



May 9, 2011

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RE: Proposed Rule—Part 205: Participation by Religious Organizations in
USAID Programs

Dear Mr. Alexander:

On behalf of the American Civil Liberties Union (ACLU), a non-partisan organization with more than a half million members, countless additional activists and supporters, and 53 affiliates nationwide dedicated to the principles of individual liberty and justice embodied in the U.S. Constitution, we are writing to express our concern with the proposed U.S. Agency for International Development (USAID) rule that would permit federal funding to be used to construct, acquire, or rehabilitate houses of worship. The deeply flawed proposal is not supported by Establishment Clause jurisprudence, undermines the Establishment Clause's applicability to foreign assistance, would create non-uniform rules across the federal government, goes further than other administrations' policies to permit taxpayer funding for construction of houses of worship, and vitiates core values guaranteed in the Constitution. For these reasons, we strongly urge you not to adopt the proposed rule.

The current rule, adopted by the George W. Bush Administration in 2004, prohibits federal funds from being used for the “acquisition, construction, or rehabilitation of structures to the extent that those structures are used for inherently religious activities” and further explains that “[s]anctuaries, chapels, or other rooms that a USAID-funded religious congregation uses as its principal place of worship, however, are ineligible for USAID-funded improvements.”¹ The proposed rule would abolish the current—constitutionally necessary—prohibition and instead allow federal funds to be used to build churches, mosques, temples, and other buildings devoted to religious use.

¹ 22 C.F.R. 205.1(d).

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The Proposed Rule Is Not Supported by Establishment Clause Jurisprudence

(1) The Supreme Court in 1947 explained that “[t]he imposition of taxes to . . . build and maintain churches and church property” was one of the grave harms addressed by the First Amendment.² Subsequently, the Supreme Court specifically held that the government could not pay to construct or maintain religious buildings. The Supreme Court has never retreated from this bedrock Establishment Clause principle.

In *Tilton v. Richardson*,³ the Supreme Court held that taxpayer funds may not be used to construct buildings that would ever be used for religious instruction or worship. The government-funded buildings must be wholly and permanently dedicated to secular use, the Court explained, to avoid unconstitutionally advancing religion with taxpayer dollars.

Following *Tilton*, the Supreme Court also held that government funds could not be used for repair and maintenance of religious schools: “If 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,” because doing so would have the effect of “subsidiz[ing] and advanc[ing] the religious mission” of the religious schools.⁴

Only one case—an appellate court, not the Supreme Court—has held that it is constitutional to use government funds to rehabilitate churches, contradicting the holdings of *Tilton* and *Nyquist*. In *American Atheists, Inc. v. City of Detroit Downtown Development Authority*,⁵ the U.S. Court of Appeals for the Sixth Circuit’s conclusion relied almost exclusively on neutrality.⁶ Because the government made grants available to religious and non-religious organizations and used neutral selection criteria, the court concluded that a grant to a church did not have the effect of advancing religion. This outlier case, however, does not—and, indeed, cannot—overrule established, binding Supreme Court precedent.

(2) The proposed rule attempts to codify a brand new test to determine if taxpayer funds can be used to build a church, mosque, temple, or religious school. The new test is simply wrong as a matter of law and would set a bad precedent.

(a) The existing Establishment Clause test, known as the *Lemon* test, requires that government-funded projects have a secular purpose and a primary effect that does not advance or inhibit religion, and must not foster excessive government entanglement with religion. The criteria set forth in the proposed rule, however, do not account for critical aspects of the *Lemon* test. The proposed rule fails to require that the USAID program have a *primary* or *principal* effect that neither advances nor inhibits religion. Rather it simply says that the program’s effect must be “furthering a development objective.” If the program has one permissible effect

² *Everson v. Bd. of Educ.*, 330 U.S. 1, 11 (1947).

³ 403 U.S. 672, 683 (1971) (plurality opinion). All the other Justices agreed with this part of the holding, making it *unanimous*.

⁴ *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 777, 779-80 (1973).

⁵ 567 F.3d 278, 291-94 (6th Cir. 2009).

⁶ In her concurring and controlling opinion in *Mitchell v. Helms*, Justice O’Connor cautioned that the Supreme Court has “never held that a government-aid program passes constitutional muster *solely* because of the neutral criteria it employs as a basis for distributing aid.” 530 U.S. 793, 839 (1999) (emphasis in original).

(“furthering a development objective”), it may still have the impermissible *primary* effect of advancing religion. Moreover, the proposed rule does not address the problem of excessive entanglement. Thus, the proposed rule mischaracterizes the *Lemon* test by omission of critical language and will lead to confusion.

