

The Coalition Against Religious Discrimination

July 10, 2008

The Honorable John McCain
United States Senator
John McCain 2008
P.O. Box 16118
Arlington, VA 22215

The Honorable Barack Obama
United States Senator
Obama for America
P.O. Box 8102
Chicago, IL 60680

RE: COALITION AGAINST RELIGIOUS DISCRIMINATION URGES THE RESTORATION OF RELIGIOUS LIBERTY AND CIVIL RIGHTS PROTECTIONS IN THE FAITH-BASED INITIATIVE

Dear Senators McCain and Obama:

As you evaluate and formulate policies on the role that community-based and faith-based organizations should play in providing government-funded social services, we write to urge you to restore religious liberty and civil rights protections into these partnerships. We believe that the policies pursued under the title “Faith-Based Initiative” in recent years lack the proper accountability and constitutional safeguards necessary to preserve the independence of religious organizations and protect the civil rights and religious liberty of the employees and beneficiaries of government-funded programs.

The Coalition Against Religious Discrimination (CARD) is a broad and diverse group of leading religious, civil rights, educational, labor, health, and women’s organizations. CARD formed in the mid-1990s specifically to oppose insertion of the legislative proposal commonly known as “charitable choice” into authorizing legislation for federal social service programs. Since then, CARD has continued to oppose efforts that further entrench and expand related policies in federal programs. Coalition members appreciate the important role religiously affiliated institutions historically have played in addressing many of our nation’s most pressing social needs, as a complement to government funded programs; indeed, many members of CARD are directly involved in this work. But, we also recognize the dangers in many of the policy shifts pursued under the guise of charitable choice and the Faith-Based Initiative.

This letter is intended to provide a brief background and an overview of the important policy considerations that deserve considerable attention as the next administration formulates its policy regarding the Faith-Based Initiative.

Background

Charitable choice refers to specific legislative provisions, authored by then-Senator John Ashcroft, that were the forerunner to the Faith-Based Initiative. The provisions were inserted with little debate or scrutiny into a handful of 1990s-era social service programs, such as Temporary Assistance for Needy Families (TANF) and those created by the Substance Abuse and Mental Health Services Administration (SAMHSA) Act. Indeed, the haste with which Congress acted in authorizing charitable choice is demonstrated by the fact that the early charitable choice statutes vary in confusing ways and conflicting provisions often appear within the same statute.¹

¹ Compare 42 U.S.C. § 290kk with 42 U.S.C. § 360xx-65.

President Clinton signed these charitable choice provisions into law but issued signing statements indicating that his Administration would not “permit governmental funding of religious organizations that do not or cannot separate their religious activities from [federally-funded program] activities,” because such funding would violate the Constitution.² In short, the Clinton Administration interpreted the provisions as being constrained by the constitutional mandates that prohibit the direct funding of houses of worship and government-funded employment discrimination.³

The Bush Administration vastly expanded charitable choice through the Faith-Based Initiative. Shifting from previous government policy, the Administration made changes that would allow direct funding of houses of worship and sanction government-funded religious discrimination. Furthermore, this Administration has taken steps to apply charitable choice rules to nearly every federally-funded social service program.

In 2001, the Bush Administration proposed legislation (H.R. 7) to expand charitable choice to nearly all federal social service programs. The measure failed in Congress, in large part, because of the civil rights and religious liberty concerns CARD raised. The Administration thereafter systematically imposed charitable choice on nearly all federal social service programs through executive orders and federal regulations, allowing religious organizations to participate in federal grant programs without the traditional safeguards that protect civil rights and religious liberty.⁴

Some programs—such as Head Start, AmeriCorps, those created by the Workforce Investment Act, and others—contain specific statutory provisions barring religious discrimination that cannot be superseded by executive order. As a result, the Bush Administration has attempted to repeal these statutory provisions as applied to religious organizations. Each time, Congress, at the urging of CARD, has resoundingly rejected these efforts. Failing in its attempts to repeal these laws in Congress, the Administration then issued guidance making the far-fetched assertion that the Religious Freedom Restoration Act (RFRA) provides religious organizations a blanket exemption to binding anti-discrimination laws.

