



February 6, 2012

Economic Development Administration
Office of Chief Counsel
Suite D-100
U.S. Department of Commerce
1401 Constitution Avenue, NW
Washington, DC 20320

RE: Comments on Economic Development Administration Regulatory
Revision, Docket No. 110726429-1418-01

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To whom it may concern:

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 Economic Development Administration rule that would eliminate a constitutionally required prohibition on using buildings constructed with taxpayer funding for religious purposes.

The deeply flawed proposal is not supported by Establishment Clause jurisprudence, is part of a disturbing trend of proposed regulations that flout the Constitution, and vitiates core values guaranteed in the Constitution. For these reasons, we strongly urge you not to adopt the proposed rule.

Section 314.10(c)(1)(ii) of the current rule prohibits entities from using property built or rehabilitated with taxpayer funding for religious activities. The proposed rule would abolish this current—constitutionally necessary—prohibition. The Analysis of Comments Received and Proposed Changes explains that the Economic Development Authority funds construction of economic development-related projects, such as a job-training facilities or business-incubation centers.¹ The proposed rule would permit the federal government to give its interest in facilities and buildings constructed with taxpayer funds to its project partners, which can include nonprofits such as faith-based organizations. If the prohibition is removed from the regulations, the properties constructed or acquired with federal funds could then be used as parish halls, sanctuaries, or religious schools.

¹ Economic Development Administration Regulatory Revision, 76 Fed. Reg. 76,492, 76,518 (proposed Dec. 7, 2011).

The Current Rule Is Required by the Establishment Clause

The Proposed Rule Would Contravene Valid and Binding Precedent

The Analysis of Comments Received and Proposed Changes says that Section 314.10(c)(1)(ii) of the current rule “address[es] the legal requirements”² of *Tilton v. Richardson*.³ Yet, it goes on to claim that this current prohibition “may not be required.” This is not true. As the Analysis notes, “courts have made a number of important distinctions to Establishment Clause jurisprudence” since the Supreme Court announced *Tilton*, a case that is directly and squarely on point. This is not so for *Tilton*, however: It is still valid and binding law.

In *Tilton v. Richardson*, the Supreme Court held that taxpayer funds may not be used to construct buildings that would ever be used for religious instruction or worship.⁴ The government-funded buildings must be wholly and permanently dedicated to secular use, the Court explained, to avoid unconstitutionally advancing religion with taxpayer dollars.

The Economic Development Authority program is exactly like the program challenged in *Tilton* in two significant respects: the government would hold a 20-year interest in buildings constructed with taxpayer funds⁵ the program would not include a permanent prohibition on using those buildings for religious activities. But as the Court explained, “[i]t cannot be assumed that a substantial structure has no value after that period.”⁶ Thus, “[i]f, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion.”⁷ As a result, the Court held that the “restrictive obligations” required by the Establishment Clause cannot “expire.”⁸

Subsequently in *Hunt v. McNair*,⁹ the Supreme Court upheld a state program designed to assist all institutions of higher education to construct buildings, mainly by issuing revenue bonds. Because the program included a permanent prohibition “forbidding religious use” of buildings and facilities financed under the program, the Court held that the program did not advance religion.

Like the Economic Development Authority program, the construction funding programs in *Tilton* and *Hunt* had a secular purpose and had neutral eligibility criteria.¹⁰ But this did not change the

² 76 Fed. Reg. at 76,518.

³ 403 U.S. 672 (1971).

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

⁵ *See id.* at 675.

⁶ *Id.* at 683.

⁷ *Id.*

⁸ *Id.*

⁹ 413 U.S. 734, 744-45 (1973).

¹⁰ Despite those who may advocate otherwise, neutrality is a necessary requirement for government funding programs, but not sufficient alone to establish constitutionality. 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). *See, e.g., Prince v. Jacoby*, 303 F.3d 1074, 1101 & n.4 (9th Cir. 2002) (confirming Justice O’Connor’s concurrence in *Mitchell* controls).

Supreme Court’s conclusion that using buildings constructed with taxpayer money for religious activities would be unconstitutional. No matter the purpose of the program or who may apply for funding, facilities built with federal funding must never be used for religious activities. The proposed rule directly contravenes Supreme Court precedent.

These holdings have never been reconsidered by the Supreme Court; they remain valid and binding. This was confirmed by the Supreme Court in *Bowen v. Kendrick*: “[T]he constitutional limitations on use of federal funds, as embodied in the statutory restriction, could not simply ‘expire’ at some point during the economic life of the benefit that the grantee received from the Government.”¹¹ And recent federal court decisions,¹² including *Community House v. Boise*,¹³ apply *Tilton*’s holding that “to avoid an Establishment Clause violation, a publicly financed government building may not be diverted to religious use.”

But even if the Economic Development Authority believes that *Tilton*’s reasoning is outdated, it is not free to ignore binding Supreme Court precedent. As the Supreme Court has admonished:

We do not acknowledge, and we do not hold, that [the government] should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that “[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [government] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.”¹⁴

A Poorly Reasoned OLC Opinion Cannot Justify Ignoring Binding Law

The Analysis of Comments Received and Proposed Changes relies on a 2003 Office of Legal Counsel (“OLC”) opinion on the Save America’s Treasures program.¹⁵ The OLC opinion, however, is poorly reasoned. It rationalizes providing federal funds to help preserve historic houses of worship by labeling *Tilton*’s holding (which it acknowledges has “not been expressly overruled”) as very narrow and cabining its applicability, saying *Tilton* does not apply to grants designed to preserve “threatened” or “endangered” historic buildings of “national significance.” But even if *Tilton*’s holding is “narrow,” it “plainly . . . controls the question,” here¹⁶ because the Economic Development Authority’s program is exactly like that in *Tilton* and dissimilar to the Save America’s Treasures program. It involves spending significant taxpayer funds to construct buildings and facilities.

