



RIN 1290-AA52

February 9, 2026

**RE: Written Comment re the Department of Labor Request for Information at 90 FR 57217. Docket ID: 2025-22457. RIN 1290-AA52**

To whom it may concern:

We write today to offer Christian Legal Society’s perspective about potential barriers to faith-based organizations’ participation in Department of Labor-funded or regulated programs. See 90 FR 57217-18. We appreciate the desire of the Department of Labor (“the Department” or “DOL”) to provide equal treatment and reasonable accommodations for faith-based organizations.

We appreciate that 29 CFR 2.32 (“the regulations”) specifically seeks to ensure that faith-based organizations may participate and retain their religious identity, but we have concerns with the language currently employed in the regulations, as we detail herein. Specifically, immediately right after stating that faith-based organizations may retain their autonomy, right of expression, and religious character, the regulations then specify limitations on the activities of such organizations that could be applied in a way that undermines their autonomy. Further clarification of what those phrases do not mean would bring them more into alignment with current Supreme Court caselaw.

We conclude with some specific suggestions for actions that could be taken, including an NPRM to adjust the regulatory language to bring it more in line with current Supreme Court jurisprudence, and/or the development of a guidance document clarifying the practical implications of what it means for religious organizations to maintain their autonomy while ensuring equitable provision of services to all beneficiaries. Such changes would help ensure that religious organizations participating in DOL programs may help deliver services “without undue restrictions on such organizations’ religious liberty.” 90 FR 57217-18.

We make the following observations:

1. The regulations already provide some important protections for religious organizations.
2. Some of the regulatory language is likely to be read by future administrations in a way that hinders the religious freedom of service providers. This could result in

constitutional issues and is likely to undermine the original goal of allowing faith-based organizations to receive equal treatment and serve their communities.

3. Simple clarifications could bring the regulatory language more in line with current Supreme Court precedent and enable faith-based organizations to provide excellent and needed services without compromising their identities.

**We discuss these observations in turn:**

**First, the regulations currently provide some important religious protection for faith-based organizations that must be preserved.** We applaud the language in 29 CFR 2.32(a)(1) that says faith-based organizations must not be discriminated against “on the basis of the organization’s religious character, motives, or affiliation, or lack thereof, or on the basis of conduct that would not be considered grounds to favor or disfavor a similarly situated secular organization.” We also appreciate that the regulations give some specifics about how religious organizations should be treated fairly. For example, they specifically mention that faith-based organizations do not have to conceal religious “icons, indicia, messages, etc.” already posted at their facilities when they provide government funded services at those locations. 29 CFR 2.32(c)(2). This ensures that their religious character does not have to be hidden. The regulations also mention that faith-based organizations may not be required to “provide assurances or notices” not required of non-faith-based organizations. 29 CFR 2.32(b)(1). This prevents the singling out of religious organizations by suggesting that they should apologize for being religious. The focus should instead be on whether they are providing services well.

The presence of these specific clarifications indicates that there is also room for additional clarifications, as we suggest below. Additional clarity would appropriately increase understanding and encourage long-term stability in the participation of faith-based organizations as service providers. Future administrations need to know what it means and what it takes to allow religious organizations to maintain their religious character.

**Second, some of the regulatory language, particularly 29 CFR 2.32(c)(1), is likely to be read by future administrations in a way that hinders the religious freedom of faith-based service providers.** This could result in constitutional issues and is likely to undermine the original goal to allow faith-based organizations to receive equal treatment and serve their communities. Some clarifications of the regulations, therefore, would help avoid these problems.

The Biden Administration, in its multi-agency final rule in March 2024, relied on vague phrases promising to follow the First Amendment so that it could ignore concerns about whether the language could be misused to stifle religious identity or expression. It stated a

prohibition and then threw in a phrase like “except where consistent with the Establishment Clause,” 89 FR 15707, without explaining its meaning or providing any best practices. The administration also created promises of “case-by-case” consideration for accommodation requests, 89 FR 15671, without providing any clear standards for when accommodations would likely be offered. In practice, that provides little clarity for the agency staff trying to implement the regulations and creates uncertainty for religious organizations considering whether they want to participate in government programs as service providers.

