

John L. Fitzhenry
Legal Fellow, Edwin Meese III Center for Legal and Judicial Studies
The Heritage Foundation
214 Massachusetts Ave NE
Washington DC 20002-4999

Re: *A.G. Order No. 5563-2022 “Partnerships With Faith-Based and Neighborhood Organizations”*

I write in my personal capacity¹ to comment on the inadvisability of certain proposed changes to the rules governing the federal funding of religious social service providers announced in the notice of proposed rulemaking titled “Partnerships With Faith-Based and Neighborhood Organizations” (the “Notice”).²

The Agencies³ propose to revise the definition of “indirect federal funding” by adding the words “wholly,” “genuinely,” and “private” to modify the word “choice” and by adding a sentence “stating that the availability of adequate secular alternatives is a significant factor in determining whether a program affords true private choice.” According to the Agencies, these revisions are necessary to eliminate confusion caused by the prior 2020 Rule, “to avoid Establishment Clause concerns,” and to “promote maximum participation by beneficiaries and providers in the Agencies’ covered programs and activities.”⁴

These premises are fundamentally flawed. The putative “confusion” and “Establishment Clause concerns” described in the Notice are based on a misreading of the Supreme Court’s Establishment Clause jurisprudence. Rather than addressing concerns, which are more imagined than real, the proposed revisions threaten to violate the rights of religious organizations under the Free Exercise Clause. At a minimum, the revisions create significant confusion for religious service providers who wish to retain the teachings of their faith as cornerstones of the services they provide to beneficiaries. Under the proposed rule, their ability to do so would hinge on an agency-by-agency assessment of whether “providers that offer secular programs are as a practical matter unavailable” to “particular beneficiaries.”⁵ That highly individualized, context-dependent assessment which lacks any specific guardrails is likely to produce confusion, which in turn is likely to produce practical costs with which the Agencies have not reckoned.

Moreover, the proposed revisions are a poor fit with the Agencies’ stated goal of expanding participation by beneficiaries and service providers in the Agencies’ programs. Rather than expanding access, the revisions will dissuade some religious service providers from participating

¹ I have included my organizational affiliation for identification purposes only.

² <https://www.federalregister.gov/documents/2023/01/13/2022-28376/partnerships-with-faith-based-and-neighborhood-organizations#citation-8-p2401>.

³ This comment adopts the Notice’s definition of “Agencies,” i.e., the Department of Education, Department of Homeland Security, Department of Agriculture, Agency for International Development, Department of Housing and Urban Development, Department of Justice, Department of Labor, Department of Veterans Affairs, and Department of Health and Human Services.

⁴ Notice at 2395, 2398, 2401.

⁵ *Id.* at 2400.

in the Agencies' programs and induce others to withdraw in order to maintain their fundamentally religious character. The likely result then is fewer service providers available to beneficiaries. That is not merely an incidental cost—the new rule's operation makes it likely that the regions where service providers are scarcest, and thus most needed, are precisely the regions where service providers will be dissuaded from participating.

The Agencies' attempt at redefinition represents a misguided approach that prizes the sensitivities of a few beneficiaries over the needs of the many while inflicting needless uncertainty on the federal government's necessary partnerships with religious organizations. I therefore ask that the Agencies abandon their proposed revisions to the definition of indirect federal funding.

Finally, the Notice calls for comment on possible new "Regulatory Definitions of 'Federal Financial Assistance' or 'Financial Assistance.'" Whatever the Agencies may gain from such an open-ended approach, this general solicitation of views untethered to any particular proposal cannot provide a basis for final rule making. Rather, it can only be a preliminary step in the possible formulation of a new definition that must be subject to further notice and comment.

I therefore ask that any new definition the Agencies propose to adopt, whether as a result of the general comments in response to this Notice or otherwise, be submitted to the public for further comment. I submit that no redefinition can be adopted lawfully without such an opportunity.

I. The Rule Depends on Unsupported Assumptions.

The Agencies' reasoning proceeds from several unstated but dubious assumptions. The logical connection between the proposed revisions and the goal of maximizing beneficiary participation is that the Agencies' current rules for partnering with religious service providers erect some obstacle between the Agencies' programs and eligible beneficiaries. What the obstacle is and who the affected beneficiaries are is nowhere expressly stated in the Notice. The Notice pays de rigueur obeisance to "historically marginalized communities," but that vague designation informs the reader not one whit about how these differently situated communities are disserved by the current state of relations between the federal government and religious service providers.

Two further (but also unstated) assumptions offer possible answers. The first is that some beneficiaries are dissuaded from accessing the Agencies' programs because they object to the religious activities of their local service provider, either from a dislike of religion in general or from disagreement with the service provider's particular faith expression. The second is that service providers' religious convictions cause them to discriminate against certain beneficiaries thereby making the Agencies' programs inaccessible to some.

