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February 18, 2020

Acting Secretary Chad F. Wolf
Office for Civil Rights and Civil Liberties
Department of Homeland Security
Washington, DC 20528

RE: Comments and Objections to the U.S. Department of Homeland Security's Proposed Rule "*Equal Participation of Faith- Based Organizations in DHS's Programs and Activities: Implementation of Executive Order 13831*," RIN 1601-AA93

Dear Acting Secretary Chad F. Wolf:

The Center for Constitutional Rights is a national, not-for-profit legal advocacy organization dedicated to protecting and advancing rights guaranteed by the United States Constitution, federal statutes, and local and international law. Since our founding in 1966, The Center for Constitutional Rights has litigated landmark civil rights and human rights cases before the Supreme Court and other tribunals concerning government overreach and discriminatory state policies.

The Center for Constitutional Rights writes today in our capacity as civil rights leaders to express our grave concern about "*Equal Participation of Faith- Based Organizations in DHS's Programs and Activities: Implementation of Executive Order 13831*," RIN 1601-AA93 (hereinafter "Proposed Rule") the Proposed Rule issued by the U.S. Department of Homeland Security ("DHS") and published in the Federal Register on January 17, 2020, with a mere 30-days for public comment. The Proposed Rule authorizes taxpayer-funded entities to discriminate against the public in the name of religion—jeopardizing the ability of millions of Americans to access government-funded programs and seek redress when they experience discrimination. It also removes a number of safeguards that allow beneficiaries to receive services from alternative providers that do not enforce a religious point of view.

As an organization dedicated to seeking justice for groups that have traditionally faced discrimination and bias—including immigrants, racial minorities, religious minorities, disabled individuals, and lesbian, gay, bisexual, transgender, and queer ("LGBTQ+") persons—the Center for Constitutional Rights has a strong interest in ensuring that workplaces and government-funded programs are accessible to all. Given the unprecedented negative effects the Proposed Rule will have on the public and DHS's failure to observe regulatory and procedural requirements, we respectfully ask that DHS give due consideration to the comments and objections summarized below and withdraw the Proposed Rule.

COMMENTS AND OBJECTIONS TO RIN 1601-AA93 BY THE CENTER FOR CONSTITUTIONAL RIGHTS

I. The Proposed Rule Violates the Administrative Procedure Act Because the Notice and Comment Period Provided by DHS Is Inadequate

The Center for Constitutional Rights objects to the Proposed Rule as a preliminary matter because the U.S. Department of Homeland Security has denied the public a meaningful opportunity to comment pursuant to the Administrative Procedure Act. Even though DHS concedes that the Proposed Rule is a *significant* regulatory action that changes the legal regime applicable to taxpayer-funded entities, DHS unjustifiably limited the notice and comment period to a mere 30 days, and shortchanged the ability of the American public to participate in the rulemaking process.

Given the importance of the Proposed Rule, DHS's notice and comment period should have run for a minimum of 60 days as agency precedents dictate. For instance, Executive Order 13563 establishes that comment periods for proposed agency rules "should generally be *at least 60 days*." Executive Order 13563, Improving Regulation and Regulatory Review §2(b) (Jan. 18, 2011) (emphasis added). Likewise, Executive Order 12866 directs federal agencies to "afford the public a meaningful opportunity to comment on any proposed regulation, *which in most cases should include a comment period of not less than 60 days*." *See* Executive Order 12866, Regulatory Planning and Review (Sept. 30, 1993)(emphasis added).

Here, DHS has failed to provide any justification for its unusually short comment period. Accordingly, the Proposed Rule is void under the Administrative Procedure Act, 5 U.S.C. § 553(c), because DHS has failed to provide the public a *meaningful* opportunity to participate in its rulemaking.

II. The Proposed Rule Authorizes Invidious Discrimination in the Name of Religion and Harms Program Beneficiaries

The Center for Constitutional Rights objects to the rule because it grants taxpayer-funded entities virtually unchecked power to discriminate under the guise of religion. For instance, the Proposed Rule allows DHS-grantees to restrict their benefits and programming to certain populations as a form of religious accommodation. These provisions dramatically expand the religious exemptions available under law, and give DHS-funded entities the ability to privilege individuals with shared religious beliefs in virtually all facets of their operations.