(b) The proposed rule emphasizes neutrality in its criteria to determine whether a grant program is constitutional, including whether a grant program defines its beneficiaries neutrally and has neutral selection criteria, which are amenable to neutral application.⁷ Neutrality, however, is not the only criterion to determine constitutionality. In other words, as the most recent, controlling Supreme Court opinion on this issue concluded, neutrality is a necessary requirement for government funding programs, but not sufficient standing alone to establish constitutionality.⁸ The proposed rule ignores other factors that courts rely on to decide if a government action is permissible, such as whether government funding used to build a house of worship or religious school would be perceived as conveying a message that the U.S. Government favors or prefers one religion,⁹ whether the funding would have the effect of supporting the inculcation of religious belief,¹⁰ or whether the funding is actually used for religious purposes.¹¹ As with the *Lemon* test referenced above, this is a significant and material error by omission.

These overlooked criteria would be particularly relevant if USAID funds were used to construct a church, mosque, temple, or religious school. For instance, USAID regulations require that buildings funded by USAID “must be marked with the USAID Identity. Temporary signs or plaques should be erected early in the construction or implementation phase. When construction or implementation is complete, a permanent, durable sign, plaque or other marking must be installed.”¹² Thus, any observer would see that the U.S. Government paid to construct a house of

⁷ The George W. Bush Administration’s Office of Legal Counsel issued two opinions that would permit government funding for rehabilitation of houses of worship and religious schools under limited circumstances. (Authority of the Department of the Interior to Provide Historic Preservation Grants to Historic Religious Properties such as The Old North Church, Memorandum for the Solicitor, Department of the Interior, from M. Edward Whelan III, Acting Assistant Attorney General, Office of Legal Counsel (Apr. 30, 2003); Authority of FEMA to Provide Disaster Assistance to Seattle Hebrew Academy, Memorandum for the General Counsel, Federal Emergency Management Agency, from Jay S. Bybee, Assistant Attorney General, Office of Legal Counsel (Sept. 2002)). The proposed rule seems to draw heavily from these opinions. Among other concerns we have with the opinions is their emphasis on whether selection criteria are “amenable to neutral application.” According to the opinions, if there is little government discretion in the approval process, then a grant for rehabilitation or reconstruction of houses of worship or religious schools would likely be constitutional. The opinions concluded that the grant programs in question employed neutral criteria with little room for subjective judgments. Pursuing our national security and foreign policy interests, however, often involves picking sides—something that is inherently subjective. And in many countries, where religious and political identities are indistinguishable, support for a political group that is aligned with U.S. policy results in support for a particular faith or denomination. The picking and choosing between religions is what the Establishment Clause was designed to prevent.

⁸ *Mitchell*, 530 U.S. at 839 (O’Connor, J., concurring and controlling opinion) (“We have never held that a government-aid program passes muster *solely* because of the neutral criteria it employs as a basis for distributing aid. . . . [N]eutrality is not alone sufficient to qualify the aid as constitutional.”) (internal quotation marks and citations omitted).

⁹ First articulated in *Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984) (O’Connor, J., concurring).

¹⁰ *Mitchell*, 530 U.S. at 845 (O’Connor, J., concurring and controlling opinion) (citing *Agostini v. Felton*, 521 U.S. 203, 223 (1997)).

¹¹ *Id.* at 857-58 (O’Connor, J., concurring and controlling opinion).

¹² 22 C.F.R. 226.91(b).

worship or school and would logically believe that the U.S. Government favors the religion observed there. Moreover, for many faiths and denominations, all design aspects of their houses of worship are sacred and intended to embody and express religious beliefs. For these groups, houses of worship often are not just venues for their religious activity. USAID funds used to construct a house of worship would, therefore, also be used to support that faith's inculcation of religious belief. Likewise, building a religious school would clearly have the effect of supporting inculcation of religious belief as that is the very mission of religious schools. Finally, there would seem to be very few ways government funding could more obviously be used for religious purposes than building a house of worship—even if done under the auspices of something like job training.

If the proposed rule is finalized, it must be revised to more accurately reflect Establishment Clause jurisprudence.

The Proposed Rule Undermines the Establishment Clause's Applicability to Foreign Assistance

Only one federal court has considered whether the Establishment Clause applies abroad. In *Lamont v. Woods*,¹³ the U.S. Court of Appeals for the Second Circuit held that it does. The court explained that even the importance of promoting U.S. foreign policy through foreign aid does not “warrant[] freeing all foreign aid programs from all constitutional constraint” and that applying the Establishment Clause to a USAID grant program would have only minimal effect on foreign policy. The court acknowledged that the government may be able to overcome the application of the Establishment Clause if it can demonstrate a compelling reason why the grant is vital to foreign policy. The proposed rule undermines the applicability of the Establishment Clause to foreign assistance. It also does not account for the high burden the government must overcome if it wants get around the Establishment Clause mandate when pursuing foreign policy goals.

