



Eliminate Discrimination in Charitable Choice and Faith-Based Initiatives

Issue

Current executive orders and agency regulations surrounding “charitable choice” and the “faith-based initiatives” by the Office of Faith-Based and Community Initiatives’ (“OFB”) permit discrimination in the hiring practices of religious organizations and do not sufficiently ensure beneficiaries are protected from discrimination or proselytization by service providers.

Short Answer

The President should revoke executive orders signed by President Bush that permit discriminatory hiring practices by faith-based and community organizations, and agencies should revoke agency rules and other guidance that were promulgated in support of those executive orders. In their place, the President should issue executive orders that clarify that faith-based and community organizations are governed by all applicable federal, state and local anti-discrimination laws and that “charitable choice” statutory provisions do preempt these laws. The administration should also strengthen regulations protecting beneficiaries from discrimination or proselytization by service providers should also be strengthened.

Background

President Bush created the OFB in 2000, ostensibly to provide faith-based social service providers with a greater opportunity to receive federal funds to provide those services.¹ Theoretically directed by the OFB, these religious organizations receive federal funding to implement under what is commonly referred to as the “faith-based initiative.” Religious organizations can be awarded federal grants and contracts, so long as the organizations’ actions are consistent with the First Amendment’s separation of church and state. Such programs are carried out under the coordinated efforts of the Executive and Legislative Branches, as Congress appropriates large sums of money to federal agencies but permits some Executive discretion as to how those funds should be dispersed. It is in dispensing this money that the administration can most significantly influence discriminatory practices.²

The administration of President George W. Bush took steps to alter what it characterized as an uneven playing field that had required neutral hiring practices and therefore, according to the

¹ See WHITE HOUSE OFFICE, *White House Faith-Based and Community Initiative*, <http://www.whitehouse.gov/government/fbci/president-initiative.html> (providing an overview of both the type of work done by such organizations and more information on their relationship to the federal government).

² One such example is the “Compassion Capital Fund” (CCF), a federal program created in 2002 by Congress as part of a broader appropriations act. See Pub. L. No. 107-116, 115 Stat. 2177, 2196 (Jan. 10, 2002). Congress has continued to appropriate money for distribution pursuant to the CCF, including most recently over \$50,000,000 in FY2007 for “non-profit community-based organizations,” yet has not included detailed criteria for how the money should be used. See DEP’T OF HEALTH & HUMAN SERVS., *Compassion Capital Fund Fact Sheet*, http://www.acf.dhhs.gov/programs/ccf/about_ccf/facts.html; see also CONG. RESEARCH SERV., THE COMPASSION CAPITAL FUND: BRIEF FACTS AND CURRENT DEVELOPMENTS, https://www.policyarchive.org/bitstream/handle/10207/3922/RS21844_20050228.pdf;sequence=1 (CRS Report on initial years of CCF implementation).



Administration, disfavored social programs carried out by religious organizations.³ To this end, the Administration has sought to provide funding to religious organizations regardless of their internal hiring practices. Most notably, White House policy states that federal funds should be allocated with “[n]o discrimination for or against a provider based on religious character, affiliation, or lack thereof.”⁴ In practice, to achieve this so-called “level playing field,” the Administration has explicitly permitted religious groups to maintain internal hiring practices that discriminate against candidates or employees who do not ascribe to the organization’s religious beliefs.⁵

These accommodations allow federally-funded religious organizations to discriminate against the gay, lesbian, bisexual and transgender (“GLBT”) community. Such discrimination can occur in two ways. First, federally-funded religious organizations could discriminate in their distribution of social services, most egregiously by refusing to serve the GLBT community. Although current regulations and other guidance prohibit discrimination against beneficiaries, additional guidance should be issued to ensure compliance with these provisions.⁶

Predating “faith-based initiatives” and the OFB, several statutory “charitable choice” provisions were enacted to allow direct government funding of religious organizations for the purpose of providing social services. The statutory provisions relating to “charitable choice” are found in the following social service programs: Temporary Assistance to Needy Families (“TANF”), Welfare-to-Work, Substance Abuse and Mental Health Administration (“SAMHSA”), Project for Assistance in Transition from Homelessness (“PATH”), and the Community Service Block Grant (“CSBG”). While the content of these statutes is facially neutral, subsequent interpretive guidance by the Bush administration also asserts an exemption for religious providers from non-discrimination laws.⁷

In continuing to endorse its policy that religious providers are exempt from non-discrimination laws, the Bush Administration has also promoted this policy through the Department of Justice (“DOJ”). In particular, the DOJ’s Office of Justice Programs (“OJP”) has issued guidance that interprets the Religious Freedom Restoration Act (“RFRA”)⁸ to RFRA require that “its funding agencies permit faith-based organizations both to receive federal funds and to continue considering religion when hiring staff.”⁹ Although RFRA was enacted to prevent laws that substantially burden a person’s free exercise of religion, that current interpretations use it to exempt faith-based social service providers from complying with non-discrimination laws when receiving federal funds.