As a practical matter, this means a same-sex couple could be refused family housing in the wake of a natural disaster, while a transgender shelter seeker could be denied shelter by a FEMA grantee. A FEMA grantee could claim a right to refuse to assist a same-sex or couple in requesting federal disaster relief benefits. Muslim immigrants could also be forced to complete citizenship classes at a faith-based organization that incorporates Christian doctrine into their teachings. The Proposed Rule also increases the likelihood these harms will result by requiring DHS to issue special notices informing potential grantees that they can apply to be exempt from generally-applicable civil rights laws.

The Proposed Rule also eliminates important safeguards for beneficiaries of DHS-funded

programs. For instance, the Proposed Rule makes it more difficult for Americans who rely on government-funded programs to identify secular alternatives by eliminating the requirement that referrals to non-religious programs be provided upon request. The Proposed Rule strips the requirement that DHS-grantees seeking to evoke an exemption provide program beneficiaries written notice of their own religious freedom rights. The Proposed Rule also sidesteps the constitutional requirement set forth in *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) that individuals who rely on vouchers as a form of indirect aid have at least one non-religious provider to choose from. Adding insult to injury, the Proposed Rule also allows entities to make participation in religious activities mandatory for beneficiaries of DHS-funded voucher programs.

Accordingly, the Proposed Rule gives DHS-funded entities an unprecedented license to discriminate and impose their religious beliefs on others using taxpayer dollars. Since no one should be forced to abandon their religious beliefs or identities as a condition to access government-funded services, the Center for Constitutional Rights strenuously objects to the Proposed Rule.

III. The Proposed Rule Violates the U.S. Constitution and Federal Law

A. The Proposed Rule is Infirm Under the Establishment Clause of the U.S. Constitution Because of Its Staggering Breadth

The Center for Constitutional Rights also objects to the Proposed Rule because it is infirm under the U.S. Constitution. For well over a century, the Supreme Court has held that the First Amendment's Free Exercise Clause does not provide individuals an unconditional right to act in accordance with their religious morals and beliefs.

In *Employment Division v. Smith*, 494 U.S. 872 (1990), Justice Antonin Scalia, writing for the Court, summed up this longstanding principle, stating that the Supreme Court had "never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate." *Id.* at 878-79. The Supreme Court also explained that where "prohibiting the exercise of religion is not the object of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Id.* at 885.

The Supreme Court has also made clear that religious exemptions that burden or harm third parties implicate the Establishment Clause of the U.S. Constitution. *See, e.g.*, *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 706 (1994) ("[religious] accommodation is not a principle without limits"); *Estate of Thornton v. Caldor, Inc*., 472 U.S. 703, 708-11 (1985) (privileging religious prerogatives over secular concerns violates the Establishment Clause); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18 n.8 (1989) (religious accommodations may not impose "substantial burdens on nonbeneficiaries"); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 729 n. 37 (2014) ("courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries") (citations omitted).

The Proposed Rule departs from this legal standard and unconstitutionally erodes the bedrock principle of separation of church and state by allowing taxpayer-funded entities to condition employment and program participation on a religious litmus test. Contrary to settled law,

the Proposed Rule does not "take adequate account of the burdens" this sweeping exemption places on nonbeneficiaries, or ensure that it "does not override other significant interests." *Cutter v. Wilkinson*, 544 U.S. 709, 720, 722 (2005); *accord Bullock*, 489 U.S. at 18 n.8. Instead, the Proposed Rule communicates that the government values religious perspectives over the rights of Americans with divergent beliefs.

The expansion of the religious freedom doctrine contemplated by the Proposed Rule is not dictated or supported by recent Supreme Court decisions. In *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 37 S. Ct. 2012 (2017), the Supreme Court did not bar faith-based organizations operating under government grants from implementing safeguards like a referral system to protect the religious freedom of others. Instead, *Trinity Lutheran* narrowly addressed the issue of whether religious entities could be disqualified from receiving grants wholesale because of their religious character.

Similarly, in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*,138 S. Ct. 1719 (2018), the Supreme Court refused to adopt a blanket rule exempting employers with religious beliefs or affiliations from complying with generally-applicable non-discrimination law. To the contrary, the Court noted:

> [W]hile those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law.
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> *Id*. at 1727.