The next administration has the opportunity to restore the constitutionally required safeguards and civil rights protections that were in place for decades prior to the passage of the charitable choice statutes and the creation of the Faith-Based Initiative.

The Faith-Based Initiative Is Not Required for Religious Groups to Participate in Social Services

Religious organizations have a longstanding and proud tradition of providing social services, including in some cases, with the use of government funds. Such participation long predates the Faith-Based Initiative. Traditionally, religiously affiliated organizations that have accepted government funds to provide such services have played by the same rules as other non-religious providers. Despite the rhetoric surrounding the “faith-based” debate, these proposals are not necessary for government collaboration with faith-based groups.

² *E.g.*, William J. Clinton, Statement on Signing the Consolidated Appropriations Act, FY 2001 (Dec. 21 2000).

³ *See* 151 Cong. Rec. H8317-18 (daily ed. Sept. 22, 2005) (statement of Rep. Emmanuel) (stating that the Clinton Administration did not “support,” “introduce [language],” “promulgate[] . . . rules,” or “enforce[]” rules or policies exempting religious organizations from the ban on government-funded religious discrimination).

⁴ *See* www.whitehouse.gov/government/fbci/executive-orders.html (listing executive orders); <http://www.whitehouse.gov/government/fbci/regulatory-changes.html> (listing regulatory changes).

The Federal Government Should Not Condone Discrimination in Government-Funded Positions

Title VII of the Civil Rights Act of 1964, as amended, prohibits discrimination in employment on the basis of race, national origin, color, religion, or sex.⁵ Title VII grants an exemption to religious organizations, however, allowing them to adopt hiring practices that favor fellow adherents to their particular faith.⁶ It has been generally accepted that this exemption applies when the religious organization is using its own funds, but is not applicable to government-funded positions. Accordingly, the religious organizations that for generations have partnered with the government did not engage in religion-based hiring for positions that were funded with taxpayer money.

In contrast, the Faith-Based Initiative allows religious organizations to take government funds *and* use those funds to discriminate in hiring a qualified individual based on nothing more than his or her religious beliefs. The federal government should not subsidize workplace discrimination; longstanding civil rights protections should be restored.

The Faith-Based Initiative Must Not Be Used to Undercut State and Local Anti-Discrimination Laws

As implemented, the Faith-Based Initiative seriously threatens the enforceability of state and local civil rights laws that provide more extensive coverage against employment discrimination than federal law.⁷

Where federal statutes are ambiguous as to whether they defer to state law, and even where a statute affirmatively defers to state law, the Bush Administration has advanced a policy attempting to undermine anti-discrimination laws through agency regulations. For example, even though SAMHSA explicitly states that it does not “modify or affect” state laws or regulations,⁸ the Administration has suggested that its provisions may preempt any *local* civil rights law that does not permit faith-based organizations to select staff on the basis of religion or other protected categories.⁹ This aggressive attack on the hard-won anti-discrimination laws at the state and local levels is one of the greatest offenses of the Faith-Based Initiative, given that many of the programs to which the charitable choice provisions apply are carried out at the state and local levels. Furthermore, state and local antidiscrimination laws are particularly important, as some categories of discrimination are only prohibited at the state and local levels.

The Faith-Based Initiative Threatens the Independence of Houses of Worship

The Faith-Based Initiative not only erodes the longstanding linkage of civil rights obligations to government funding; it also undermines the crucial religious liberty guarantees of the First Amendment to the U.S. Constitution. As a policy, the Faith-Based Initiative fundamentally alters how the federal government contracts with faith-based organizations for the provision of social services.

Before the Faith-Based Initiative, religiously affiliated organizations already had been among the main providers of social services. The Faith-Based Initiative, however, permits public funds to flow *directly*

⁵ 42 U.S.C. § 2000e-2.

⁶ 42 U.S.C. § 2000e-1(g).

⁷ The Administration has stated: “With respect to States and localities, the President will urge the courts to provide guidance on whether faith-based organizations are required to comply with State and local ordinances that restrict their ability to participate in federally-funded formula and block grant programs.” The White House Office of Faith-Based and Community Services, *Protecting the Civil Rights and Religious Liberty of Faith-Based Organizations: Why Hiring Rights Must Be Preserved* 8.

