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ACCOUNTABILITY CHALLENGES IN GOVERNMENT FUNDING OF FAITH-BASED ORGANIZATIONS

► Anita R. Brown-Graham

On September 30, 2003, the federal government issued four final regulations and six proposed regulations intended to advance President Bush's Faith-Based Initiative.¹ As a result of the final regulations, which affect the federal Departments of Health and Human Services (DHHS) and Housing and Urban Development (HUD), faith-based organizations now have access to nearly \$28 billion in federal grants.² The proposed regulations, which will affect programs administered by the Department of Labor, the Department of Justice, and the Department of Education, will make even more federal funds available to faith-based groups. Generally, the regulations provide that

- faith-based organizations are eligible for federal funding on an equal basis with other organizations;

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1. The emphasis on partnerships between government and faith-based organizations actually began after President Clinton signed the Welfare Reform Act of 1996, which included the little-known Charitable Choice provision. Few partnerships formed, however, because of the extensive regulations and lengthy fund disbursement process involved. For instance, the North Carolina Division of Social Services received \$302 million in federal funds through the Temporary Assistance for Needy Families program and awarded less than \$1 million of this allotment to faith-based charities. *See* Yonat Shimron, *Faith, Hope & Charity*, THE NEWS & OBSERVER, April 8, 2002, at A25, available at 2002 WL 3459932. The Bush administration has pledged to remove all regulatory barriers to the formation of partnerships between government and faith-based organizations.

2. *See* Andrew Mollison, *Faith-Based Aid May Hinge on High Court*, ATLANTA JOURNAL-CONSTITUTION, October 14, 2003, at 1A.

- faith-based organizations are no longer required to form a separate, secular organization to receive federal funds;
- faith-based organizations that receive public funding remain independent in matters relating to governance and expression of beliefs;
- direct federal funds may not be used to support inherently religious activities such as worship, religious instruction, or proselytization;
- the provisions apply to state or local funds in cases where a state or local government commingles its own funds with the federal funds covered by the regulations.

As a result of these regulations, local governments that administer applicable federally funded programs can expect to see increasing numbers of faith-based organizations competing for federal funds. In addition, the recent federal emphasis on partnering with faith-based providers will surely result in more of these providers seeking local public funds to support their programs.

On the one hand, providing public funding to religious service organizations³ breaks no new ground. Government agencies have for many years funded religiously affiliated organizations such as Catholic Charities, Lutheran Social Services, the Salvation Army, and others. What is different today, and will be amplified by these recent regulations, is the encouragement of government funding of programs sponsored by pervasively sectarian organizations, such as congregations, whose primary purpose is to provide religious instruction and spiritual support to their members rather than social services to clients.⁴ Public

3. This article uses the terms “religious organization,” “religious service organization,” “community of faith,” and “faith-based organization” interchangeably to refer to both religiously affiliated and pervasively sectarian groups.

4. Substantial arguments exist to suggest that some of the Charitable Choice provisions may be unconstitutional under current Supreme Court jurisprudence. *See, e.g.*, Alan Brownstein, *Constitutional Questions about Charitable Choice*, in WELFARE REFORM AND FAITH-BASED ORGANIZATIONS 219 (Derek H. Davis and Barry Hankins eds., 1999). The Court’s interpretation of the Establishment Clause, however, does not represent stable doctrine. While this article focuses on what the law is presently, it also relies heavily on more recent jurisprudence to analyze how the Court might interpret both the new mandates and any resulting accountability measures that local governments might impose.

funding of these faith-based organizations raises accountability questions of constitutional dimensions.

This article focuses on the tension between the federal mandate to accommodate social programs operated by pervasively sectarian organizations and the need to hold these organizations accountable for their expenditure of public funds. In particular, the article explores the history and law relating to public funding of religious organizations and suggests measures local governments can take to (1) set and enforce meaningful standards for public services delivered by pervasively sectarian organizations and (2) ensure that public moneys are not being spent to promote religious proselytism or to subsidize employment discrimination based on religious affiliation.