The Proposed Rule also sweeps far more broadly than the ministerial exemption the Supreme Court permitted in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*, 565 U.S. 171 (2012), because it insulates taxpayer-funded entities from the employment discrimination claims of ministers and non-ministers alike. The Proposed Rule also allows entities that have never been organized for a religious purpose to receive exemptions so long as they tell DHS "yes I qualify." This is contrary to existing law. See, e.g., *Spencer v. World Vision, Inc*., 633 F.3d 723, 724 (9th Cir. 2011) (per curiam) (asking whether entities claiming an exemption are organized and "engaged primarily in carrying out" a religious purpose); *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n*, 503 F.3d 217, 226 (3d Cir. 2007) (ascertaining whether an entity's "purpose and character are primarily religious" before granting an exemption) (citation omitted).

As such, the Proposed Rule is void and unsupported by existing law. And although it claims to implement Executive Order 13831, the Proposed Rule actually conflicts with the Order's requirement that religious freedom initiatives be "implemented consistent with applicable law." Executive Order 13831, F.R. Doc. 2018-09895, at 20717.

B. The Proposed Rule Burdens the Constitutional Right of Privacy

The Center for Constitutional Rights also objects to the Proposed Rule because it will burden the constitutional rights to privacy that extend to sexual and reproductive choices as enshrined in *Lawrence v. Texas*, 539 U.S. 558 (2003), *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Roe v. Wade*, 410 U.S. 113 (1973).

Under the Proposed Rule, anyone who has been sexually active outside the context of a heterosexual marriage can be denied services or employment by DHS-grantees that object to their choices. The Proposed Rule gives members of the public a Hobson's choice: forgo taxpayer-funded jobs and programs or surrender your constitutionally-protected rights to privacy and bodily autonomy.

The consequences of the discrimination authorized by the rule will be borne most heavily by job seekers in small or disadvantaged job markets, including people of color living in poverty or in rural areas, including Native American people living on reservations. Linking people's ability to find work or access government-funded services to their sexual and reproductive choices will simultaneously burden their constitutional rights and exacerbate the already sky-high health disparities that exist among Black and indigenous populations.

C. The Proposed Rule Chills Speech and Conduct Protected by the First Amendment

The Center for Constitutional Rights also objects to the Proposed Rule because it creates a special hierarchy for speech that privileges "religious speech" above speech on other issues. Under the Proposed Rule, individuals who speak out about social issues in a manner deemed inconsistent with a grantee's religious faith will be vulnerable to reprisal— including termination or denial of services —while religious individuals who speak out about LGBTQ+ people or people who seek abortions arguably enjoy special protections. This turns the protection afforded by the First Amendment on its head.

IV. The Proposed Rule Dilutes the Protections Against Discrimination that All Americans Enjoy

The Center for Constitutional Rights further objects to the Proposed Rule because it diminishes the ability of *all* Americans to live, work, and access services free of discrimination. Although religion has long been used to justify invidious discrimination based on race, sex, or other protected grounds, until now courts have refused to give these arguments state sanction. *See, e.g., Bob Jones University v. United States*, 461 U.S. 574, 604 (1983); *Kennedy v. St. Joseph's Ministries, Inc*., 657 F.3d 189, 192 (4th Cir. 2011); *Rayburn v. Gen. Conference of Seventh-Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986); *EEOC v. Pac. Press Pub. Ass'n*, 676 F.2d 1272, 1277 (9th Cir. 1982); *Hamilton v. Southland Christian Sch*., 680 F.3d 1316 (11th Cir. 2012); *EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 163 (9th Cir. 1986); *Herx v. Diocese of Ft. Wayne-South Bend, Inc*., 48 F. Supp. 3d 1168, 1175-76 (N.D. Ind. 2014).

The Proposed Rule threatens this legal regime by creating carveouts and loopholes to these bedrock principles and sowing doubt about when courts can enforce laws prohibiting discrimination, harassment, and violence in the workplace on the basis of race, sex, religion, national origin, disability, sexual orientation, and gender identity. As a result, the Proposed Rule will make it harder for victims of discrimination to seek redress, and will particularly disadvantage women, LGBTQ+ people, and religious minorities as detailed below.