Constitutional problems are more likely to arise when the government seeks to create an absolute separation between religious activity and non-religious activity. While it is necessary to specify the purpose and parameters for how government funds are to be used, most efforts to exclude everything religious while inviting religious organizations to help provide the services are going to be susceptible to overregulation and likely to result in government interference. This is true of phrases like the prohibition on engaging in “any explicitly religious activities.” 29 CFR 2.32(c)(1). Who gets to define what constitutes “explicit,” and how will it be applied consistently? The Supreme Court has often acknowledged this difficulty, stating that drawing lines between levels of what is more religious or less religious is problematic. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 110 (2001) (holding that the exclusion of a religious club’s activities because of their “quintessentially religious” nature violated the First Amendment). It is wrong for the government to say something is too religious just because it includes elements like “religious instruction and prayer” as part of a bigger goal of teaching morals. *Id.* at 111. Justice Scalia’s concurrence in *Good News* further explained that there is no intelligible distinction between “worship” and “other religious speech.” See *Id.* at 126-27. The Court has also said it is a constitutional violation to exclude a group from speaking out of a religious viewpoint on a topic that is otherwise permissible to discuss. *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (holding that it is viewpoint discrimination to exclude a group from participating in a forum because it wants to approach a topic from a religious perspective). The Supreme Court has clearly stated that the government must avoid viewpoint discrimination. In addition, it has made clear that allowing religious voices opportunities to speak in the same way as non-religious voices (to avoid viewpoint discrimination) does not offend the Establishment clause. See *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 839 (1995).

Here, 29 CFR 2.32 conditions the promise that a religious organization can retain “its autonomy; right of expression; religious character; and independence” only insofar as it does not use the funding “to support or engage in any explicitly religious activities.” The scope of that condition and the meaning of “explicitly religious activities” is less clear than

it is intended to be, and can easily lead to constitutional problems if allowed to be interpreted subjectively. *The line drawing process can vary based on the eye of the beholder between 1) when something is just a religious viewpoint being expressed during an activity that is not overtly religious or 2) when religious expression during an activity turns the whole activity into an “explicitly religious activity.”*

Some recent court cases demonstrate the danger of this line-drawing, and how it can lead to justifying the rejection of a faith-based organization’s services simply because of its religious character, structure, and religious governance decisions. See *Youth 71Five Ministries v. Williams*, 160 F.4th 964 (9th Cir. 2025). In *Youth71Five Ministries*, the Ninth Circuit noted the importance of allowing a religious organization to preserve its religious identity and autonomy. *Id.* at 985. Yet it also held that the government does not unconstitutionally exclude a religious organization if a government program, as a policy decision, puts a neutral condition on potential grantees prohibiting them from making employment, contracting, or service decisions “based on personal religious beliefs.” *Id.* at 988. We argue, below, that some “neutral” policies are not actually “equal.” See *infra*, p.10. Moreover, we continue to dispute the constitutionality of such a policy and respectfully suggest that, as a practical matter, it is not a good idea. This administration should act to clarify that such a policy choice is NOT what its regulations mean or require. Instead, we advocate for regulatory language that allows religious organizations to define and adhere to their religious character and beliefs, including through their structure and governance decisions. Notably, the *Youth 71Five* court did its analysis in the context of analyzing an “expressive association” claim, 160 F.4th at 984-989, arguably undermining both free speech and free exercise interests.

In support of the better policy choice we suggest here, the same court (the Ninth Circuit) also recently acknowledged that when an organization sees the motivation and expression of its workers and the devotional nature of its organizational structure as part of its identity, its employment decisions and standards cannot be essentialized as just “activities” that can then be regulated without constitutional impact. *Union Gospel Mission of Yakima v. Brown*, 162 F.4th 1190 (9th Cir. 2026). Its internal management decisions, protected by the church autonomy doctrine, may include its “policy of hiring co-religionists for non-ministerial roles” and its decisions about what is necessary for it to advance its “religious mission and message.” *Id.* at 1203. It stands to reason then that neither secular government agents nor judges should be the ones to decide where the line is between religious identity and religious activities. *Id.* at 1204. They are not equipped to determine the boundary line between identity-based religious expression and “overt religious content,” the line described in 29 CFR 2.32(c)(1) that would be wise to change.

