

million to the project.

What does the private developer bring to the table for the Planning Office? Coverage of all preconstruction costs, which can run in the millions, for architects, engineers, and lawyers. What does he get in return? An image upgrade. Partnering with a nonprofit improves the profile of a breed whose motives are often compared to those of a moray eel.

Alberghini's shop should only get busier with time. She intends to hire more employees and promote more advocacy for affordable housing among church congregations. And as the archdiocese continues to shrink its real estate, more and more church property will come on line.

"It's really important that we still do this, given what's going on in the church now," she says. "Maybe more than ever."

Sam Allis's e-mail address is allis@globe.com

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AMERICAN CIVIL LIBERTIES UNION

Statement on the Unconstitutional or Otherwise Illegal

Conduct Authorized by the Proposed Rule on Participation by Faith-Based Organizations in HUD Housing Programs

Before the Subcommittee on the Housing and Community Opportunity

of the House Committee on Financial Services

Presented by Christopher E. Anders, Legislative Counsel[1]

March 25, 2003

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[1] Christopher E. Anders is legislative counsel with the American Civil Liberties Union, Washington National Office, 122 Maryland Avenue, N.E., Washington, D.C. 20002, 202-544-1681.

The American Civil Liberties Union appreciates the opportunity to submit this statement expressing our serious concerns with the proposed rule on the participation by faith-based organizations in housing programs administered by the Department of Housing and Urban Development. We strongly urge the Subcommittee to use its oversight authority to prohibit HUD from replacing its existing rule that protects civil rights in federal programs, guards the religious exercise rights of participants, and prohibits the misuse of scarce federal housing funds for the construction of church building. The proposed rule would eliminate all of the safeguards in the existing rule.

As written, the proposed rule is inconsistent with constitutional requirements and does not sufficiently detail the scope of constitutionally prohibited religious activities that must be excluded from federal programs. Unless substantially revised, the proposed rule will likely result in grant recipients engaging in unconstitutional or otherwise illegal conduct.

The Proposed Rule Will Likely Result in Unconstitutional Employment Discrimination

The proposed rule abets unconstitutional employment discrimination based on religion as it repeals—without any authorization or approval from Congress—specific regulations prohibiting recipients of HUD funds from discriminating against their employees based on religion. HUD seems to be trying to apply to HUD programs "charitable choice" provisions that Congress enacted as part of the authorization or reauthorization of three specific programs administered by the Department of Health and Human Services.

Congress never authorized HUD to apply charitable choice to its housing programs. However, even if it had provided such authorization, the entire proposition that a religious organization can discriminate with federal dollars is unconstitutional. The charitable choice provisions authorized for the three HHS programs improperly allow a religious organization receiving funds to retain its exemption from the provision in Title VII of the Civil Rights Act of 1964 generally prohibiting religious discrimination in employment. For example, the employment practices provision for the TANF welfare reform program provides that "the participation of a religious organization in, or its receipt of funds from, an applicable program does not affect that organization's exemption under 42 U.S.C. 2000e-1 regarding employment practices." 67 Fed. Reg. at 77363. The referenced section of the U.S. Code is a provision in Title VII of the Civil Rights Act of 1964 that permits religious organizations to prefer members of their own religion when making

employment decisions. Although the Supreme Court upheld the constitutionality of the religious organization exemption in Title VII, *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 336-39 (1987), the Court did not consider whether a religious organization could discriminate based on religion when making employment decisions in programs that the government finances to provide governmental services.

Several courts have considered whether a religious organization can retain its Title VII exemption after receipt of *indirect* federal funds, *e.g.*, *Siegel v. Truett-McConnell College, Inc.*, 13 F. Supp.2d 1335, 1344 (N.D. Ga. 1994) (clarifying that its decision permitting a religious university to invoke the Title VII exemption is because the government aid is directed to the students rather than the employer), but only one federal court has decided the constitutionality of retaining the Title VII exemption after receipt of *direct* federal funds, *Dodge v. Salvation Army*, 1989 WL 53857 (S.D. Miss. 1989). In that unreported decision, the court held that the religious employer's claim of its Title VII exemption for a position "substantially, if not exclusively" funded with government money was unconstitutional because it had "a primary effect of advancing religion and creating excessive government entanglement." *Id.* The analysis applied by the court in *Dodge* should apply with equal force to the HUD programs that would provide *direct* federal funds to religious organizations.

In addition to causing the Establishment Clause violation cited by the court in *Dodge*, the employment provisions in the proposed rule may also subject the government and any religious employer invoking the proposed rule to liability for violation of constitutional rights under the Free Exercise Clause and the Equal Protection Clause. Although mere receipt of government funds is insufficient to trigger constitutional obligations on private persons, a close nexus between the government and the private person's activity can result in the courts treating the private person as a state actor. *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982).

It is beyond question that the government itself cannot prefer members of a particular religion to work in a HUD-funded program. The Equal Protection Clause subjects governments engaging in intentional discrimination on the basis of religion to strict scrutiny. *E.g.*, *United States v. Batchelder*, 442 U.S. 114, 125 n.9 (1979); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). No government could itself engage in the religious discrimination in employment accommodated and encouraged by the proposed rule's employment provision. Thus, the government would be in violation of the Free Exercise Clause and the Equal Protection Clause for knowingly funding religious discrimination.

Of course, a private organization is not subject to the requirements of the Free Exercise Clause and the Equal Protection Clause unless the organization is considered a state actor for a specific purpose. *West v. Atkins*, 487 U.S. 42, 52 (1988). The Supreme Court recently explained when there is a sufficient nexus between the government and the private person to find that the private person is a state actor for purposes of compliance with constitutional requirements on certain decisions made by participants in the government program:

> [S]tate action may be found if, though only if, there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.' . . . We have, for example, held that a challenged activity may be state action when it results from the State's exercise of 'coercive power,' when the state provides 'significant encouragement, either overt or covert,' or when a private actor operates as a 'willful participant in joint activity with the State or its agents' . . . . .

Brentwood Academy v. Tennessee Secondary School Athletic Association, 121 S. Ct. 924, (2001) (citations omitted).