A. The Proposed Rule Will Threaten the Rights of Women to Live Free of Discrimination

One impact of the Proposed Rule is that it will undermine the ability of women to access

government-funded programs.[1] Women have long been subjected to a range of discrimination based on sex, justified by claims of religious beliefs. For instance, women employees have been fired for their decisions about whether and how to start a family, including becoming pregnant outside of marriage, using in vitro fertilization to start a family, or seeking an abortion. *See, e.g.*, *Herx v. Diocese of Ft. Wayne-South Bend Inc.*, 48 F. Supp. 3d 1168 (N.D. Ind. 2014); *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 345 (E.D.N.Y 1998) (an unmarried teacher at a religious school was fired because, as explained by the school, her pregnancy was "clear evidence that she had engaged in coitus while unmarried").[2]

Certain entities have tried to deny opportunities to women altogether, based on their religious belief that women and mothers should not work outside the home. This includes religious schools failing to renew a pregnant employee's contract because of a belief that mothers should stay at home with young children. *Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 623 (1986). Women have also been discriminated against in the workplace in terms of pay and benefits and working conditions by employers that harbor religious beliefs about the appropriate role of women in society. For example, one religious school denied health insurance to women by providing it only to the "head of household," defined to be married men and single persons, based on its belief that a woman cannot be the "head of household." *E.E.O.C. v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986).

DHS-funded entities that similarly want to express disapproval for women who are pregnant, unmarried, or using birth control will be able to seek refuge in the Proposed Rule, notwithstanding their receipt of taxpayer dollars.

B. The Proposed Rule Will Exacerbate the Discrimination that LGBTQ+ People Face

The Proposed Rule will also jeopardize the rights of more than 11.3 million LGBTQ+ people in the United States (an estimated 4.5 percent of the adult population), including the 1.4 million people who identify as gender non-conforming, non-binary, or transgender.[3] LGBTQ+ people already widespread discrimination in areas such as employment, housing, healthcare, and

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[1] Here, the Center for Constitutional Rights addresses women who are not LGBTQ-identified. The impact of women who identify as LGBTQ+ are addressed below in Section IV.B.

[2] *See also* Dana Liebelson and Molly Redden, *A Montana School Just Fired a Teacher for Getting Pregnant. That Actually Happens All the Time*, Mother Jones, Feb. 10, 2014, *available at* https://www.motherjones.com/politics/2014/02/catholic-religious-schools-fired-lady-teachers-being-pregnant/; *Ducharme v. Crescent City Déjà Vu, L.L.C.*, No. 2:2018cv04484 (E.D. La. 2019) (woman fired at her job for having an abortion; court held that federal and state anti-discrimination laws prohibit employers from firing employees for having an abortion).

[3] THE UCLA SCHOOL OF LAW WILLIAMS INSTITUTE, ADULT LGBT POPULATION IN THE UNITED STATES, (Mar. 2019), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Population-Estimates-March-2019.pdf. *See* also Andrew R. Flores, *et al.*, *How Many Adults Identify as Transgender in the United States?*, THE UCLA SCHOOL OF LAW WILLIAMS INSTITUTE at 2–3 (June 2016), https://williamsinstitute.law.ucla.edu/research/how-many-adults-identify-as-transgender-in-the-united-states/.

education.[4] Because of these barriers, LGBTQ+ people also experience disproportionate rates of poverty and homelessness relative to the general population.[5] Rates of homelessness are even higher among transgender women of color, as nearly 50% of Black, Indigenous, and Multiracial transgender women surveyed nationwide had experienced homelessness.[6] Transgender people are also four times more likely to meet the threshold for extreme poverty—i.e. having a household income under $10,000 per year—while lesbian, gay, and bisexual women are more likely to be impoverished and receive public assistance.[7] These harmful trends will only be exacerbated by DHS's Proposed Rule, as it provides cover to food pantries and programs that harbor anti-LGBTQ+ bias.