The History and Law of Public Funding for Faith-Based Organizations

Government funding of programs provided by communities of faith has come a long way since Justice Hugo Black declared in 1947 that government could neither interfere with, fund, nor otherwise aid religious belief or expression and could provide financial support only to institutions that are not pervasively sectarian.⁵ This strict separationist approach dominated the Supreme Court’s jurisprudence until the 1970s when it began to be replaced by a theory of neutrality.⁶ More recent case law heavily supports the neutrality theory, which permits government agencies to fund faith-based organizations if funds are made available to religious and nonreligious organizations on an equal basis.⁷

5. *See* *Everson v. Board of Education*, 330 U.S. 1, 43–44, 61 (1947); *see also* *Levitt v. Comm. for Public Education and Religious Liberty*, 413 U.S. 472, 482 (1973) (holding unconstitutional a program in which funds were to be used for school bus trips because the trips might have advanced religious instruction).

6. *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (holding that a statute providing for aid to a secular organization may survive constitutional scrutiny if the legislative intent is neutral, its primary effect neither advances nor inhibits religion, and it does not foster an excessive government entanglement with religion).

7. *See, e.g.*, *Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819 (1995) (rejecting the University’s Establishment Clause defense for denying funding to religious student groups for magazine printing costs); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993)

In the past, many local governments have sought to avoid legal challenges by funding only those faith-based organizations that set up separate, secular non-profit organizations to provide social services. The federal government's recent regulations make clear, however, that faith-based organizations are not required to set up secular nonprofits in order to receive public funds. Churches, mosques, and synagogues can receive public funds directly under what has come to be known as "Charitable Choice."⁸ While the Supreme Court has not yet addressed the several questions surrounding the constitutionality of direct governmental funding of these pervasively sectarian organizations, it appears that, under the theory of neutrality, government may, and, in fact, sometimes must, fund the programs of organizations in which "a substantial portion of . . . functions [are] subsumed in the religious mission" and "secular activities are indistinguishable from . . . religious activities."⁹

Local governments that contract with pervasively sectarian, faith-based organizations are plagued with vexing questions on how to ensure the accountability of their partners. These faith-based organizations are often structured differently than secular nonprofits, making many of the customary checks and balances inapplicable. For example, the Revised Model Nonprofit Corporation Act recognizes that although directors and officers of religious organizations have the same fiduciary duties as their counterparts in other types of nonprofit organizations, religious organizations must have greater flexibility in structure and operation. Thus, for example, religious organizations can remove directors more easily than can other nonprofits.¹⁰ Also, religious organizations need not provide members with rights to inspect membership

(allowing the state to fund an interpreter for a deaf Catholic school student under the federal Individuals with Disabilities Education Act); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986) (approving state-funded vocational rehabilitation for a blind student seeking to become a pastor at a private Christian college); *Mueller v. Allen*, 463 U.S. 388 (1983) (upholding a state tax deduction to parents for various private school expenses).

8. Michele Erstin Gilman, "Charitable Choice" and the Accountability Challenge: Reconciling the Need for Regulation with the First Amendment Religion Clauses, 55 VAND. L. REV. 799, 811 (2002).

9. See *Mitchell v. Helms*, 530 U.S. 793, 850 (2000) (defining pervasively sectarian organizations); see also *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736, 752 (1976).

10. § 7.02(a)(2) (2000).

lists or receive financial statements.¹¹ Other protections include exemptions from lobbying disclosure rules and from filing Form 990. In addition, the IRS is bound by more restrictive rules regarding when it can audit a religious institution and more stringent notice requirements regarding advance warning of an audit.¹²

This reduced level of organizational and federal oversight might motivate a local government to be more vigilant in its efforts to ensure the accountability of the faith-based partnering organization. However, the contractual relationship between government agencies and faith-based organizations implicates a number of additional laws that may preclude the government's usual compliance requirements. The most important of these laws is the First Amendment to the Constitution of the United States, which provides, in part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The courts have sought to balance the baseline of the Free Exercise Clause of the First Amendment—that government must accommodate differing religious beliefs—and the ceiling of the Establishment Clause—that government may not become overly involved in religious matters.¹³ The Establishment Clause issues that courts seek to root out in this balance are sponsorship, financial support, and active participation of government in religion.¹⁴ The Free Exercise issues concern regulation of religious practices. Local governments may run afoul of either clause as they fund and attempt to impose accountability measures on faith-based partners.