The extraordinary role that the government has taken in accommodating, fostering, and encouraging religious organizations to discriminate based on religion when hiring for HUD programs creates the nexus for constitutional duties to be imposed on the provider, in addition to the requirements already placed on government itself. There is no doubt that HUD understands what it is doing in repealing its ban on religious discrimination in employment. The clear intent of the proposed rule is to encourage certain providers receiving federal funds to discriminate based on religion.

The proposed rule's repeal of the employment protections are part of a growing pattern of congressional, presidential, and regulatory actions taken specifically for the purpose of accommodating, fostering, and encouraging federally-funded private organizations to discriminate in ways that would unquestionably be unconstitutional if engaged in by the federal government itself. The proposed rule was issued only a few weeks after President Bush signed Executive Order 13279, which amended an earlier executive order, which had provided more than 60 years of protection against discrimination based on religion by federal contractors. The Bush order provides an exemption for religious organizations contracting with the government to discriminate in employment based on religion. In addition, the federal

government is simultaneously proposing to allow religious organizations to discriminate based on religion in employment for federal programs involving substance abuse counseling, welfare reform, and veterans benefits.

The Proposed Rule Ignores a Statutory Prohibition on Religious Discrimination in Community Development Block Grant Programs

The repeal of the employment protections in the CDBG portion of the proposed rule is a unilateral decision by HUD to refuse to enforce a nondiscrimination statute duly enacted by Congress and signed by the President. The authorizing statute for the CDBG programs contains a specific statutory prohibition on discrimination based on religion in those programs. 42 U.S.C. 5309. Because the statutory nondiscrimination provisions do not exclude employment decisions, as Title VI largely does, employment decisions are within the coverage of the nondiscrimination provisions. Thus, even if a religious organization receiving or administering CDBG funds can somehow escape Title VII liability for imposing a religious test on employees in the CDBG-funded program, the program-specific statutory nondiscrimination provision completely bars HUD from providing any federal funds to a provider that will discriminate based on religion in hiring persons to provide services with those CDBG funds.

The Community Development Block Grant (CDBG) Proposed Rule Exceeds the Scope of the Executive Order 13198 Pertaining Specifically to Faith-Based Organizations

On December 12, 2002 President Bush issued Executive Order (EO) 13279 to expand opportunities for faith-based and community organizations to address societal needs using federal dollars. EO 13279 specifically amends the application of EO 11246, which prohibits discrimination and requires affirmative action, to faith-based organizations. These changes pertained only to religious organizations.

Presumably in an effort to make HUD policy consistent with the Executive Order issued in December, HUD issued a series of regulatory modifications, including a change to § 570.607 that applies to CDBG recipients. This change exceeds the scope of the mandate of the President's EO because it eliminates the fair employment and affirmative action reporting and compliance requirements that exist for <u>all recipients</u> of CDBG funding—religious and non-religious alike.

Such a change would result in permitting all recipients of CDBG funding to avoid the fair employment obligations imposed on all government agencies and those funded by them, and implies that discrimination by religion, race, or any other category by such recipients is now permissible. The faith-based initiative should not be issued as a proxy to ameliorate the equal protection guarantees under the constitution by allowing discrimination with public dollars.

The CDBG Proposed Rule Represents a Major Shift in HUD Policy Against Employment Discrimination in Federally Assisted Programs

The proposed regulation is a landmark change in HUD policy prohibitions against employment discrimination. In 1965 President Lyndon B. Johnson issued EO 11246 and this policy has remained unchanged through five Republican and three Democratic Administrations. EO 11246 not only prohibits discrimination in contracting and employment, but it requires vigorous record keeping to prevent future discrimination in hiring and to address racial inequalities apparent in workforces across the country. It specifically prohibits discrimination in employment on the basis of race, creed, color, or national origin. Persons who contract with the federal government must take specific measures to ensure fairness and equality in hiring and must document these efforts. Consistent with this longstanding policy, the current HUD regulation, in force since 1975, requires recipients of CDBG funding to comply with standards set forth in EO 11246 to prevent discrimination in employment. However, the proposed regulation makes it clear that recipients will no longer have to abide by the prohibitions and requirements of EO 11246.

Established in 1975, CDBG is one of the largest federal grant programs in the nation; it was appropriated about $4.4 billion in FY2003. The primary purpose for the program is the development of healthy communities "by providing decent housing and a suitable living environment and expanding economic opportunities, principally for persons of low and moderate income." 42 U.S.C. § 5301(c). CDBG money is a critical resource for most state and local governments in assisting communities rehabilitate and build affordable housing, supporting small businesses in low-income neighborhoods and providing other important services. Many contracts flow from the funding allocated within the CDBG program, a large portion of which includes construction and human services contracts. Given the enormous amount of federal resources distributed under this program, it is particularly wrong that HUD would propose a

regulation that removes vital protections against discrimination and relax requirements to ensure a diverse workforce.

The CDBG Proposed Rule Is Illegal and Moves Beyond the Stated Administration Policy

HUD's description of the change in the CDBG regulation is legally flawed. According to HUD, "by its own term, the Executive Order [11246] applies to government contractors and subcontractors, not grantees." 68 Fed. Reg. at 649. Section 301 of the Executive Order 11246 explicitly covers grants for construction contracts involving Federal financial assistance. Construction contracts are one of the many ways CDBG funding is used by state and local governments to revitalize their communities. CDBG construction contracts would be covered by the terms of EO 11246, but HUD is proposing a regulation that creates a loophole for recipients of CDBG funding. HUD is required to formulate its policy based on Executive Order 11246, and other executive orders issued by the President. In this case, HUD has not only proposed a regulation that goes far beyond its authority, but it is also offering a regulation that directly conflicts with an existing Executive Order.

It is not clear that HUD intended to make this change. When asked directly about the change to § 570.607 by Senator Corzine in a recent Banking, Housing and Urban Affairs hearing, Secretary Martinez said he was "unaware of the issue." Moreover, Secretary Martinez responded, "the faith based initiative attempts to break down barriers and bring more people into opportunities for partnership with the federal government. There's nothing that I'm aware of in that particular regulatory change that would in any way either attempt or by design or accidentally limit participation by people from a broad spectrum of race and creed and other backgrounds."[2] In this instance, the HUD proposed regulation not only limits participation, but also has the effect of excluding the very people the regulation was enacted to include and protect from discrimination.