³ See WHITE HOUSE OFFICE, UNLEVEL PLAYING FIELD: BARRIERS TO PARTICIPATION BY FAITH-BASED AND COMMUNITY ORGANIZATIONS IN FEDERAL SOCIAL SERVICES PROGRAMS (Aug. 2001), <http://www.whitehouse.gov/news/releases/2001/08/20010816-3-report.pdf>.

⁴ See WHITE HOUSE OFFICE, PROMOTING EQUAL TREATMENT: A GUIDE FOR STATE AND LOCAL COMPLIANCE WITH FEDERAL REGULATIONS, <http://www.whitehouse.gov/government/fbci/pdf/etpc-presentation.pdf>.

⁵ See Exec. Order 13,279, § 2(e), 67 Fed. Reg. 77,141 (Dec. 12, 2002).

⁶ See *id.*

⁷ See *e.g.* 42 C.F.R. Part 54.

⁸ 42 U.S.C. § 2000bb *et seq.* (2006).

⁹ See U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, *Effect of the Religious Freedom Restoration Act on Faith-Based Applicants for Grants* (Oct. 2007), <http://www.justice.gov/fbci/effect-rfra.pdf> (hereinafter, *DOJ Memoranda on the Effect of RFRA*).



The OJP analysis rests on the incorrect assertion that RFRA requires federally funded religious providers be exempt from non-discrimination laws. This assertion is incorrect for two reasons. First, non-discrimination laws do not impose a burden on the free exercise of religion—a fact recognized by previous administration policy. Prior to 2002, the executive branch had taken the position, in both agency interpretations and litigation strategy, that RFRA did not prevent the imposition of conditions on government benefits.¹⁰

Though this abrupt change in policy is telling as to the questionable basis of the OJP memo, the Supreme Court holdings regarding RFRA offer the second and more compelling evidence in showing that the OJP analysis is incorrect. In an appeal by an Archbishop who was denied a permit to build a church in a historic preservation zone, the Court held that RFRA is unconstitutional as applied to the States.¹¹ The Court reasoned that Congress’s power to enforce the Fourteenth Amendment could not justify RFRA’s violation of the constitutional limitations of federal power over the States.¹² As a result of this holding, state anti-discrimination requirements cannot be preempted by RFRA, as RFRA carries no authority over state laws (which, the Court noted, includes local and municipal ordinances).¹³ Contrary to the OJP memo, this analysis shows that RFRA was never meant to, nor constitutionally can, exempt religious providers seeking federal funds from non-discrimination requirements.

The threat to the GLBT community that these policies pose is significant. At least two lawsuits have already been filed alleging that federally-funded religious organizations have used these religious preferences to discriminate against GLBT family specialists and youth counselors.¹⁴

I. Recommendations for “charitable choice” and “faith-based initiatives”

A. Recommendations

¹⁰ See IRA C. LUPU & ROBERT W. TUTTLE, DEVELOPMENTS IN THE FAITH-BASED AND COMMUNITY INITIATIVES: COMMENTS ON NOTICES OF PROPOSED RULEMAKING AND GUIDANCE DOCUMENTS 15 n.12 (Rockefeller Inst. of Gov’t ed. Jan. 2003), http://www.rockinst.org/publications/religion_policy/default.aspx?id=374. Professors Lupu and Tuttle explain that the “administrative and litigating position of the United States up until [2002] had been that the imposition of conditions on discretionary government benefits – like those distributed through government grants and contracts – did not qualify as a ‘substantial burden’ on the exercise of religion within the meaning of RFRA.” *Id.* They go on to state that, before 2002, “no agency of the federal government had ever suggested that RFRA prohibited the imposition of any conditions of participation – involving employment discrimination or otherwise – on religious entities (or anyone else) in any federal program.” *Id.* at 16 n.13. See *id.* at 16 (citing *Branch Ministries v. Rossotti*, 40 F. Supp. 2d 15 (D.D.C. 1999)).

¹¹ See *City of Boerne v. Flores*, 521 U.S. 507 (1997).

¹² See *id.*

¹³ See *id.* at 516.