The more rigid separationist view reflected in the current regulatory language is based on an old view of constitutional standards. It is important to consider both the regulatory evolution and the constitutional doctrinal evolution in considering if changes to the regulatory language are now appropriate. **Timing matters, and the language in 29 CFR 2.32(c)(1) should reflect the current state of the law.**

- **The History of This Regulatory Language**

President George W. Bush issued an important Executive order for faith-based organizations on December 12, 2002. EO 13279 established that federal agencies should formulate policies that would ensure faith-based organizations be treated equally in having opportunities to receive grants and participate in meeting community needs. EO 13279 established some of the language that became common in the regulations for many agencies, including the DOL. It reflected the then state of the law in terms of how the Supreme Court understood restrictions on free exercise and a more restrictive reading of the Establishment Clause than current Supreme Court jurisprudence holds. EO 13279 included the original restriction on what faith-based organizations could do with direct federal funds, stating that its programs must be implemented “in accordance with the Establishment Clause and the Free Exercise Clause of the First Amendment” and that such organizations should not “engage in *inherently* religious activities” unless they are offered “separately in time or location.” EO 13279 (emphasis added).

The state of the law at that time was influenced by several Supreme Court cases that drew careful lines around how government funds could be used. For example, *Everson v. Board of Education*, 330 U.S. 1 (1947), said that a state law that authorized reimbursement to parents for transportation to schools, including parochial schools, did not violate the First Amendment because the money was just for a general program that did not go directly to the parochial schools or support them. *Id.* at 18. On the Establishment Clause side, *Lemon v. Kurtzman*, 403 U.S. 602 (1971) had established the Lemon test to ensure that government actions did not “advance” religion and were not “excessively entangled” with religion. *Id.* at 612-13. In addition, cases like *Agostini v. Felton*, 521 U.S. 203 (1997) had said that teachers could provide remedial education to certain students in parochial schools as long as they were not inculcating religious beliefs. *Agostini* created a more nuanced line by rejecting an assumption that religion would be inculcated just on the basis that it occurred in a sectarian environment, *id.* at 224, but it still preserved a strong line between government aid and any religious purpose by ensuring that the funds were tied to the eligible student, not to the school. *Id.* at 229. In addition, *Locke v. Davey*, 540 U.S. 712 (2004), held that a state could limit its scholarship program by excluding students directly pursuing theological training for ministry.

Notably, *Lemon* has been overruled in *Kennedy v. Bremerton*, 597 U.S. 507 (2022), which stated that *Lemon* had resulted in “chaos” and “differing results” based on preference. *Id.* at 534. The *Kennedy* court said the government did not have to censor all religious speech, purging it from the public square. *Id.* Instead, it clearly rejected the caselaw formed around *Lemon*’s standard and stated that the courts should interpret the Establishment Clause based on “historical practices and understandings” and the “original meaning” of the First Amendment. *Id.* at 536. In addition, *Locke v. Davey* has also been severely cabined by *Carson v. Makin*, 596 U.S. 767 (2022), which suggested that *Locke* applies only to situations where funds would go directly to vocational religious degrees, consistent with historical interests in avoiding taxpayer support for church leaders. *Id.* at 788.

The regulatory language change from “inherently religious” to “explicitly religious” in many agency regulations was made under the Obama Administration in 2016 in its multi-agency rule of April 4, 2016. 81 FR 19355. It is difficult to evaluate how significant this word change has been, but the final regulations in 2016 defined “explicitly religious activities” as including “religious worship, instruction, or proselytization” and said such activities must be offered separately in time or location (similar to the prior definition). 81 FR 19406, 19408. The 2016 rule also said that an activity is considered “explicitly religious” if it “includes activities that involve overt religious content.” Notably, the Bush EO had not included the word “overt.” The Obama Administration regulations exclude from the definition activities that are “merely...motivated by religious faith.” This clarification appeared in the Final Rule at 81 FR 19410 in regulations for the Department of Homeland Security. It remained unclear how far “motivation” could go and if it could involve any elements of expression. The Obama Administration justified these changes, saying that it was important to clearly separate funded activities from religious activities. It claimed that its language “more closely matches constitutional standards as they have developed in case law” and would prevent any federal funds from being used to “promote religion or coerce beneficiaries” and would prevent “entanglement of church and state.” 81 FR 19372.