Considering the ways that discrimination already makes LGBTQ+ people poor and reliant on social services programs, the additional rollbacks contemplated by the Proposed Rule will be nothing short of devastating, particularly for LGBTQ+ people of color.[8]

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[4] *See, e.g.*, Sandy E. James, *et al.*, *The Report of the 2015 U.S. Transgender Survey*, Nat'l Ctr. for Transgender Equality (Dec. 2016) (hereinafter "2015 U.S. Transgender Survey"), https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf; Emma Mishel, *Discrimination against Queer Women in the U.S. Workforce: A Résumé Audit Study*, SOCIUS: SOCIOLOGICAL RESEARCH FOR A DYNAMIC WORLD (2016) (reporting that LGBTQ+ job applicants were selected for interviews 30% less often than other applicants); CTR. FOR AM. PROGRESS, MOVEMENT ADVANCEMENT PROJECT, *Paying an Unfair Price: The Financial Penalty for LGBT Women in America* at 10 (2015), http://www.lgbtmap.org/file/paying-an-unfair-price-lgbt-women.pdf. (hereinafter "*Paying an Unfair Price*") (Jennifer C. Pizer et al., Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits, 45 Loy. L.A. L. Rev. 715, 721, 737 (2012).

[5] 2015 U.S. Transgender Survey at 174–78 (revealing that 30% of respondents experienced homelessness, and the rate was nearly twice as high among those who lost their job because of their gender identity or expression and transgender women of color); *see also* M.V. Lee et al., *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination*, THE UCLA SCH. OF LAW WILLIAMS INST. (June 2007), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Sears-Lau-Ho-Bias-in-the-Workplace-Jun-2007.pdf (hereinafter "*Bias in the Workplace*").

[6] 2015 U.S. Transgender Survey at 174–78 (finding that 59% of Native American women, 51% of Black women, and 51% of multiracial women had experienced homelessness).

[7] Jaime M. Grant, *et al.*, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, NAT'L CTR. FOR TRANSGENDER EQUALITY (2011), https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf (hereinafter "2011 U.S. Transgender Survey"). Rates of extreme poverty are even higher among transgender people of color and transgender people with disabilities, ranging from 18 to 21 percent of survey respondents. *See* 2015 U.S. Transgender Survey at 144 (finding that 21% of people with disabilities, 19% of Black respondents, and 18% of Latino/a respondents reported a household income below $10,000); Kerith J. Conron et al., *Sexual Orientation And Sex Differences In Socioeconomic Status: A Population-Based Investigation In The National Longitudinal Study Of Adolescent To Adult Health*, 72 J. EPIDEMIOL CMTY. HEALTH, 1016-1026 (2018) (reporting on LGB women).

[8] *See generally* 2015 U.S. Transgender Survey (discussing disproportionate impact of discrimination on transgender people of color).

C. The Proposed Rule Will Have a Devastating Impact on Atheists and Religious Minorities

The Center for Constitutional Rights also objects to the Proposed Rule because it will negatively impact religious minorities and deprive them of vital government-funded services. Since Christianity is the predominant religion in the United States, allowing DHS-grantees to condition program access on acceptance of their religious beliefs will disadvantage members of minority religions like Islam, as well as atheists who profess no religion at all.

The harm that religious minorities will suffer under the Proposed Rule is hardly speculative, as there are already instances where non-Christians have been shunned from programs and opportunities solely because of their religion.[9] No one should be disqualified from receiving DHS-funded services because they are the "wrong" religion or not religious at all. Yet, this is precisely what the Proposed Rule allows. In effect, DHS-funded entities will be able to hang a sign that says "Jews, Sikhs, Catholics, Latter-day Saints are not welcome," without a clear form or recourse for discrimination victims.

V. The Proposed Rule Violates the Administrative Procedure Act and Other Federal Statutes

A. The Proposed Rule Lacks a Valid Justification and Exceeds DHS's Rulemaking Authority

The Center for Constitutional Rights further objects to the Proposed Rule under the Administrative Procedure Act because it is arbitrary and capricious and effectuates a dramatic change to the existing legal regime concerning taxpayer-funded entities without an adequate justification. The DHS cannot justify its proposed regulation based on federal statutes or recent decisional law.

As a preliminary matter, the Proposed Rule is not justified by the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb et seq. The safeguards for beneficiaries that the Proposed Rule eliminates are minimal impositions that do not trigger RFRA's protections. *See, e.g.*, *Goehring v. Brophy*, 94 F.3d 1294, 1299 n.5 (9th Cir. 1996) (Even if a plaintiff's beliefs "are sincerely held, it does not logically follow . . . that any governmental action at odds with these beliefs constitutes a substantial burden on their right to free exercise of religion."); *Locke v. Davey*, 540 U.S. 712 (2004) (describing stipulation on funding as "a relatively minor burden").