Setting and Enforcing Public Standards for Public Services

Some argue that religious entities should receive government funding on the same bases as nonreligious groups but that religious institutions should enjoy exemptions from many of the accountability standards to which other entities are subjected.¹⁵ Proponents of

11. § 7.20(f).

12. I.R.C. §§ 7611(a)(1)(A), (a)(2), (a)(1)(B), (a)(3) (2000).

13. Elizabeth Tobin, *Blurring the Line Separating Church and State: California Exposes the Inherent Problems of Charitable Choice*, 86 MINN. L. REV. 1629, 1644 (2002).

14. *Id.* at 1645.

15. See, e.g., Carl H. Esbeck, *A Constitutional Case for Governmental Cooperation with Faith-Based Social Service Providers*, 46 EMORY L. J. 1, 21 (1997); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 42 (2000).

this position would require local governments to exempt religious organizations from many of the general rules regulating secular service providers, including licensing requirements, building standards, and health, safety, and nondiscrimination laws. Others counter that these exemptions would allow religious organizations to “have their cake and eat it, too,” granting them full access to government subsidies while exempting them from government regulations.¹⁶ Despite the policy debate, it appears that generally applicable accountability provisions included within government contracts with faith-based groups will likely be deemed lawful under First Amendment jurisprudence if the provisions (1) have a neutral purpose and effect toward religion and among different religions (the “effects test”) and (2) avoid excessive government entanglement with religion (the “entanglement test”).¹⁷

To be deemed neutral under the effects test of the First Amendment, accountability provisions must have the effect of safeguarding the religious integrity and character of any faith-based organization willing to accept government funds to provide services to the needy.¹⁸ Similarly, the Charitable Choice language of

16. See Ira C. Lupa, *Government Messages and Government Money: Santa Fe, Mitchell v. Helms, and the Arc of the Establishment Clause*, 42 WM. & MARY L. REV. 771, 820 (2001).

17. See *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). The *Lemon* test was modified for cases involving aid to religious schools in *Agostini v. Felton*, 521 U.S. 203, 232–33 (1997). Under the modified *Lemon–Agostini* test, a faith-based publicly funded program does not violate the Establishment Clause if (1) it has a secular purpose, (2) it does not result in governmental indoctrination, (3) it does not define its participants by reference to religion, and (4) it does not create excessive government entanglement with religion. Under *Employment Division v. Smith*, 494 U.S. 872 at 890 (1990), generally applicable government regulations, even those that arguably burden religious groups, are presumptively valid unless

1. the Free Exercise Clause is linked with another constitutional violation (a hybrid claim),
2. the regulation at issue requires some form of individualized determination,
3. the law at issue is not neutral, or
4. the regulations violate the Establishment Clause by excessively entangling church and state.

18. Conversely, the overall contract must safeguard the religious freedom of beneficiaries, both those who are willing to receive services from religious organizations and those who object to receiving services from such organizations.

several federal programs sets forth the parameters of neutrality by expressly exempting religious organizations from regulations that otherwise would intrude on their religious character.¹⁹ The provisions of the Personal Responsibility and Work Opportunities Reconciliation Act of 1996 (PRWORA), for example, “include affirmative statements that religious organizations retain the independence to ‘control . . . the definition, development, practice and expression of [their] religious beliefs.’”²⁰ This independence includes the right of organizations to protect their fiscal autonomy by segregating federal and nonfederal funds, thereby limiting any program audit to the federal funds even when both funding streams contribute to the program activity.²¹

Although the Supreme Court has allowed some accommodations to safeguard the religious integrity of faith-based service providers, it has also recognized

19. Charitable Choice is a provision of the 1996 Welfare Reform Act, the Community Service Block Grant, and programs within the Substance Abuse and Mental Health Services Administration. See 42 U.S.C. §§ 601–619, 9920, and 290kk (2000). The provision was designed to encourage states to enlist the aid of faith-based providers in the fight against poverty and other social ills. On December 12, 2002, President Bush signed an Executive Order expanding the basic Charitable Choice provisions to virtually all social services. See Exec. Order No. 13,279, 67 Fed. Reg. 77,141 (Dec. 12, 2002).