But the Supreme Court made a significant shift away from the reasoning that there must be a clear separation between funded activities and any hint of religion or religious practice in a series of cases starting with *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449 (2017). *Trinity Lutheran* reflects an understanding that religious organizations should not only not be protected against discrimination in the application of laws and policies but also should not be discriminated against in the distribution of government benefits or opportunities because of their religious character. *Id.* at 463. In sum, a religious organization should not “hav[e] to disavow its religious character.” *Id.* The Supreme Court’s recent caselaw is less concerned with completely separating all hints of religion from engaging with government funds, and more concerned with making sure government funds

are provided in a manner that is neutral towards religion and does not automatically favor the secular over the religious. See *Espinoza v. Montana Dep't of Rev.*, 591 U.S. 464 (2020) (holding that it violated the Free Exercise Clause to exclude religiously affiliated schools from a state tax credit scholarship program); *Carson*, 596 U.S. 767 (holding that it violated the Free Exercise Clause to exclude sectarian schools from a state-funded tuition assistance program). Outside the funding context, the Court has also clarified that it violates the Free Exercise Clause for the government to treat secular activities more favorably than religious exercises or activities. *Tandon v. Newsom*, 593 U.S. 61, 62 (2021).

The Court no longer holds that the Constitution requires religious organizations not to be overtly religious if they receive government funds. *Carson*, 596 U.S. at 787 (stating that creating prohibitions that impact a school's ability to live out its religious function is to risk entangling the state in dictating the school's mission and function). As the Court has stated: "The Free Exercise Clause 'protect[s] religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status.'" *Trinity Lutheran*, 582 U.S. at 458 (quoting *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. at 533, 542 (1993)). The Court has not simply clarified that categorical exclusion is wrong, but rather has changed the First Amendment doctrinal understanding of what the exclusion of religious groups means. Justice Sotomayor, in her dissent in *Trinity Lutheran*, understood the majority as having made a complete change in precedent; she understood it as undermining the previously established standard that no government funds could directly support religious practices. She stated that, unlike the Court's previous cases, the *Trinity Lutheran* majority had not required any "assurances that public funds would not be used for religious activity." 582 U.S. at 476. She found the invocation of "strict scrutiny" particularly problematic, because she said prior cases had merely "asked whether the government had offered a strong enough reason to justify drawing a line based on that status." *Id.* at 491. No one in the majority clarified or disputed her characterization that it was a significant change in the law.

We believe the majority in *Trinity Lutheran* appropriately questioned prior caselaw, which favored secularism instead of neutrality, and often seemed inconsistent. Many of the prior cases involved divided courts with multiple dissents, seeking to police "entanglement." *E.g.*, *Meek v. Pittenger*, 421 U.S. 349, 364 (1975) (a fractured court rejected the loan of "other materials and equipment" to sectarian schools because it "can be diverted to religious purposes"); see also *Wolman v. Walter*, 433 U.S. 229, 250 (1977) (parsing out state services provided to non-public school students, and deciding which ones were constitutional or unconstitutional based on whether they were intertwined with religious activities based on the *Lemon* test). Notably, *Wolman's* conclusion was overruled in part in

*Mitchell v. Helms*, 530 U.S. 793 (2000). The *Mitchell* Court began to reject rigid separationism, with a plurality of the Court upholding a law that permitted the loan of certain materials and equipment to private religious schools to implement “secular” programs, saying it did not create excessive entanglement. *Id.* at 808. The plurality also shifted its focus to neutrality and asked whether a secular purpose was furthered instead of focusing on whether the religious school benefited. *Id.* at 823.