We hope, as Secretary Martinez indicated, that this proposal was unintended. The ACLU urges HUD to withdraw its proposal to modify § 570.607. Discrimination in employment persists and this regulation is necessary to ensure fairness in employment practices, particularly when the funding is provided by public money.

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[2] U.S. Senate Committee on Banking, Housing and Urban Affairs, Hearing on the Administration's Proposed Fiscal year 2004 Budget for the Department of Housing and Urban Development, March 4, 2003.

The Proposed Rule Allows the Unconstitutional Misuse of HUD Housing Funds to Build Houses of Worship

The proposed rule unconstitutionally allows the use of public funds for structures used for religious activities. In seven of the eight HUD programs covered by the proposed rule, HUD funds may be expended on a structure that is used "for both eligible and inherently religious activities," provided that the HUD funds do not "exceed the cost of those portions of the acquisition, construction, or rehabilitation that are attributable to eligible activities." This aspect of the proposed rule is perhaps the most clearly unconstitutional proposal of all of the many constitutionally flawed proposals that the Administration has advanced as part of its faith-based initiative.

More than 31 years ago, in an opinion written by Chief Justice Warren Burger, the Supreme Court established a bright-line test on whether and how the government may finance "brick-and-mortar" construction for real property owned by religious institutions. In that seminal decision, the Supreme Court held that public funds may be used by religious institutions for capital improvements only when the structures are wholly and permanently dedicated to secular use. *Tilton v. Richardson*, 403 U.S. 672 (1971). The Court held that a public subsidy used to construct buildings at sectarian academic institutions was constitutional only if the buildings were subject to a permanent prohibition on religious use. *Id.* at 683. The Court struck down a twenty-year limitation on this prohibition, holding that the public funds would otherwise have the effect, at the end of the twenty-year period, of advancing religion.

The proposed rule would replace existing rules that apply *Tilton* in a manner that allows religiously-affiliated organizations to participate in HUD housing programs with a proposal that ignores one of the most central and lasting decisions in Establishment Clause jurisprudence. Indeed, perhaps one of the most clear signs of the carelessness in the drafting of the proposed rule is the HUD General Counsel's own confusion on how HUD would apply this rule. In an article in the *New York Times*, the HUD General Counsel explained the formula for determining how much HUD funds could be used in the construction of a house of worship in spatial terms, i.e., how much of the space is allocated to HUD activities. The next day, the same HUD General Counsel explained the same proposed rule to an Associated Press reporter in terms of time, i.e., how much time the building is used for HUD activities. Under this constitutionally bizarre interpretation of the proposed rule, a church could presumably build its sanctuary with six-sevenths of the funding from HUD

sources if it removed the pews and installed beds during the week and then reinstalled the pews for Sunday services. It is beyond any doubt that the courts will not allow such unconstitutional abuse of HUD housing funds. HUD should retain its current rules and not expose itself and religious institutions to liability for such unconstitutional conduct.

The Proposed Rule Raises Serious Establishment Clause Concerns

The proposed rule authorizes religious organizations to provide publicly funded benefits and services. Although the proposed rule indicates its intention to limit the role of faith-based groups to conduct consistent with the Establishment Clause of the United States Constitution, it falls far short of that goal.

The proposed rule also does not sufficiently detail the scope of religious content that must constitutionally be omitted from government-funded programs. It authorizes conduct—such as holding publicly funded programs in facilities adorned with religious icons and issuing invitations, during government-sponsored programs, to later prayer sessions—that will unconstitutionally convey the message that the government endorses religious beliefs. And, in express violation of binding Supreme Court precedent, it permits direct grants of public dollars to organizations whose religious mission subsumes all secular functions.

First, although the proposed rule specifies that no HUD funds may be used for "inherently religious activities," it fails to clarify the scope of religious activity that must, by mandate of the Constitution, be omitted from publicly funded programs. The proposed rule defines "inherently religious activities" only as conduct "such as worship, religious instruction, or proselytization." As further guidance, the Department of Housing and Urban Development states that "inherently religious activities" include "for example, conduct[ing] prayer meetings, studies of sacred texts, or any other activity that is inherently religious." Such guidance is insufficient to ensure that grantees do not run afoul of the Constitution. The proposed rule must be clear:[3] Religious organizations using public funds to

[3] The need for clarity on this issue is evident from the comments of those entities now implementing the Charitable Choice provisions. In a September 2002 survey of five states conducted by the General Accounting Office in response to a request by Congress, faith-based organizations and government officials involved in implementing federal Charitable Choice provisions expressed great confusion about what activities are "allowable . . . under the prohibition on the use of federal funds for religious instruction and proselytizing."

provide social services must provide those services in an entirely secular manner. The list of examples provided by the proposed rule does too little to prevent the unconstitutional inclusion of religious messages in government-financed programs.

For example, although none of the following scenarios falls clearly within the "inherently religious activities" barred by the proposed rule, each violates the Establishment Clause and therefore must be prohibited:

- A faith-based organization receives federal funds to run a vocational training program. The counselors running the program use Bible stories to help emphasize the importance of a good work ethic.
- A faith-based organization receives federal funds to run a welfare-to-work program. As one presentation for program participants, the organization puts on a skit in which Jesus appears as a character forgiving past sins and encouraging a fresh start.
- A faith-based organization receives federal funds to run a drug treatment program. The program's counselors encourage participants to accept and trust in a higher power as one of many steps necessary for recovery.

These scenarios are based on actual conduct, by recipients of public funds, that have been held unconstitutional. For example, in a lawsuit challenging the state of Louisiana's distribution of federal dollars to faith-based organizations in the context of abstinence education, the ACLU established (among many other constitutional violations) that one faith-based organization had used the story of Joseph and Mary and the virgin birth to teach teenagers the importance of abstinence; that others relied heavily on scriptural precepts to promote abstinence; and that others used theatrical skits with Jesus as a character to teach the importance of abstinence. The United States District Court for the Eastern District of Louisiana held that the use of public dollars for such conduct violates the Establishment Clause. *ACLU v. Foster*, 2002 WL 1733651 (E.D.La.)