20. Steven K. Green, *Charitable Choice and Neutrality Theory*, 57 N.Y. ANN. SURV. AM. L. 33, 41 (2000) (citations omitted).

21. Charitable Choice legislation prohibits the use of federal funds for “sectarian instruction” or “proselytizing” by private social service organizations. Agency guidelines contain similar speech restrictions as a condition of funding. The intent behind such prohibitions is to prevent the use of public funds for exclusively religious activities. Some have argued, however, that the prohibitions risk violating a faith-based organization’s free speech rights by discriminating against its constitutionally protected religious speech. See, e.g., *Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819 (1995) (holding the University engaged in unconstitutional viewpoint discrimination by funding some student groups’ speech expressions while withholding funds from other groups simply because of the religious nature of their views on social issues); *Board of Regents v. Southworth*, 529 U.S. 217 (2000) (upholding the University’s policy of funding diverse student speech); see generally Vernadette Ramirez Broyles, *The Faith-Based Initiative, Charitable Choice, and Protecting the Free Speech Rights of Faith-Based Organizations*, HARVARD JOURNAL OF LAW AND PUBLIC POLICY (2003).

that too much accommodation can become favoritism toward a religion and thus violate the Establishment Clause. Thus the Supreme Court signaled how it might resolve the question of whether religious organizations are entitled to mandatory exemptions from government regulations when it held, in *Employment Division v. Smith*,²² that religious groups are subject to neutral laws of general application. The holding makes it unlikely that claims for mandatory exemptions from regulations will prevail. Moreover, in *Texas Monthly v. Bullock*,²³ the Supreme Court struck down a sales tax exemption for religious periodicals because the exemption benefited only religious groups. The Court made clear that even permissive accommodations designed to alleviate a government-created burden on religion cannot favor particular sects and cannot favor religious groups over nonreligious groups or result in a burden on nonbeneficiaries.

Preventing the Use of Public Funds for Religious Proselytization

The use of public funds to promote religious doctrine violates the effects test of the Establishment Clause. Because the constitutionality of public funding to religious organizations is measured, at least in part, by how that funding is used by the recipient, the government must monitor the activities supported by the funding. The two other competing constitutional concerns implicated by monitoring are (1) whether the monitoring amounts to excessive entanglement²⁴ and

22. 494 U.S. 872, 890 (1990). It should be noted that *Smith* did not involve a religious institution seeking exemption from regulation. Rather, the case involved two Native Americans who were fired by a private drug rehabilitation organization after they used peyote at a Native American church ceremony. The state denied their unemployment compensation applications pursuant to a state law that disqualified employees discharged for work-related conduct. The court reasoned that if the state could criminalize conduct, it could also penalize the conduct in its unemployment scheme. The court recognized two exceptions to its holding, however. First, where violation of the Free Exercise claim is joined with a claim of the violation of another constitutional protection, that hybrid claim might be entitled to an exemption. Second, where the law at issue provides for a system of individualized determinations of the exemption, the government may not, without compelling reason, refuse to apply that system in cases involving religious expression.

23. 489 U.S. 1, 8 (1989).

24. The Court noted in *Agostini* that entanglement exists if “(i) the program would require ‘pervasive monitoring by

(2) whether the monitoring results in government-sponsored religious indoctrination. Thus, while careful governmental regulation and oversight is necessary to avoid claims that the government is participating in religious indoctrination, such regulation and oversight is likely to result in complaints of governmental control and surveillance—hallmarks of excessive church-state entanglement.²⁵