¹¹ 487 U.S. 589, 614 (1988).

¹² Only one case—an appellate court, not the Supreme Court—has diverted from this precedent. Yet, this case does not in any way support the proposed rule’s deletion of the prohibition on religious use of buildings constructed with taxpayer funds. The grant program in that case was a “one-time grant” for “exterior cosmetic repairs” and “surface-level improvements,” rather than grants to construct buildings as in *Tilton*. *American Atheists v. City of Detroit Downtown Development Auth.*, 567 F.3d 278, 298-99 (6th Cir. 2009).

¹³ 490 F.3d 1041, 1059 (9th Cir. 2007).

¹⁴ *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (quoting *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)).

¹⁵ 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).

¹⁶ *See id.*

Moreover, in its efforts to question the holding of *Tilton*, OLC relies on cases that are completely inapt. Indeed, it cites to cases on free-speech forums, which are irrelevant to programs, like the Economic Development Authority's, that involve government aid and funding.¹⁷ The OLC opinion also claims that because a doctrine that was *not* central to the holding in *Tilton*¹⁸ has been criticized by courts,¹⁹ the case should not apply.

The Office of Legal Counsel under the Clinton Administration, on the other hand, concluded that grants to churches for rehabilitation would violate the Establishment Clause.²⁰ That OLC opinion explained the Reagan Administration and the George H.W. Bush Administration reached the same conclusion: "direct financial support of active churches would be inappropriate in light of Establishment Clause concerns." The Obama Administration should not rely on a George W. Bush Administration opinion that is an outlier, is irrelevant, and is poorly reasoned. This is especially true because President Obama has made a commitment to comply with the Constitution.²¹

The Economic Development Authority cannot ignore binding constitutional law, which requires that the current rule's prohibition on religious use remain in place.

The Draft Rule Is Part of a Disturbing Trend of Proposed Regulations that Ignore the Constitution

A 2010 executive order dealing with the government's relationship with faith-based organizations makes a commitment to "promote compliance with constitutional and other applicable legal principles" and calls for "uniformity in agencies' policies" in order to do so.²² Yet, this proposed rule would strip a constitutionally required protection from the Economic Development Authority's program. The administration has now proposed three regulations that would flout the Constitution: USAID recently proposed regulations²³ and the Department of Housing and Urban Development proposed an interim rule²⁴ that also ignore Supreme Court precedent.

¹⁷ In *Locke v. Davey*, the Supreme Court explained that the speech-forum cases do not apply to cases dealing with government financial aid. A government-funded scholarship program "is not a forum for speech. . . . Our cases dealing with speech forums are simply inapplicable." 540 U.S. 712, 720 n.3 (2004).

¹⁸ See 403 U.S. at 680-82.

¹⁹ The OLC opinion pronounced the doctrine's demise by counting votes, including an opinion that may "set forth reasoning that is inconsistent with" the doctrine, but does not address it directly. The Supreme Court has cautioned against this. See *Agostini*, 521 U.S. at 237.

²⁰ 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).

²¹ Exec. Order No. 13,559, 75 Fed. Reg. 71,317 (Nov. 22, 2010).

²² *Id.*

²³ Participation by Religious Organizations in USAID Programs, 76 Fed. Reg. 16,712 (proposed Mar. 25, 2011).

²⁴ Homeless Emergency Assistance and Rapid Transition to Housing: Emergency Solutions Grants Program and Consolidated Plan Conforming Amendments, 76 Fed. Reg. 76,954 (proposed Dec. 5, 2011).

Moreover, following the Supreme Court’s ruling in *Tilton*, Congress has repeatedly passed restrictions on construction funding. For instance, in 2009, under this administration, prohibitions were enacted in the school-modernization program in the American Recovery and Reinvestment Act.²⁵ The Higher Education Opportunity Act,²⁶ enacted under George W. Bush, included several similar restrictions.²⁷ This regulation would deviate from prevailing policy—undermining the “uniformity” the administration claims it wants to achieve in order to promote compliance with the Constitution.

The Obama Administration should not forgo its commitment to comply with constitutional principles by removing a protection even the George W. Bush Administration, which worked to strip religious freedom protections from government partnerships with faith-based organizations, recognized was constitutionally necessary.

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 construct buildings that are used as 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. James Madison wrote:

Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?²⁸

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.²⁹ Subsequently, the Court specifically held that the government could not pay to construct or maintain religious buildings and it has never retreated from this bedrock Establishment Clause principle. The proposed rule is antithetical to our constitutional values.

²⁵ Pub. L. No. 111-5, § 14004(c)(3), 123 Stat. 115, 281-82 (2009).

²⁶ Pub. L. No. 110-315 (2008).

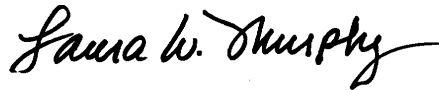
²⁷ *E.g.*, 20 U.S.C. § 1103e(1); 20 U.S.C. § 1068e(1).

²⁸ James Madison, Memorial and Remonstrance Against Religious Assessments, quoted in *Everson v. Bd. of Ed.*, 330 U. S. 1, 65-66 (1947) (appendix to dissenting opinion of Rutledge, J.).

²⁹ *Everson*, 330 U.S. at 11.

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