The risk of the occurrence of such conduct is very real, and the proposed rule must be changed to make clear that it is impermissible. To ensure that the use of HUD dollars does not violate the Establishment Clause, the proposed rule must be changed to make clear that the government may not "disburs[e] [public] funds to organizations or individuals that convey religious messages or otherwise advance religion in any way in the course of any event supported in whole or in part by [public] funds, or in any document or other resource produced . . . in whole or in part using [public] funds." *ACLU v. Foster*, 2002 WL 1733651 (E.D.La.)

Second, the proposed rule authorizes conduct that will impermissibly convey the message that the government endorses religious content. For instance, the proposed rule allows organizations to use their facilities for government-financed programs "without removing religious art, icons, scriptures, or other symbols." The proposed rule also permits personnel running the taxpayer-funded programs to wear clerical garb and to invite participants to attend subsequent religious worship sessions. Yet allowing such intermingling of government financing and religious content impermissibly fosters the impression of government support for a religious mission. *See, e.g., County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 592-93 (1989) (holding that government actions with the purpose or effect of endorsing religion violate the Establishment Clause); *see also Mitchell v. Helms*, 530 U.S. 793, 843 (2000) (O'Connor, J., concurring) (government-financed programs violate the Establishment Clause if "the reasonable observer would naturally perceive the aid program as government support for the advancement of religion") (emphasis in original). The proposed rule must be changed to remedy these constitutional deficiencies.

Third, the proposed rule allows the direct granting of public dollars to organizations, such as churches and religious seminaries, in which religious missions overpower secular functions. Proposed Rule, definitions of "direct funding" and "religious organization" (allowing direct financial grants to *all* nonprofit religious organizations). Yet binding Supreme Court authority forbids the direct grant of public dollars to such organizations. In *Bowen v. Kendrick*, 487 U.S. 589, 610 (1988), the Supreme Court held that the government may not issue direct money grants to institutions in which "religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission." *See also Mitchell* 530 U.S. at 819-20 (plurality opinion) (recognizing "special Establishment Clause dangers" when public dollars flow to such sectarian institutions); *id.* at 855 (O'Connor, J., concurring) (noting "our continued recognition of the special dangers associated with direct money grants to [such sectarian] institutions"). The Court explained that the ban on direct financial aid to such institutions is necessary because "there is a risk that direct government funding, even if it is designated for specific secular purposes, may nonetheless advance the pervasively sectarian institution's 'religious mission.'" *Id.* at 610; *see also id.* at 612 ("[I]n the context of aid to [such] institutions . . . there [i]s a 'substantial' risk that aid to these religious institutions would, knowingly or unknowingly, result in religious indoctrination."). To meet constitutional mandates, the proposed rule must be changed to prohibit direct financial grants to such sectarian institutions.

The Proposed Rule Should Provide Clear Protections From Religious Coercion

The proposed rule prohibits a provider from discriminating against a beneficiary who refuses to "actively participate in a religious practice," but allows the imposition of penalties for failure to *passively* participate. The Constitution prohibits the government from coercing persons, even subtly or indirectly, to undergo religious indoctrination or to participate (even as bystanders) in religious services. *See, e.g., Santa Fe Independent School District v. Doe*, 530 U.S. 290, 310-12 (2000); *Lee v. Weisman*, 505 U.S. 577, 592-96 (1992). This rule of law applies to government-funded social service providers, barring them from coercing or pressuring benefit recipients to take part in religious activity or to submit to religious proselytization. It would be unlawful, for example, for a religious organization to require a HUD beneficiary to sit through or be present at a prayer service, bible study or other religious activity, even if the beneficiary is not required to "actively participate" in that activity. The proposed rule should be modified to disallow the conditioning of benefits, any form of discrimination, or recipient participation—whether active or passive—in religious activities.

The Proposed Rule Cannot Authorize a Voucher Program Without Adequate Constitutional Safeguards

The proposed rule establishes a mechanism for the provision of vouchers without meeting the requirements recently laid out by the Supreme Court. While the Supreme Court decision *Zelman v. Simmons Harris*, 536 U.S. 639, 122 S.Ct. 2460 (2002) has allowed the use of vouchers at religious schools, it also established a strict set of requirements that must be met in order to make a voucher program constitutional. According to the Court, a voucher program must be completely neutral with respect to religion, use of vouchers at a religious institution must be a wholly genuine and independent private choice, the vouchers must pass directly through the hands of the beneficiaries, the voucher program must not provide incentives to choose a religious institution over a non-religious one, the program must provide genuine, legitimate secular options, and there must be a secular purpose for the program. *Id.*

The proposed rule must be constructed to comply with the strict framework laid out by the court in *Zelman*. The most challenging issue the proposed rule must address is the existence of "real choice." The proposed rule must necessarily limit

voucher programs to those communities in which wide-ranging secular options are available. Currently, it is unclear that this standard can be met in many places in this country. Unlike the education context, in the social service context, there is no clearly comparable and available public, charter, magnet, or private social service structure in place to ensure real choice. Moreover, the proposed rule goes so far as to contemplate a system where the alternative options are not even secular.

The Proposed Rule Must Establish a Rule that Beneficiaries Have the Right to Secular Service Provider Alternatives and Must Be Given Proper Notice of This Right

First, the proposed rule does not address the rights of beneficiaries to object to a religious provider assigned to them or to receive an alternative secular provider. The proposed rule must require providers to ensure that beneficiaries' rights are respected. The proposed rule gives states virtually unbridled discretion in determining how beneficiaries receive notice of their right to object to a religious provider and their right to an alternative provider. In addition to clearly establishing this right, the rule must define the time within which a referral to an alternative provider must be made, how accessible the program must be, and whether the services provided will be comparable.