⁸ 42 U.S.C. § 290kk-1(e).

⁹ Charitable Choice Provisions & Regulations, 60 Fed. Reg. 56436 (Sept. 30, 2003).

to houses of worship without the establishment of separate, religiously affiliated 501(c)(3) organizations.¹⁰

Direct government funding of houses of worship represents a radical erosion of First Amendment principles, endangering the autonomy of religious bodies by allowing government intrusion directly into the activities of houses of worship. Though the Bush Administration has argued that this traditional arrangement singles out religious institutions for an additional “burden,” in reality, requiring funding to go to separately incorporated, religiously affiliated institutions serves to protect the integrity of the religious institutions and provide accountability for government funds. Many religious organizations are rightly wary of the Faith-Based Initiative; they remain concerned that their religious ministries would be subject to intrusive government regulations, including audits, reporting requirements, and compliance reviews.

Accordingly, CARD urges you to respect religious liberty by reinstating the longstanding, constitutionally required policy prohibiting direct government funding to pervasively sectarian entities.

The Faith-Based Initiative Fails to Protect the Religious Liberty of Social Service Beneficiaries

CARD remains deeply concerned about the lack of adequate protections against proselytizing to beneficiaries during government-funded programs. Although the Faith-Based Initiative provides that no direct¹¹ funds should be expended for “inherently religious activities, such as worship, religious instruction, or proselytization as part of the program,” it fails to adequately protect the religious liberty of beneficiaries. The Bush Administration recognizes that some religious social service providers integrate religion into their services and cannot be funded by the government constitutionally, yet its regulations require only that “inherently” religious activities should be separated in time *or* place from government-funded services. Furthermore, the regulations fail to require adequate notice to vulnerable beneficiaries about their rights and there has been little oversight to ensure that religious liberty rights of beneficiaries are being respected.¹² Neither beneficiaries nor our religious institutions are served by rules that do not clearly and adequately delineate the rights and responsibilities for each party.

Conclusion

Charitable choice statutes and the Faith-Based Initiative have been counterproductive, undermining fundamental civil rights and religious liberty protections and impeding the ability of state and local governments to enforce their own laws. Past partnerships between government and religiously affiliated organizations have demonstrated well that necessary constitutional and anti-discrimination

¹⁰ Melissa Rogers, *Traditions of Church-State Separation: Some Ways They Have Protected Religion and Advanced Religious Freedom and How They are Threatened Today*, 18 J.L. & POL. 277, 317 (2008).

¹¹ The Bush Administration makes a clear distinction between “direct” and “indirect” assistance (vouchers). Generally, the regulatory prohibitions prohibiting inherently religious activity and religious discrimination against beneficiaries only apply to direct assistance programs and do not cover voucher programs.

¹² The United States Government Accountability Office issued a report that, though not comprehensive, examined various agencies that provide grants under the Faith-Based Initiative and investigated some grantees. “Faith-Based and Community Initiative,” GAO-06-616. The report discovered many problems, indicating that a more thorough analysis is warranted. The deficiencies found include: many organizations were engaging in inherently religious activities during federally funded programs rather than separating the activities in time or location, *id.* at 7, 29, 34-35; numerous federal and state agencies were failing to provide information to grantees on the safeguards related to separating religious activities and prohibiting nondiscrimination against beneficiaries, *id.* at 7, 29; and the vast majority of federal and state agencies were not monitoring whether the organizations were adhering to safeguards related to non-allowable religious activities and nondiscrimination against beneficiaries, *id.* at 7, 36.

safeguards do not interfere with these organizations' ability to provide excellent service to Americans participating in federal programs.

CARD strongly believes that it is entirely possible to encourage charitable works and provide services to communities in need without rolling back religious liberty and civil rights protections. We disagree that communities in need should be faced with the stark choice between services they need and the constitutional and civil rights protections to which they are entitled. Therefore, we ask you to carefully weigh the constitutional and practical considerations of the Faith-Based Initiative as you continue your presidential campaign. We urge you to restore religious liberty and civil rights as critical components of future administrative policy.

Thank you for your consideration. We look forward to working with you on this very important matter.