A recent case, *Freedom from Religion Foundation v. McCallum*,²⁶ illustrates this conflict. In *McCallum* a federal district court held unconstitutional the state of Wisconsin’s funding of Faith Works of Milwaukee (Faith Works), a program providing residential substance abuse treatment and employment assistance to criminal offenders and welfare recipients. Faith Works did not discriminate against potential clients based on religion and did not require clients to convert to any particular religion. Faith Works did, however, include topics related to faith and spirituality in its twelve-step recovery program. After reviewing the applicable federal and state laws and the grant agreement (all of which included prohibitions against the use of funds to promote religion) and the oversight provisions (which permitted monthly visits by the state to organizations receiving funds), the court was not troubled by the prospect of excessive entanglement.²⁷ On the other hand, when addressing the issue of state-sponsored religious indoctrination, the court held that public funding of the program violated the Establishment

public authorities’ to ensure [that the public funds were not being used] . . . to inculcate religion; (ii) the program would require ‘administrative cooperation’ between the [government and sectarian organizations]; and (iii) the program might increase the dangers of ‘political divisiveness.’” *Agostini v. Felton*, 521 U.S. 203, at 233 (1997) (citing *Aguilar v. Felton*, 473 U.S. 402, 413–14 (1985)).

25. “Pervasively sectarian,” a vaguely defined term of art, has its roots in the Supreme Court’s recognition that government must not engage in detailed supervision of the inner workings of religious institutions, and the Court’s distaste for the picture of state inspectors prowling the halls of parochial schools and auditing classroom instruction. Under the “effects” prong of the Lemon test, the Court has used one variant or another of the pervasively sectarian concept to explain why any but the most indirect forms of government aid to such institutions would necessarily have the effect of advancing religion. *Bowen v. Kendrick*, 487 U.S. 589, 631 (1988) (Blackmun, J., dissenting); see *Lemon v. Kurtzman*, 403 U.S. 602 at 612–13 (1971); *Agostini*, 521 U.S. at 232–33.

26. 179 F. Supp. 2d 950 (W.D. Wis. 2002).

27. *Id.* at 967 (citing *Agostini*, 521 U.S. 203, 234).

Clause. The court was particularly troubled by the ineffectiveness of the government's monitoring of this pervasively sectarian organization.²⁸ Despite the restrictions in federal and state law and the grant agreement, the court noted that the grant agreement failed to include any consequences for noncompliance and concluded the state had not put in place adequate safeguards "to insure that direct, public funds are restricted to secular purposes."²⁹ Indeed, once the court determined that Faith Works subjected participants to religious indoctrination, it easily went one step further to find that this indoctrination could be attributed to the government because the rules prohibiting the use of grant money for religious activities "exist[ed] only on paper." Notably, the court compared pervasively sectarian organizations, such as Faith Works, to nonprofits that are merely religiously affiliated, and suggested that because pervasively sectarian organizations are more likely to engage in religious worship, proselytization, and religious education as part of their social service programs, compliance with the constitutional prohibition against government-sponsored indoctrination will require more than merely stating that public funds should not be used to support religious activities.³⁰

28. The court in *McCallum* found that simply because a social service program had secular purposes did not mean that it was not permeated by religion. The court noted that the religious organization had "used the integration of religion into [its program] as a strong selling point for obtaining funding" and that it could not "now try to excise religion from its offerings, saying that it contracted with the state to provide . . . wholly secular services . . . without any reference to religion." *McCallum*, 179 F. Supp. 2d at 969-70. 29. *Id.* at 975.

30. Earlier Supreme Court cases have also focused on these distinctions. So, for example, Roman Catholic elementary and secondary schools were often classified as pervasively sectarian because they tended to be "located close to parish churches," have school buildings filled with "identifying religious symbols" (crosses, crucifixes, religious paintings, religious statues), make "instruction in faith and morals [a] part of the total educational process," sponsor "religiously oriented extracurricular activities," have faculties composed substantially of nuns or priests, and be "dedicated . . . [to] provid[ing] an atmosphere in which religious instruction and religious vocations are natural and proper parts of life." See *Lemon*, 403 U.S. at 615-16. By contrast, religiously affiliated colleges were not labeled pervasively sectarian unless they "impose[] religious restrictions on admissions, require[] attendance at religious activities, compel[] obedience to the doctrines and dogmas of the faith, require[] instruction in theology and doctrine,