The proposed rule must include a provision to protect beneficiaries who object to the religious character of a provider and it must provide standards to guide the states and ensure remedies for beneficiaries. The propose rule must, for example, require states and/or providers to notify beneficiaries of their rights and options. By the same token, the rule should require that referrals be made in a set number of days, not less than five for example, and provide similar guidance for all undefined terms. The rule must also provide a grievance process for beneficiaries who are not promptly provided with an adequate alternative. The rule must ensure protections against, for example, the government establishing a program whereby an individual is assigned and forced to remain for any period with a religious provider, contrary to his or her beliefs.

In this country, a person should never be forced to make a choice between government-funded programs, all of which are religious. The rule needs to be clarified to state that if a person objects to being assigned to a religious provider the government must provide a secular alternative. In light of the lack of clear prohibitions on religious content in the services, the need for this clarification is certainly amplified.

The Proposed Rule Must Provide Safeguards to Mitigate the Potential Constitutional Violation and Provide Adequate Oversight and Monitoring of Grantees

The proposed rule would remove those provisions of HUD's current regulations that require HUD-funded religious organizations to provide assurances that they will conduct eligible program activities in a manner that is "free from religious influences." The proposed rule argues that it is "unfair" to require only religious organizations to provide such assurances and therefore removes the requirement all together. Given the Establishment Clause dangers of providing government funding to faith-based organizations for the provision of social services, the proposed rule must include these assurances along with additional safeguards, such as those incorporated in the court order resolving the litigation in Louisiana to ensure that government funds were not used inappropriately to fund religion. For example, the proposed rule should require that the contracts between a government agency and its grantees specify that government funds may not support programs or materials that convey religious messages or otherwise promote religion.

The proposed rule should also require monthly reports from grantees detailing whether religious content has been included in any publicly funded program. Periodic site visits to publicly funded programs should be required to ensure compliance with the Establishment Clause. Grantees should be required to notify participants in publicly funded events that, by mandate of the Constitution, any promotion of religion is impermissible and any pressure that they participate in religious activities is impermissible. Such measures are necessary to mitigate the constitutional concerns raised by the proposed rule.

Conclusion

The ACLU strongly urges the Subcommittee to exercise its oversight authority before HUD reverses decades of protecting HUD programs from the problems associated with direct funding of religious buildings, introducing religious content into federal programs, and allowing federally-funded religious discrimination in employment. There is no need to change the present approach to awarding federal housing contracts and grants. The unconstitutional and anti-civil rights provisions of the HUD proposed rule benefit only those religious groups who both want federal money and want to discriminate, but it will have no effect on the eligibility of the many religiously-affiliated groups that have long followed the existing HUD regulations, that comply with all constitutional requirements, and that follow the same employment civil rights laws that apply to every other

federally-funded service provider. The possibility that government funded religion will result in federal funds going to persons who discriminate against others is a risk that HUD--and this Subcommittee--can and should avoid.

A P P E N D I X

April 28, 2003

STATEMENT OF JOHN WEICHER
ASSISTANT SECRETARY, HOUSING
FEDERAL HOUSING COMMISSIONER
U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

BEFORE THE
UNITED STATES HOUSE
COMMITTEE ON FINANCIAL SERVICES

APRIL 28, 2003

Chairman Oxley, Ranking Member Frank, Distinguished Members of the Committee:

Thank you for the opportunity to join you this afternoon to discuss a major initiative of President Bush and Secretary Martinez: their commitment to battling social distress by redefining the role of government in helping Americans in need. Because of our long history of partnering with faith-based and community organizations to provide housing and other important services, the initiative is especially relevant to the work of the U.S. Department of Housing and Urban Development (HUD).

I am here on behalf of the Department to present our views on the role of faith-based organizations. With me are Ryan Streeter, Director of the HUD Center for Faith-Based and Community Initiatives, and HUD Chief of Staff Frank Jimenez. With the Committee's permission, I will be deferring to them as the principal persons with the most detailed knowledge on this subject.

The Administration's goals are clear and achievable: to provide the best possible quality in government-funded service; to support the essential work of all charities, whether secular or religious, regardless of their size; and to ensure a level playing field that embraces every group or organization working to transform lives through their compassionate service.

These community caretakers fulfill a critical need in this country. As President Bush said in October of last year, "An America without faith-based organizations caring for people in need is an America without hope."

One of the President's first official acts was to sign Executive Order 13199, which created the White House Office of Faith-Based and Community Initiatives. He directed the Office to lead a "determined attack on need" by strengthening and expanding the role of faith-based and community organizations in addressing the nation's social problems. The Office reaches into every community of need, while giving special attention to homeless individuals, prisoners, at-risk youth, addicts, impoverished senior citizens, and families moving from welfare to work.

Through Executive Order 13198, the President created Centers for Faith-Based and Community Initiatives in seven federal agencies, including HUD. The HUD Center coordinates the work of the entire Department as we seek to eliminate the obstacles that hinder faith-based and community groups from competing for federal funds on an equal footing with other charities.

We now realize that some of our programs operate under obstacles are unnecessary and persistent. In far too many instances, they have caused the federal government to ignore or impede the efforts of faith-based and community organizations to serve individuals in need. We are taking steps to correct these issues.

By order of the President, HUD – and the six other agencies that comprise the faith-based and community initiative – conducted exhaustive reviews of our internal regulations to identify the barriers to the participation of faith-based and other community organizations in our programs. We discovered a number of common obstacles, the most frequent being a prevailing perception among federal officials that close collaboration with religious organizations is legally suspect.

Some federal programs essentially bar religious organizations from applying for funding, creating a second barrier to partnering with HUD. For instance, funds under HUD's HOME program, which communities around the country use to construct affordable housing, may not be granted to religious organizations "for any activity including secular activities."

These obstacles that we have identified, including inappropriate and excessive restrictions on religious activities, create another barrier that restricts faith-based organizations from receiving HUD funding. A recent case involved the St. Francis House homeless shelter in Sioux Falls, South Dakota – a Catholic facility that provides meals, shelter, and other services to homeless persons. The shelter was denied a HUD grant simply because voluntary prayers were offered before meals. The Department informed the city that there was no violation, and that funds could appropriately be used for St. Francis House, and this was done.