RFRA also permits substantial burdens on the exercise of religion when countervailing interests are significant. *See* RFRA 42 U.S. Code § 2000bb–1(b) (asking whether the burden is

[9] Lornet Turnbull, *World Relief Rejects Job Applicant Over His Faith*, *Seattle Times*, Mar. 10, 2010, *available at* https://www.seattletimes.com/seattle-news/world-relief-rejects-job-applicant-over-his-faith/; Prepared Statement of Alan Yorker, Faith-Based Initiatives: Recommendations of the President's Advisory Council on Faith-Based and Community Partnerships and Other Current Issues; Hearing Before the H. Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary, 111th Cong. 226 (Nov. 18, 2010), *available at* https://www.govinfo.gov/content/pkg/CHRG-111hhrg62343/html/CHRG-111hhrg62343.htm; *See* EEOC, Charges Filed on the Basis of Religion - Muslim or National Origin - Middle Eastern FY 1995–FY 2015 available at https://www.eeoc.goy/eeoc/statistics/enforcement/religion_muslim_origin_middle_eastern.cfm.

"the least restrictive means of furthering [a] compelling governmental interest"). This criterion is easily met in this case because the Proposed Rule allows entities to deny employment and services to Americans on the basis of protected characteristics such as race, sex, gender identity, religion, sexual orientation, and national origin, in conflict with the government's compelling interest in eradicating discrimination in all segments of life. *See, e.g.*, *Norwood v. Harrison*, 413 U.S. 455, 465-66 (1973) (stating that "the Constitution prohibits the state from aiding discrimination"); *Texas Monthly, Inc. v. Bullock*, 480 U.S. 1, 18 n. 8 (1989) (affirming that religious accommodations may not impose "substantial burdens on nonbeneficiaries").

Moreover, the Supreme Court's decision in cases such as *Trinity Lutheran* and *Hobby Lobby* do not authorize taxpayer-funded entities to discriminate against the public in the name of religion. *See* Section III, *supra*. Nor do they prohibit DHS from implementing basic safeguards such as notices and referrals that protect the religious freedom of program beneficiaries. *Id.* Therefore, the Proposed Rule is not justified under existing law.

Nor can the Proposed Rule be justified in terms of cost because DHS concedes that the Rule will not result in meaningful cost savings for tax-payers. *See* Proposed Rule RIN 1601-AA93, 85 Fed. Reg. at 2894. DHS admits that it estimates cost savings of key provisions of the Proposed Rule at a mere $200 dollars per grantee). *Id.* And while cost savings under the Proposed Rule are virtually non-existent, the cost to beneficiaries is astronomical as detailed in Section V.B below.

Because DHS's justification for the Proposed Rule collapses under any level of scrutiny, the Rule is arbitrary and capricious under the Administrative Procedure Act and exceeds DHS's rulemaking authority.[10]

B. The Proposed Rule Imposes Costs on the American Public that DHS Failed to Properly Consider

The Center for Constitutional Rights also objects to the Proposed Rule because DHS failed to conduct a proper analysis of costs as mandated by federal law including the Administrative Procedure Act and various Executive Orders. *See, e.g.*, Executive Order 12866, Regulatory Planning and Review (Sept. 30, 1993). Executive Order 13563, Improving Regulation and Regulatory Review (Jan. 18, 2011). These rules collectively require agencies to adequately assess all the potential costs of a rule and adopt them only where it has been shown they will produce the least burden while maximizing the benefits to society. *See* EO 12866 (requiring agencies to "assess *all* costs and benefits" and "select those approaches that maximize *net* benefits") (emphasis added).

The Supreme Court has repeatedly held that agencies "must examine the relevant data" in

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[10] *See, e.g., Administrative Procedure Act*, 5 U.S.C. § 706 (authorizing review of agency actions); *Michigan v. Envt'l Protection Agency*, 135 S. Ct. 2699, 2706 (2015) (requiring government agencies to "articulate a satisfactory explanation for its action"); *Motor Vehicles Mfrs. Ass'n v. State Farm Ins.*, 463 U.S. 29, 43 (1983) (agency action is arbitrary and capricious when it "fail[s] to consider an important aspect of the problem"); *Gen. Chem. Corp. v. United States*, 817 F.2d 844, 846 (D.C. Cir. 1987) (per curiam) (agency action is arbitrary where its analysis was "internally inconsistent and inadequately explained).