The Proposed Rule Would Create Non-Uniform Rules Across the U.S. Government

The existing regulation is nearly identical to several other regulations governing the Department of Agriculture and the Department of Housing and Urban Development.¹⁴ Moreover, Congress has repeatedly passed similar restrictions on funds provided for construction.¹⁵ A change in the USAID regulation would create different rules for different agencies. Yet, a recent Executive Order dealing with the government's relationship with faith-based organizations calls for “uniformity in agencies' policies” in order to promote compliance with the Constitution.¹⁶ That Executive Order also uses a new term, “explicitly religious,” rather than prior term, “inherently religious,” used in the proposed rule. The Executive Order adopted the new term based on recommendations made by the President's Advisory Council on Faith-Based and Neighborhood Partnerships, because “[t]he term ‘inherently religious’ is confusing.”¹⁷ Thus, the proposed rule

¹³ 948 F.2d 825, 840-43 (2d Cir. 1991).

¹⁴ *E.g.*, 7 C.F.R. 16.3(d)(1); 24 C.F.R. 5.109(g).

¹⁵ Most recently, § 14004(c)(3) of the American Recovery and Reinvestment Act of 2009 prohibited renovation of buildings used for religious worship or instruction. *See also, e.g.*, 25 U.S.C. 1813(e).

¹⁶ Exec. Order No. 13,559, 75 Fed. Reg. 71,317 (Nov. 22, 2010).

¹⁷ President's Advisory Council on Faith-Based and Neighborhood Partnerships, *A New Era of Partnerships: Report of Recommendations to the President* 129-30 (Mar. 2010).

would be at odds with both existing law and rules that are being drafted under the Executive Order.

The Proposed Rule Goes Further than Other Administrations' Policies to Permit Taxpayer Funding for Construction of Houses of Worship

The Office of Legal Counsel under the Clinton Administration concluded that grants to churches for rehabilitation would violate the Establishment Clause.¹⁸ In its memorandum opinion, it explained that the Reagan Administration and the George H.W. Bush Administrations reached the same conclusion: “direct financial support of active churches would be inappropriate in light of Establishment Clause concerns.” And the George W. Bush Administration promulgated the rule now under revision. Thus, the George W. Bush Administration, like the three previous administrations, recognized that taxpayer funds cannot be used to construct or rehabilitate buildings devoted to religious use.¹⁹ It is disappointing that the Obama Administration, which has made a commitment to “promote compliance with constitutional and other applicable legal principles” in the government’s relationship with faith-based organizations,²⁰ would flout well-settled constitutional law.

The Proposed Rule Vitiates Core Values Guaranteed in the Constitution

The First Amendment to the U.S. Constitution protects the right of every citizen to follow the dictates of his or her conscience with regard to religion and belief. The guarantee is founded on permitting the freedom of belief and prohibiting the government from funding or endorsing religion. Both parts of the foundation are vital and necessary; without one, the foundation fails. Using government funds to build churches, mosques, temples, or religious schools violates this fundamental guarantee: Government support of religion infringes upon not only citizens’ personal beliefs but also religious institutions’ independence. It sows divisiveness in society and creates an incentive for religious bodies to change their beliefs to win government favor. Thomas Jefferson wrote, “To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical,”²¹ because religion must be freely chosen and freely supported. The proposed rule is antithetical to our constitutional values.

¹⁸ Constitutionality of Awarding Historic Preservation Grants to Religious Properties, Memorandum Opinion for the Solicitor, Department of the Interior, from Walter Dellinger, Assistant Attorney General, Office of the Legal Counsel (Oct. 31, 1995).

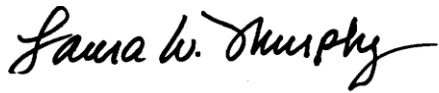
¹⁹ Besides the prohibition on funding for construction of buildings devoted to religious use, the current rule permits funding for the construction of other buildings that are used for both religious and secular programs at an amount equivalent to the costs attributable to secular activities. We believe this is unconstitutional. *See Nyquist*, 413 U.S. at 777-78 (“statistical judgment will not suffice as a guarantee that state funds will not be used to finance” religion). We acknowledge that, although flawed, the current rule tries to account for Establishment Clause concerns. The proposed rule, however, has removed this cost apportionment provision.

²⁰ Exec. Order No. 13,559.

²¹ Va. Code Ann. § 57-1, “Virginia Statute for Religious Freedom” (enacted in 1786). “[T]he provisions of the First Amendment . . . had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute.” *Everson*, 33 U.S. at 13 (citing cases).

We hope these comments are useful in your continued review of the proposed rule and we strongly urge you not to adopt it. Please contact Legislative Counsel Dena Sher at (202) 715-0829 or dsher@dcaclu.org if you have questions or comments about our concerns.

Sincerely,



Laura W. Murphy
Director, Washington Legislative Office



Dena Sher
Legislative Counsel