As another example, HUD regulations governing Community Development Block Grants and other programs require religious organizations to agree to not only avoid giving religious instruction or counseling but also to certify that they will exert no religious influence at all in providing federally funded assistance. Other organizations are not required to make similar certifications, and such a requirement unnecessarily reflects an unwarranted presumption that, without provisions specially aimed at faith-based organizations, these organizations will fail to follow the law. Moreover, such vague language may have the effect of chilling the participation of many faith-based providers in HUD programs. These providers will have no intention of using government funds to support religious activities, yet they are uncertain what these unclear regulatory phrases mean. Again, we are taking steps to correct these problems.

President Bush and Secretary Martinez are working to tear down the barriers that lead to unjust discrimination.

The President took decisive action when he signed Executive Order 13279 on December 12 of last year. The Order sets out clear principles ensuring that all eligible social service organizations are able to compete on an equal footing for federal financial assistance. Under the Order, federal programs must be implemented in such a way that they do not violate the Establishment Clause and the Free Exercise Clause of the First Amendment to the Constitution.

HUD is actively implementing the Order to ensure that our policies and programs create a level playing field for faith-based organizations. In doing so, we are improving the ability of these groups to work with us in expanding homeownership, increasing the supply of affordable housing, ending chronic homelessness, and strengthening communities.

I am pleased to report that we are making notable progress in removing the barriers to participation in HUD's grant programs.

As a first step, Secretary Martinez is actively encouraging the participation of grassroots organizations in all grant applications. These organizations touch many lives on the local level, and yet are frequently overshadowed during the grant-making process by their larger and more visible cousins. We are ensuring that

grassroots groups have every opportunity to expand their reach and touch more lives through their good works.

Our Super Notice of Funding Availability (SuperNOFA) now clearly states the eligibility of faith-based and other community organizations. We are conducting web casts specifically designed to educate these providers about the SuperNOFA and the application process. We have installed a toll-free telephone number to help them understand the application process. And we continue to make grant applications easier to understand for potential new partners by removing instances of duplication, mixed messages, and other problems that put first-time applicants at a disadvantage.

Education is key to helping faith-based and other community organizations successfully navigate the grant-making process. HUD is reaching out to these groups through educational initiatives that communicate an important message: we welcome their partnership and will give them the fullest opportunity permitted by law to compete for federal funding.

To ensure that this message is heard, we have appointed faith-based and community liaisons in each of HUD's 10 regional offices and all 81 field offices. Their job is to reach out to faith-based and other community groups that lack experience in working with HUD. HUD is including faith-based and community initiative components in many of our conferences and seminars, and HUD staff appear regularly at conferences to educate community leaders.

Today, we have more than 5,000 faith-based and other community organizations in our database. We plan to reach thousands more this year through mailings, informing them of HUD resources and tools that would be of interest to them.

HUD is coupling educational outreach with administrative reforms that are tearing down the barriers to effective partnerships with America's community of faith.

We have reviewed each of HUD's major program offices to determine the degree to which they do or do not comply with the requirements of Executive Order 13279. Specific programs are currently undergoing a detailed review; our goal is to remove the undue burden often placed on grassroots organizations, particularly those who are newcomers to HUD.

The examples I have cited represent just a sampling of our efforts. In the months ahead, we will continue working to make it easer for faith-based and other grassroots community organizations to join in HUD's mission.

To tie these efforts together, HUD issued a proposed rule on January 6, 2003, that would revise our regulations in eight programs and remove unwarranted regulatory barriers to the equal participation of faith-based organizations. The intent of the proposed rule is to ensure that HUD programs are open to all qualified organizations, regardless of their religious character. The rule would also clearly establish the proper uses of grant funds.

The public comment period for the proposed rule closed March 6. We are in the process of carefully reviewing each of the comments we received.

No matter how big or small the organization, no matter its level of experience in competing for federal grants, no matter its religious affiliation or secular nature, HUD wants every potential partner to have the opportunity to compete for federal resources. If a faith-based or other community organization wants to work with us – and they can do the job – then we will welcome them with open arms and do everything we can to help them succeed in their communities.

In this way, we will provide the best possible service to those who suffer in poverty and despair. And we will help to expand society's capacity to respond with compassion to human needs.

Thank you, Mr. Chairman.

March 7, 2003

Office of the Rules Docket Clerk
Office of the General Counsel
Department of Housing and Urban Development
451 Seventh Street, S.W. Room 10276
Washington, DC 20410-0500

Dear Sir/Madam:

PARTICIPATION IN U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT PROGRAMS BY FAITH BASED ORGANIZATIONS
DOCKET NO. FR-4782-P-01

This letter serves to comment on the U. S. Department of Housing and Urban Development's (HUD) proposed rule "Participation in HUD Programs by Faith-Based Organizations; Providing for Equal Treatment of All HUD Program Participants" (Docket No. FR-4782-P-01). The following are comments specific to various points of the proposed rule, as prepared by the National Community Development Association

GENERAL ASSESSMENT OF THE PROPOSED RULE

This proposed rule presumes that all local governments that receive federal funds are guilty of putting up barriers to impede faith-based organizations that provide public services to lower income persons from fully participating in programs funded by the Federal Government.

The proposed rule also seeks to allow greater latitude in allowing the faith-based non-profit to display religious art, icons, scriptures, or other religious symbols while using Federal funds to carry out its services.

The proposed rule would allow the faith-based non-profit the ability to preempt local laws regarding composition of it board of directors and allow the religious entity to hire workers for the non-profit based on religious preference.

The proposed rule would allow funding for structures used for both eligible and inherently religious activities, as long as the cost of the ineligible activities do not exceed the cost of those portions of the acquisition, construction, or rehabilitation that are attributable to eligible activities.