*Bowen v. Kendrick*³¹ is the only recent case in which the United States Supreme Court has addressed the issue of direct public funding of a religious organization. Although the case concerned the constitutionality of a statute rather than a specific contract and the faith-based organizations involved were not pervasively sectarian, the Court's decision is nonetheless instructive on the need to balance the prohibitions against excessive entanglement and indoctrination. The specific monitoring mechanisms involved in *Bowen* included grantee disclosures on application forms as to the nature of the services that would be provided, government evaluation of the services, and required reports from grantees. In attempting to balance the competing interests, the Court acknowledged that grant monitoring might also require a review of the educational materials or a visit to the site, but it dismissed the idea that such inspections alone would intrude on religious practice. The *Bowen* Court summarily noted that because the government was not monitoring pervasively sectarian grantees, "intensive monitoring" was unnecessary.³²

and . . . propagate a particular religion." See *Tilton v. Richardson*, 403 U.S. 672, 682 (1971).

31. 487 U.S. 589 (1988) (upholding federal grants for teenage sexuality counseling, including counseling offered by faith-based organizations). The *Bowen* Court held that the Adolescent Family Life Act (AFLA) could not be deemed unconstitutional on its face because (1) the statute was clearly motivated primarily, if not entirely, by a legitimate secular purpose—the elimination or reduction of social and economic problems caused by teenage sexuality, pregnancy, and parenthood; (2) religion is no more than incidentally advanced by Congress's requirement that grantees involve religious and other charitable organizations as part of a broad-based community support system or Congress's willingness to allow religious organizations that are not pervasively sectarian to compete for grants; and (3) the monitoring involved was not intensive and, therefore, did not result in excessive entanglement of the state with religion.

32. Justice Kennedy authored a concurring opinion, in which Justice Scalia joined, clarifying that a showing that AFLA grants were being made to pervasively sectarian organizations would not necessarily render the program unconstitutional. According to the two justices, the question "is not whether the entity is of a religious character, but how it spends its grant." *Bowen v. Kendrick*, 487 U.S. 589, at 624-25 (1988) (Kennedy, J., concurring). Conversely, Justice Blackmun noted in his dissent that he considered the label of "pervasively sectarian" to serve as a pretext for conducting a more detailed analysis of an institution, the nature of aid given to it, and the manner in which the aid was used. In that sense, a finding that a recipient of government

The *Bowen* Court noted in dictum the “risk that government funding, even if it is designated for specific secular purposes, may nonetheless advance [a] pervasively sectarian institution’s religious mission.”³³ The Court further noted the dilemma of governments, that “the very supervision of the aid to assure that it does not further religion renders [an agreement] . . . invalid.”³⁴ If the programs of these pervasively sectarian organizations require clients to obey religious teachings, attend religious services, or study a particular religious doctrine, local governments will have “to tread an extremely narrow line” between the entanglement and the effects tests in their monitoring activities.³⁵ To ensure that public funding is not used to advance religion, governments must engage in ongoing surveillance of the programs. That very surveillance, however, may well constitute excessive entanglement.

The rules of engagement are certainly not clear. But an attempt to reconcile *Bowen* and *McCallum* suggests that efforts to establish accountability from pervasively sectarian organizations will likely be upheld by a court if

1. the contract between the government and the organization includes an express provision in the contract prohibiting public dollars from being spent for religious purposes and providing consequences for noncompliance.³⁶
2. the contract makes clear that the constitutional limitation on the use of public funds does not expire during the economic life of the public benefit.³⁷
3. such efforts include on-site visits, as often as once per month, if necessary, to ensure that public funds are not being used to advance religious purposes.³⁸

funds is pervasively sectarian is a sufficient but not a necessary basis for finding that a challenged program creates an unacceptable Establishment Clause risk.

33. *Id.* at 610.

34. *Id.* at 615.

35. *Id.* (citing *Roemer v. Bd. of Pub. Works of Md.*, 426 U.S. 736, at 768 (1976) (White, J., concurring)).

36. *Bowen*, 487 U.S. at 614 (“Clearly, if there were . . . [an express provision preventing the use of federal funds for religious purposes], it would be easier to conclude that the statute on its face could not be said to have the primary effect of advancing religion”).

37. *Tilton v. Richardson*, 403 U.S. 672, at 683 (1971).

38. *Bowen v. Kendrick*, 487 U.S. 589, at 615 (1988).