See also Section IV, *supra* (cataloging the negative social consequences of the Proposed Rule).

adopting a regulation, and emphasized that failing to "consider an important aspect of the problem" can render agency action arbitrary and capricious. *Motor Vehicles Mfrs. Ass'n v. State Farm Ins.*, 463 U.S. 29, 43 (1983). The Proposed Rule as drafted will impose tremendous costs on the American public because it substitutes settled anti-discrimination law for an approach that sews uncertainty about the right of Americans to live and work when their faith does not conform to that of a DHS-grantor.

Another cost imposed by the Proposed Rule is the cost borne by beneficiaries of programs funded by DHS of locating alternative secular providers on their own. This could prove an insurmountable hurdle for many Americans dependent on social services, that could lead them to forego government-funded services completely. Accordingly, the Proposed Rule imposes repugnant social costs on beneficiaries that DHS failed to consider in violation of federal law.

C. The Proposed Rule Violates the Treasury and General Government Appropriations Act of 1999

The Proposed Rule also violates the Treasury and General Government Appropriations Act of 1999, 5 U.S.C. § 601 because it fails to perform a Family Policy Making Assessment which requires agencies to "assess the impact of proposed agency actions on family well-being." 105th Cong. Rec. S9256 (daily ed. July, 29, 1998) (Abraham (Others) Amendment No. 3362). This includes determining whether a proposed regulatory action "strengthens or erodes the stability or safety of the family" or "increases or decreases disposable income or poverty of families and children." *Id.* Since DHS failed to conduct any such analysis or provide any such certification with respect to the Proposed Rule, the Rule is improper.

D. The Proposed Rule Violates the Unfunded Mandates Reform Act of 1995

The Proposed Rule also violates the Unfunded Mandates Reform Act of 1995 ("UMRA") because DHS once again failed to conduct the analysis mandated by law without a proper exemption. The Proposed Rule does not establish or enforce "statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability," as exemptions require. Instead, the Proposed Rule creates a new regime of religious exemptions that surpass the protections found in existing statutes, including RFRA. Accordingly, DHS's failure to conduct a proper analysis cannot be excused.

E. The Proposed Rule Is Improper Because DHS Failed to Conduct an Accurate Federalism Analysis

Finally, the Proposed Rule violates the Administrative Procedure Act because it relies on a flawed and erroneous federalism analysis. The DHS states that the Proposed Rule does not have federalism implications because it will not impose substantial direct requirements or costs on State or local governments preempt State law. This is inaccurate. Rather, by creating loopholes and upending the regulatory regime applicable to government-funded entities that espouse religious viewpoints, the Proposed Rule complicates the ability of state and local jurisdictions to safeguard their workforce and enforce generally-applicable anti-discrimination laws. Because DHS failed to conduct a reasoned analysis of the Proposed Rule and its impacts, the Rule should be withdrawn.

CONCLUSION

The U.S. Department of Homeland Security's Proposed Rule "*Equal Participation of Faith- Based Organizations in DHS's Programs and Activities: Implementation of Executive Order 13831*," RIN 1601-AA93 is an unlawful and inappropriate exercise of agency rulemaking for the reasons detailed above. The Proposed Rule throws the lives of countless Americans into jeopardy by providing taxpayer-funded entities a license to discriminate against them with respect to employment as well as the provision of services. The impacts of the Proposed Rule will be especially pronounced for the millions of Americans who already experience marginalization because of their sexual orientation, familial status, and/or racial, ethnic, and gender identities.

The broad license to discriminate the Proposed Rule affords taxpayer funded entities cannot be squared with the Establishment and Equal Protection Clauses of the U.S. Constitution or federal law. The Proposed Rule also violates the Administrative Procedure Act, the Treasury and General Government Appropriations Act, and the Unfunded Mandates Reform Act in a myriad of respects.

Given these infirmities, the Center for Constitutional Rights respectfully asks DHS to withdraw the Proposed Rule in its entirety. If DHS ultimately decides to propose a new rule that gives due consideration to the regulatory impacts, DHS should ensure that the public receives **a new 60-day notice and comment period** to provide adequate time for feedback.

Respectfully submitted,

Chinyere Ezie
Staff Attorney
Center for Constitutional Rights