GENERAL STATEMENT

The National Community Development Association does not support this rule in its current form. We believe that exiting laws and regulations already enable and encourage faith-based groups to participate in the HUD programs administered by local governments. NCDA's members can document the funding of thousands of faith-based groups throughout the history of these programs. Therefore, we cannot support the premise that all local governments have set up barriers to discourage the participation of faith-based groups in HUD programs. We also disagree with the rule's implication that local governments attempt to dissuade faith-based groups form participating in HUD funded programs because of their religious nature. As stated above, local governments work very well and welcome the inclusion of faith-based groups in providing public service activities. However, we strongly believe that local governments have the right, and the responsibility to administer programs so that laws and regulations of the programs, the city and the state are adhered to and to do this when it comes to faith-based groups is no different than the treatment and requirements of other non-profits.

We do not support co-mingling faith-base activities and secular activities in the same buildings. This is clearly a violation of the separation of church and state doctrine of the Constitution, and would invite legal action against s city if such activities were carried out with HUD funds.

And lastly, the proposed rule seeks to preempt state and local laws that have been in effect for decades, were written to comply with federal/Constitutional requirements in providing funding to faith-based groups.

SPECIFIC COMMENTS ON THE PROPOSED RULE

PARTICIPATION BY FAITH-BASED ORGANIZATIONS IN HUD PROGRAMS

Local governments, large and small already have long- standing, well established policies in place on awarding grants to non-profits– religious or otherwise– regarding, federal, state and local funds, to ensure fairness in funds distribution. Indeed, many cities have within their governing documents, (i.e. city charters and local laws) detailing precisely how and by what process the local government shall handle and disburse funds; federal and local to non-governmental entities. In most cases locals laws that affect federal and state funds have companion laws that are derived from state laws, which in most cases mirror or are more restrictive than federal laws.

1.) In the case of HUD funds, it is crystal clear how these funds shall be distributed within the Consolidated/Action Plan structure. The Citizen Participation requirements address how local governments will alert the public, including their non-profit communities on how it conducts its consolidated planning process and how these groups can become actively involved in identifying and prioritizing local needs. Without a formalized structure in place, particularly with more needs to address than funds available, would be political suicide for mayors, city managers, and city councilors. The process, when clearly spelled out, makes for a more efficient and justifiable rating and ranking process for funds

distribution.

2.) The State and Small Cities program. It appears that this rule does not impact 30% of the CDBG funds available and the local governments– small cities– that participate in the CDBG program. As the rule unconditionally presumes that all local governments are guilty of unfair treatment of religious-based non-profits, then aren't the smaller local governments also guilty? Just as this rule presumes that all local governments with populations over 50,000 are unfairly treating religious non-profits, it also presumes that all local governments that receive CDBG funding through the State and Small Cities program are treating religious non-profits fairly. How has this determination been reached? Instances of unfair treatment on any instance should be handled as any other grievance within a federal program, through a process that investigates a complaint using the proper channels so that it can be resolved. There is no need to make rules for the whole when only a few may be guilty.

3.) Local governments are required to alert the general public and the non-profit community how and when information will be available for participation in HUD's programs; the consolidated planning process. If religious entities feel that they are not being treated fairly, they have the right, like any other entity or citizen, to pursue a grievance though the courts system.

FAITH-BASED ACTIVITIES
INDEPENDENCE OF FAITH-ORGANIZATIONS
NONDISCRIMINATION IN PROVIDING SERVICES

The proposed rule also seeks to make the work or mission of non-profits with a religious affiliation of higher status than that of secular non-profits. If passed, the rule would allow its religious nature of the non-profit to preclude it from adhering to laws– local, state and federal– regarding equal opportunity of employment. Specifically, the religious non-profit would be able to reject a job applicant who would work on the public service activities being funded with HUD funds simply because the applicant was not of the same faith or belief structure of the entity they wished to work for.

1.) Religious entities, by nature are inherently biased and discriminatory, otherwise there would be only one religion or form of worship. To blur the line between the separation between church and state, particularly in the case of receiving federal funds, goes against the United States Constitution and sets back th 50 years of civil rights legislation. It falls to the Federal Government to ensure that all citizens rights are protected as the Constitution ensures regardless of race, color, or religion, particularly when it comes to federal funds. To allow any entity to discriminate in the hiring of persons because of their religious affinity goes against the "freedom of religion" clause in the constitution.

2.) To discriminate in job hiring on a religious basis opens the door to other forms of discrimination against persons seeking employment, such a single mothers, unmarried individuals living together, bi-racial marriages and a host of other "seemingly" religious or

moral based issues that could make a person or persons "unqualified" for a job working for a particular religious non-profit.

3.) In the case of non-profit boards of directors, and particularly with CHDO's, the HOME program is very specific about the composition of CHDO boards and tenant participation. These rules are not specific to just secular groups. A change in the HOME rules would be required for the religious concern to "retain is authority and internal governance" under this new rule, should it pass.

INDEPENDENCE OF FAITH-ORGANIZATIONS
FAITH-BASED ACTIVITIES

The proposed rule in allowing activities "of an inherently religious nature" to be present or occur while providing the public service would, in effect, be providing direct funding of religious activities.

1.) Even if the use of federal dollars is strictly monitored, many religious organizations receiving federal funding will find that, en toto, they have more cash on hand than if they were not receiving such funds. This will enable such organizations to budget additional money for inherently religious activities, regardless of whether these activities are directly (and thus inappropriately) funded with federal dollars. The cumulative effect is the same: a federal subsidy for inherently religious activities.

2.) The "definitions, practice, and expression" of a religious organization conceivably could be so clearly expressed in the allowed "religious art, icons, scriptures, or other religious symbols" as to create an environment in which program beneficiaries have no choice but to endure an inundation of religious dogma that is tantamount to proselytization. This sort of environment would be strengthened by the dissemination of "mission statements and other governing documents" that include religious terms.

The cumulative effect of the presence of permitted "religious art, icons, scriptures, or other religious symbols" could create an environment that effectively discriminates against program beneficiaries on the basis of their personal religious beliefs. Compare this to the well-established "hostile environment" concept within sexual harassment law.

3.) While the proposed rule states that "HUD funds provided directly to a participating organization may not be used, for example, to conduct prayer meetings, studies of sacred texts, or any other activity that is inherently religious." It seems likely that some of the methods and materials employed by religious organizations and their spin-offs will blur the line between what is permissible and what is not. The controversy over a Scientology-backed literacy campaign's use of a technique called "Study Technology" is particularly instructive. By changing a few words here and there, the literacy campaign was able to use materials that were directly derived from what are considered by many to be the Church of Scientology's "sacred texts." Local governments have neither the time nor the resources to monitor the numerous opportunities for abuse that the faith-based initiative could create.