Employment Discrimination: A Difficult Question of Public Accountability

Religious discrimination in the employment practices of faith-based organizations presents thorny legal and political issues for local governments. Local officials often seek not only to eradicate employment discrimination within their units of government but also to discourage it among private employers. Thus, local governments may have policies that prohibit contracting with private entities that engage in employment discrimination on unlawful bases, one of which is usually religious affiliation.

The question of whether employment discrimination on the basis of religion by a faith-based organization is legal involves two separate issues. The first is, Are faith-based organizations covered under federal employment discrimination statutes (namely, Title VII of the Civil Rights Act of 1964)? The answer is no. Title VII prohibits employment discrimination on the bases of race, color, religion, sex, and national origin. However, Title VII exempts religious discrimination by religious organizations to protect the ability of these organizations to maintain their religious liberties and identities by hiring employees who share their religious beliefs. The Supreme Court upheld the exemption in *Corporation of the Presiding Bishop of the Church of Latter-Day Saints v. Amos*, reasoning that the exemption alleviates significant governmental interference with the ability of religious organizations to define and carry out their religious missions.³⁹

The second question is, Does acceptance of public funds change the employment discrimination rules for faith-based organizations? It is, after all, one thing to keep government from interfering with religion in a purely private sphere and another to argue that government-funded discrimination deserves the protection of the Free Exercise clause. The answer to this question is not clear. The various federal programs promoting local partnerships with faith-based organizations indicate differing answers. For example, unlike the PRWOR,⁴⁰ which provides that religious grantees retain the right to make employment decisions based on religion, the Department of Labor’s Workforce Investment Act⁴¹ specifically prohibits employment discrimination by grantees. Yet another category of programs, including the Community Development Block Grant Program, includes language such as: No person shall, on the ground of race, color, national

39. 483 U.S. 327 (1987).

40. 42 U.S.C. § 604a(c)–(h) (West Supp. 2000).

41. 29 U.S.C. § 2938 (2002).

origin, religion, or sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity subsidized in whole or in part with funds made available according to this legislation.⁴² This language makes clear that individuals may not be denied services because they belong to a different faith or to no faith at all and could be further interpreted to prohibit employment discrimination based on religion.

In sum, local governments that administer these federal programs must look to the source of funding for guidance on whether faith-based grantees are exempted from the general prohibitions against religious discrimination in employment decisions. If the federal regulations governing the programs appear to sanction a faith-based provider's employment discrimination based on religion, these local governments may well find themselves responding to constitutional challenges that their public funding of the discriminatory faith-based organization amounts to an unconstitutional infringement of the Free Exercise rights of potential employees and impermissible government discrimination.⁴³

Conclusion

Local governments may find it difficult to establish accountability standards for pervasively sectarian organizations, and they may well be tempted to avoid the constitutional quagmire by simply refusing to contract with these organizations at all. However, the Establishment Clause and current federal policy require governments to be neutral—not hostile—toward religion and religious expression.⁴⁴ Since governments may not discriminate against faith-based organizations, whether pervasively sectarian or religiously affiliated, just because they are religious, local governments will have to balance accommodating these organizations in their funding streams with demanding accountability of them within the bound-

aries of the First Amendment and federal policy. In the midst of this balancing act, local governments should be aware that they

1. may usually impose generally applicable neutral accountability measures on secular and sectarian providers alike;
2. may not grant permissive exemptions from accountability measures if the effect would be to favor religious organizations over secular organizations;
3. must take reasonable steps to ensure that public dollars are not spent on proselytism but at the same time avoid imposing accountability measures that interfere with the religious integrity of faith-based organizations; and
4. must consult with the specific source of federal funds, when applicable, to determine the relevant rules regarding employment discrimination based on religion.

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42. 24 U.S.C. § 570.602 (2002).

43. See Laura Muttterperl, *Employment at (God's) Will: The Constitutionality of Antidiscrimination Exemptions in Charitable Choice Legislation*, 37 HARV. C.R.-C.L.L. REV. 389 (2002).

44. *Good News Club v. Milford Central School*, 533 U.S. 114, 121 (2001) (quoting *Rosenberger v. Rector of the Univ. of Va.*, 515 U.S. 819, at 849 (1995)) (“[N]eutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse.”).