The government violates the neutrality principle established in *Trinity Lutheran* when the government says it is not making a categorical exclusion but still effectively requires an organization to either cease the activities that reflect its religious character or be denied the benefit offered. 582 U.S. at 463 (stating this is not about an “entitlement,” but about “a right to participate in a government benefit program without having to disavow its religious character”). A group’s religious character is much greater than just the fact that it has a religious identity; it is about the group’s right to pursue its purpose (including in its hiring and conduct standards for its employees and volunteers), view its objectives, utilize its resources, and measure its success, all with the lens of its religious worldview.

Religious character includes some aspects of practice, not just labels. *Carson* makes this clear, indicating that any effort to make a “status-use distinction” in a way that requires the state to scrutinize “whether and how” religious organizations pursue their missions, rather than focusing on whether the required services are provided, can both “raise serious concerns about state entanglement with religion” and may raise free exercise violations. *Carson*, 596 U.S. at 787-88.

The Supreme Court has also brought more clarity in its Establishment Clause jurisprudence, bringing it into more harmony with the Free Exercise Clause. The Establishment Clause does not require zero engagement with religion; instead, it is intended to coincide well with the Free Exercise Clause. *Kennedy*, 597 U.S. at 543. The government does not have to “ferret out and suppress religious observances.” *Id.* The government’s goal is not secularization and in fact, efforts to over-secularize can run the other way. It has long been understood to be a significant threat of entanglement when the government tries to evaluate whether a religious organization’s activities are too religious or adequately separated from its religious purposes and goals. See *Hunt v. McNair*, 413 U.S. 734, 749 (1973) (noting that it is crucial to avoid “excessive entanglement between the State and religion”). And the Court has long made clear that it is not a violation of the Establishment Clause if a religious group receives a benefit that has been generally offered for the public benefit. See, e.g., *Widmar v. Vincent*, 454 U.S. 263 (1981); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Rosenberger*, 515 U.S. 819 (1995).

- **The “overtly religious?” standard is therefore inconsistent with this caselaw.**

In light of this recent caselaw, the term “overtly religious” as used in 29 CFR 2.32(c)(1) is vague and easy to interpret subjectively. For example, an organization providing free services for unhoused youth might have a practice of praying as a group of employees before they go out to engage with the youth. They do not require or even encourage the youth to pray with them. Some observers may think that practice transforms the whole activity into an overtly religious event; others may see the requirement for employees as more reflective of the religious character of the organization, and as unrelated to their ability to accomplish the secular goal of providing excellent service to the youth consistent with the government goals for the program. It is not uncommon for religious organizations to have many internal practices and policies that are part of their religious identity—impacting how they do their work but not altering their ability to serve all beneficiaries equally.

Just as non-religious groups are free to express their identity and allow their passions and motivations to be clearly shared and seen, so too should religious organizations. Religious organizations should not be uniquely required to separate out their religious identity because their identity is religious. It is not healthy for religious organizations to live in fear and not be able to live out who they are. In addition, if the government begins to micromanage which organizational practices turn activities into “explicitly religious activities,” it could lead to an Establishment Clause violation by the government for entanglement. Religious organizations don’t want special privileges; they just want to be able to fulfill their missions and serve needs in their communities in the same way other organizations are allowed to do.

**Another problem with the regulatory language, particularly 29 CFR 2.32(d)(1) and 29 CFR 2.32(e)(1), is that certain seemingly neutral restrictions can uniquely disfavor and even target religious organizations.**

Amid these First Amendment doctrinal changes just described, the Biden Administration finalized a rule on “Partnerships with Faith-Based and Neighborhood Organizations” on March 4, 2024. 89 FR 15671. It continued to assert that the Supreme Court did not allow for “religious uses of direct aid” based on the Establishment Clause. 89 FR 15680. The administration found arguments based on *Carson* unpersuasive, claiming it was just about “indirect aid.” *Id.* Ignoring the claim that the rule disfavored groups based on their religious character and practices, the Biden rule celebrated its claimed neutrality. It focused on the idea of *equal application* of the language because it prohibited religious activities by “both faith-based and secular organizations.” 89 FR 15684. The logic of the Biden Administration was: because no group can have “explicitly religious activities,” then all groups are treated

equally. *Id.* The statement that all restrictions “shall apply equally to faith-based and non-faith-based organizations,” 29 CFR 2.32(d)(1), sounds fair, but when it applies to certain restrictions—like the prohibition on using “direct Federal financial assistance for explicitly religious activities,” 29 CFR 2.32(d)(2),—it actually uniquely disfavors religious organizations and can result in viewpoint discrimination.