ASSURANCE REQUIREMENTS

1.) An assurance of the undertaking and completion of activities is a legal concern for the local government. In fact, subcontract agreements detail what and how the federal funds are to be used for. These agreements protect the non-profit, the locality and the federal government in assuring that funds are expended according to the rules of the city, and of HUD. If the assurances of the religious non-profits are not in contract documents, how is the local government to protect itself should the non-profit engage in activities that are not allowed, unless it has signed an agreement indicating that if fully understands the terms and conditions of its use of federal/city funds? These documents exist to "assure" the locality and HUD that each and every non-profit is fully aware of its responsibilities in receiving federal/city funds, regardless of their intended activities or religious predilection.

Many local governments have hundreds if not thousands for contracts/subcontract agreements with non-profits to undertake public service activities. They cannot all be monitored on a regular basis. Without assurances, legally binding documents, in contractual agreements between the local government and the non-profit, how will there be any indication the non-profit knows what it is supposed accomplish and in what manner it is supposed to accomplish it?

STRUCTURES USED FOR RELIGIOUS ACTIVITIES

It is clear that HUD funds may not be used for the acquisition, construction or rehabilitation of structures that are used for inherently religious activities, such as worship, religious instruction, or prayer. However, HUD funds may be used for the acquisition, construction, or rehabilitation of structures only to the extent that those structures are used for conducting eligible activities under the specific HUD program. ***Where a structure is used for both eligible and inherently religious activities, HUD funds may not exceed the cost of those portions of the acquisition, construction, or rehabilitation that are attributable to eligible activities.***

1.) Allowing funding for structures that are inherently religious in nature regardless of the time used for eligible activities is clearly a violation of the separation of church and state. Under the above definition of "where a structure is used for both eligible and inherently religious activities, HUD funds may not exceed the cost of those portions of the acquisition, construction, or rehabilitation that are attributable to eligible activities," a local government could use HUD funds to acquire, rehab or construct a building, i.e. a church, synagogue, or mosque as long as the amount of funding used is proportional to the space provided for the non-profit eligible activities. Local governments cannot be placed in a situation where they could be improving/reconstructing and building churches, or other places of worship. What would be the formula for proportionment? Is there "statute of limitations" on when the religious building could just be used for religious activities. This activity would be directly funding religion or a church with federal fund.

2.) This is the proverbial "slippery slope." Once governments start improving buildings for the "general conduct" of religious activities, the degree of separation between church and state becomes less and less apparent. The government would be put in the position of sanctioning religion, and particular religious entities because they happened to apply for federal funds through a local government. Government would in fact be funding non-secular activities, structures, and ideology because of the placement and support of the building, the very icon of the ideology. This is not what the drafters of the Constitution had in mind.

3.) The timing issue on the use of facilities and the amount of funds will never work to establish the separation between the religious activities and those of the government. How will the local government know if the time used for non-religious activities is being adhered to? If the public service provided is being held in conjunction with the religious entities' non-secular activities, these services will be perceived to be under of the religious entity's purview regardless of the public service's funding source.

4.) Local governments cannot use CDBG funds for activities that are for the general conduct of government, however, under this rule, local governments could use not only CDBG funds but HOME, HOPE 3, HOPWA, Emergency Shelter Grants, Supportive Housing, and Youthbuild funds for the "general conduct of religion" as long as there is a specified time and proportion of funds used for each activity. As stated above, the government should not be in a position of virtually imposing religion, in any form, on beneficiaries of federal programs.

EXECUTIVE ORDER 11246

1.) It is technically correct that Executive Order 11246 specifically relates to contractors and subcontractors, however, most local governments have adopted this policy into their local laws, as well as have many states. To suggest that EO 11246 only applies to contractors and the construction trades is not correct and would be a preemption of state and local law.

PREEMPTION OF STATE AND LOCAL LAW

The proposed rule would allow the Federal law which, in this case, is less restrictive than most state and local laws regarding the funding of faith-based groups with federal, state, and local funds, to supercede local, and state laws. In most cases, Federal law supercedes state or local laws when the Federal law is more stringent than state or local laws.

1.) For example, in April of 1996, federal procurement standards were relaxed to allow greater flexibility in award contracts for goods and services. The threshold for small purchases was raised to $100,000. However, most states have procurement requirements as do most cities which are more restrictive and use a $10,000 upper

threshold for small purchases, which is allowed and more restrictive than the federal requirement. In the case of religious entities participating in state and local programs, all the requirements of secular non-profits are passed along to the religious non-profits. In this case the Federal law which is less restrictive would supercede the more restrictive state and local laws.

ADMINISTRATION BURDEN

The administrative and cost burden of changing local and state laws, and policies regarding funding public service programs will be hugely disruptive to beneficiaries should this rule become implemented. This rule is akin to being guilty before being proven innocent, instead of innocent before being proven guilty. Local governments should be allowed the assumption of being in compliance with existing laws and rules regarding the distribution of federal funds to religious entities that provide public services to lower income persons until proven otherwise just as an individual does.

1.) If there is indisputable proof of local governments discriminating against religious entities because of its religious nature, then shouldn't the policy for the federal government be to address this issue on a case-by-case basis instead of presuming that the entire nation is guilty of discrimination in this area? Even if there is quantifiable evidence that shows that religious groups are being discriminated against, is the solution to allow the blurring of the separation between church and state, whereby the federal government makes a practice of allowing the religious entities to discriminate in the very nature that affects the low/mod people the most, i.e. getting a job to help them become sufficient? This rule would put a huge strain on monitoring activities for non-profit projects, particularly those of a religious nature. For this rule to be affective, in practice, it would require local governments to scrutinize faith-based non-profit more so than is currently practice, and would indeed create the very situation that this rule presumes currently exits.

THE NATIONAL COMMUNITY DEVELOPMENT ASSOCIATION