¹⁴ See *Pedreira v. Kentucky Baptist Homes for Children*, 2008 U.S. Dist. LEXIS 25724 (W.D. Ky. Mar. 31, 2008). In *Pedreira*, plaintiff was fired from her job as a family specialist after it was discovered that she was a lesbian. The religious organization did not dispute this allegation, and instead responded that “Pedreira’s admitted homosexual lifestyle is contrary to Kentucky Baptist Home for Children’s core values.” *Id.* at *7-8. See also *Bellmore v. United Methodist Children’s Home and Department of Human Resources of Georgia*. In *Bellmore*, a similar fact pattern emerged: a lesbian youth counselor was fired for failing to subscribe to the religious organization’s sectarian beliefs, which included a condemnation of homosexuality. Ultimately, the case settled in favor of the counselor. See LAMBDA LEGAL, *Background*, <http://www.lambdalegal.org/our-work/publications/facts-backgrounds/bellmore-background.html>.



Through an executive order, the President should both revoke Executive Order 13,279 regarding the federal funding of faith-based service providers and instruct the Departments and Agencies to begin the process of repealing or modifying existing regulations that were based on that executive order.¹⁵ Ostensibly, Executive Order 13,087 provides for equal opportunity for religious organizations; however, in reality, it attempts to legitimize otherwise illegal discrimination by these organizations.¹⁶

The President should foreclose this possibility by issuing another executive order that clarifies that all organizations that wish to compete for federal funds must comply with all applicable federal, state, and local non-discrimination laws in the use of those funds. The executive order should direct agencies to begin the process of issuing new rules and regulations that reflect this requirement. The order should also continue the policy stated in Section 2(d) of the former executive order, which prohibits discrimination against beneficiaries, and Section 2(e), which prohibits compelling beneficiaries to engage in religious activities.¹⁷

B. Authority

The President's authority to issue and revoke executive orders stems from the textual grant of authority to "take care that the laws be faithfully executed."¹⁸ "Charitable choice" and the "faith-based initiatives" are an amalgam of rules and regulations based on statutory provisions and executive orders.¹⁹ Though regulatory changes to "charitable choice" will need to be performed in a manner that shows proper deference to due process concerns, the President has the authority to begin the process. For the rules and regulations that are based upon executive order, the President's authority is clear and unquestioned. Presidents have the unequivocal authority to issue executive orders setting policy for the executive branch and mandating that agencies comply, to the degree possible within their authorizing statutes, with that policy.

In order to modify the regulations and other executive branch guidance that are based on statutory provisions, a statutory grant of authority to the executive branch is required. Congress has given a general grant of authority to the heads of each executive department to issue all necessary regulations.²⁰ Further, each of the social service programs containing statutory "charitable choice" provisions has a grant of authority to the agency charged with its administration. For TANF, the grant of authority is found in 42 U.S.C. § 616, providing for administration of the grants by the Assistant Secretary for Family Support.²¹ However, Welfare-to-Work, though included in TANF, is to be administered by the Secretary of Labor.²² Under SAMHSA, the authority is granted to the

¹⁵ Exec. Order No. 13,279, 67 Fed. Reg. 77141 (2002).

¹⁶ See *id.* and *Pedreira v. Kentucky Baptist Homes for Children*, 553 F. Supp. 2d 853 (W.D. Ky. 2008) (alleging that a woman was fired after she was discovered to be a lesbian).

¹⁷ 67 Fed. Reg. at 77142-43.

¹⁸ U.S. CONST. art. II, § 3.

¹⁹ See, e.g., Exec. Order No. 13,279, 67 Fed. Reg. 77141 (2002); 42 U.S.C. § 9920 (establishing "Charitable Choice" for Community Service Block Grants).

²⁰ 5 U.S.C. § 301.

²¹ 42 U.S.C. § 616.

²² 42 U.S.C. § 603(a)(5)(C)(ix).



Substance Abuse and Mental Health Administration in 42 U.S.C. §290aa(d). Under CSBG, broad authority is granted to the Secretary of Health and Human Services to create and administer the block grant program.²³

C. Recommendation

The Assistant Attorney General of the Department of Justice Office of Legal Counsel (“OLC”) should issue a memorandum retracting the OJP’s prior interpretation of RFRA, and more accurately interpreting it as described below.

D. Authority

The Assistant Attorney General of the OLC is charged with ensuring that the OLC carries out its statutory responsibility, and those of the Attorney General, to furnish legal advice to the President and the heads of the executive and military departments, and to provide legal advice and assistance through rendering legal opinions to the heads of the executive departments and other components of the DOJ upon request.²⁴ As a result, the Assistant Attorney General for the OLC has the authority to issue an opinion regarding the applicability and constitutionality of RFRA.

²³ 42 U.S.C. § 9904.

²⁴ See 28 U.S.C. § 511-13 (2008); see also DEP’T OF JUSTICE, ORGANIZATION, MISSION, AND FUNCTIONS MANUAL: OFFICE OF LEGAL POLICY, <http://www.usdoj.gov/jmd/mps/manual/olp.htm>.