The Biden Administration ignored the reality that a rule prohibiting “religious” things has a clear (and likely intended) impact on religious organizations with religious missions and purposes, and almost no impact on organizations without religious purposes. It then repeatedly focused on its proclaimed “case-by-case” accommodation structure (with “case-by-case” mentioned 36 times in the final rule), claiming that process provided all the necessary First Amendment protection. *E.g.*, 89 FR 15682. However, the “case-by-case” consideration offered in 29 CFR 2.32(e)(1) lacks clear standards and is unlikely to result in consistency in how religious organizations are treated. Such organizations cannot then make clear plans or know what policies will be permissible or not. In addition, they cannot know whether they can expect regular and ongoing grant funding.

- **The Equal Treatment Fallacy**

It is false to say that religious and nonreligious groups are treated equally when the same religious restrictions are applied to them. One must start by understanding the *common-sense reality that equal treatment means that diverse groups function with equivalent restrictions on their expression and activity*. It does not result in equal treatment for religious and non-religious organizations when a policy prohibits religious organizations (formed around religious beliefs and purposes) from using religious standards for their volunteers and employees and prohibits non-religious organizations (not formed around religious beliefs, but around non-religious purposes) from using religious standards for their volunteers and employees. Equal footing instead means that, even if both groups are providing secular services, religious organizations may have employment and volunteer criteria based on alignment with their missions and purposes (which happen to be religious, so the criteria are religious) just like other groups may have leadership criteria or expectations grounded in their missions and purposes (which are organized around other ideological frameworks and values). It is not religious discrimination for a religious group to use such criteria in that context; instead, allowing religious groups to have religious criteria gives them the privilege of functioning based on their purpose equal to that of other groups with non-religious criteria.

The Establishment Clause, which has long been seen as the impetus for the difference in treatment when religion is involved, does not provide that same justification under current caselaw. It does not justify the unequal impact on religious organizations. It is perhaps the

knowledge of this very thing—the weakened strength of the Establishment Clause justification—that caused the Biden Administration to instead focus its justification on a claimed “equal treatment” based on the same language applying to all groups (despite awareness of the unequal impact on religious organizations). It remains patently true that these efforts end up overtly favoring secularism instead of being neutral toward religion, undermining the goal of including faith-based organizations on equal footing in relation to participation as service providers.

The Biden Administration’s dogmatic assertion that a policy is neutral and provides equal treatment as long as a sentence applies to every group is incorrect. The government must not ignore the clear disproportionate impact of its framing and that it perpetuates likely religious discrimination, effectively producing viewpoint discrimination. It can easily result in preventing religious organizations from being able to qualify for generally available benefits unless they set aside their religious identity.

The government (and this administration) should expose and reject this false “equal treatment” claim. It should instead seek to make policy and apply the law in light of the common sense and practical understanding of equal treatment when it comes to religious restrictions.

### **Third, simple clarifications could bring the language more in line with current Supreme Court precedent.**

We are thankful that the Department is asking about how to not unduly restrict faith-based organizations wanting to participate in its grant programs. 90 FR 57217-18.

We ask that you take action to ensure that religious organizations continue to have opportunities to participate equally in government grants and contracts without compromising their religious character across administrations. To enable that to happen, some clarifications are necessary, **either through an NPRM and/or through a guidance document**. It is particularly important to ensure that religious organizations may maintain religious hiring criteria; a religious organization’s mission is only preserved as the personnel affirm the belief and conduct standards that undergird its mission. It is also important to make clear that the claim that it results in “equal treatment” to simply prohibit all groups from having religious requirements is false because it specifically and uniquely disadvantages religious organizations. It is, in fact, not equal treatment. That false equality claim should not become a tool to undermine the autonomy and religious identities of faith-based organizations wishing to participate as service providers.

It would also be beneficial to draft a **guidance document** that clarifies what the regulatory standards do and don’t require of religious organizations. Such guidance could clarify what

it means for faith-based organizations to be treated “on the same basis as any other organization” and not discriminated against “on the basis of the organization’s religious character.” 29 CFR 2.32(a)(1). It would also be good to clarify what it means that a faith-based organization “retains its autonomy, right of expression; religious character; and independence” from the government and that it “must be permitted to continue to carry out its mission, including the definition, development, practice, and expression of its religious beliefs.” 29 CFR 2.32(c)(1).

Such guidance should also clarify that the restriction on funding going to “explicitly religious activities” should refer only to clear “activities” offered by the faith-based organization that are centered on teaching religious beliefs and practices or requiring participation in such religious beliefs and practices by beneficiaries of funded services. Those are the activities that must be separate in time or location. This is important to distinguish from a broader prohibition in order to be consistent with the “Court’s traditional understanding that permitting private speech is not the same thing as coercing others to participate in it.” *Kennedy*, 597 U.S. at 541.

The restriction on “explicitly religious activities,” however, should not include a blanket prohibition of all religious expression by employees or by the organization itself in the course of providing services—they do not have to build a wall between their identity and their provision of services. For example, the line could be described as based on whether an objective observer either 1) would consider the activity’s primary purpose to be the inculcation of religious beliefs and practices or 2) would consider the activity as coercing religious participation. In addition, it should be made clear that the policies and practices of running a religious organization are part of the autonomy and religious character of faith-based organizations and will not be considered “activities” that are prohibited.

The guidance should specifically acknowledge that many deeply committed organizations that are highly qualified to provide the desired services with excellence do have religious hiring standards. This is because they are religious organizations that see their tasks—even in providing certain secular services—as spiritually motivated and tied to the spiritual vision and values the organization incorporates into its training and expects its employees to embody. The spiritual drive of these organizations is part of what makes them highly motivated and effective, even as they provide services, as required by law and regulations, fairly and without discrimination.

Finally, the guidance should also clarify that the federal government and state actors administering federal funds may not retaliate against a faith-based organization for limiting its hiring based on religious belief criteria or standards of conduct, or for requiring that its employees and volunteers agree with its religious mission.

## Conclusion

In conclusion, we specifically recommend the following action steps:

1. Add language to clarify that the restriction on “explicitly religious activities” in 29 CFR 2.32(c)(1) and 2.32(d)(1) does not include a ban on all religious expression made in the course of providing services.
2. Eliminate the “overt religious content” amorphous attempt at line-drawing in 29 CFR 2.32(c)(1). Specify that the standard is not intended to be a rigid line excluding every mention of religious belief nor to completely shield a beneficiary from potentially witnessing religious expression by an employee. Instead, any line should be intended to provide an assurance that, as services funded by the government are provided, beneficiaries will feel welcome and safe and will not experience pressure or coercion to participate in any religious activities or practices as they receive those services. In other words, clarify that the regulatory standard is not intended to make the religious organization hide its religious character and identity as it provides the services; natural indicia of its religious character and motivation cannot be a basis to exclude them as providers. [This is consistent with other clarifications like the statement that facilities do not have to be scrubbed of religious “icons, indicia, messages, etc,” 29 CFR 2.32(c)(2)(1)].
3. Add language to clarify that the restriction on “explicitly religious activities” does not mean the government may prohibit the legally-protected practices of running a religious organization, such as hiring practices. This clarification will ensure that religious organizations are able to define and adhere to their religious character and beliefs. For example, this clarification could be added to the list in 29 CFR 2.32(c)(2)(ii) about what it means that an organization may “[r]etain its authority over its internal governance,” by including that it may determine that hiring co-religionists is necessary to preserve its identity and mission as a religious organization.
4. Draft and publish a guidance document that clarifies what the regulatory standards require and don’t require of religious organizations.

Thank you for considering this comment. For the reasons stated above, we hope you will consider acting to further enable the participation of faith-based organizations in DOL-funded or regulated programs.

Respectfully submitted,

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