The first problem is that the Agencies have not offered so much as a single anecdote supporting the existence of either phenomenon. The second is that if one assumes that one or both of these situations exists, one also has to assume that the affected beneficiaries have no reasonable access to a secular service provider for the current state of affairs to be a cause of low participation. The Agencies offer no evidence of the prevalence of this problem, if it exists. Finally, to link the whole chain together, one must assume that the 2020 Rule which the Agencies seek to revise

contributes to, or at least enables, the phenomenon causing lowered participation and the lack of secular options. Again, the Notice is devoid of evidence for these propositions.

Thus, the Agencies begin their reform project on very unsure footing. If the goal is to increase beneficiary participation, the underlying problem is that too few eligible persons are partaking. If that is so, then the Agencies must identify the cause and adopt a measure reasonably calculated to address the cause. But here doubt exists at each step. And a regulation responding to a specific problem is “highly capricious if that problem does not exist.”⁶ The Agencies are not entitled to act on the basis of “unsupported speculation,” but instead must provide some “factual basis for this belief” that the 2020 Rule and the relationship it establishes with religious service providers cause a concrete problem of under-participation in the Agencies’ programs.⁷ Where an agency lacks a factual basis for the belief motivating its regulatory choice, it necessarily lacks the reasoned explanation required for an agency’s action to be valid.

II. The Agencies Misinterpret the Establishment Clause.

The Agencies cite “Establishment Clause concerns” as the reason for their proposed revisions to the definition of “indirect federal funding.” The concern, premised on language in the Supreme Court’s 2002 decision in *Zelman v. Simmons-Harris*, is that where it is impractical for a beneficiary to access a secular service provider, the beneficiary is arguably compelled to direct his funds to a religious service provider and that decision is, therefore, not truly voluntary.⁸ Supposedly, under *Zelman*, the lack of secular alternatives results in an impermissible use of federal funds because the government would, in discrete instances, be affecting an unconstitutional establishment of religion. That is not a plausible interpretation of the twenty-year-old case. What’s more, the Notice unpersuasively attempts to deny that more recent Supreme Court decisions compel a different assessment of the Establishment Clause issue.

A. Neither *Zelman* nor Its Progeny Supports the Agencies’ Establishment Clause Concerns.

The Agencies misread *Zelman* by failing to understand the level at which a federal program must be assessed under the Establishment Clause. The question is not whether certain beneficiaries feel constrained for reasons not attributable to government action to use federal funds at a religious service provider. The question is simply whether the government funding program uses

⁶ *Alltel Corp. v. FCC*, 838 F.2d 551, 561 (D.C. Cir. 1988) (quotation marks omitted).

⁷ *New York v. United States Dep’t of Homeland Sec.*, 969 F.3d 42, 83 (2d Cir. 2020); see also *National Fuel Gas Supply Corp. v. Fed. Energy Reg. Comm’n*, 468 F.3d 831, 844 (D.C. Cir. 2006) (“FERC’s brief also resorts to a claim that ‘the absence of specific documented instances of abuse by non-marketing Energy Affiliates does not mean they have not occurred.’ The Administrative Procedure Act does not tolerate that kind of truism as the basis for the administrative action here.”).

⁸ 536 U.S. 639, 655 (2002). The Agencies do not claim that the 2020 rule allows religious service providers to coerce unwilling beneficiaries into religious activities. Nor could they. As explained in the Notice, “both the 2016 Rule and the 2020 Rule contained provisions prohibiting providers from discriminating against a program beneficiary or prospective beneficiary ‘on the basis of religion, a religious belief, a refusal to hold a religious belief, or a refusal to attend or participate in a religious practice.’”

selection criteria that are neutral towards religion such that “recipients *generally* [a]re empowered to direct the aid to” service providers of their choosing.⁹

The *Zelman* Court surveyed several prior Establishment Clause cases and repeatedly found that a program’s compliance with the Clause must be assessed at the level of its general operation, not at the level of individual beneficiaries. For instance, the Court noted that it was able to uphold a “program authorizing tax deductions for various educational expenses” against an Establishment Clause challenge by “viewing the program *as a whole*,” and determining that it enabled beneficiaries to make private choices among religious and secular options.¹⁰ The same was true of a challenge brought against a “vocational scholarship program”; “Looking at the program *as a whole*,” the Court had no difficulty concluding that it allowed for private choice.¹¹ Finally, the Court upheld federal funding for sign-language interpreters in religious schools because “[l]ooking once again to the challenged program *as a whole*, we observed that the program distributes benefits neutrally to any child qualifying as disabled.”¹²

To satisfy the Establishment Clause, an individual’s choice need only be “independent” of the government’s choice, not from every practical constraint.¹³ Only when the “single” “unmediated” will of government is the force impelling beneficiaries away from secular options and towards religious ones is the Establishment Clause implicated.¹⁴ That is not the case where personal circumstances such as geography, lack of transportation, work schedules, etc., place practical constraints on a beneficiary’s ability to access secular service providers. The neutrality of the programs’ criteria for approving service providers remains unaffected by these circumstances.

Zelman also referenced the “reasonable observer” standard for assessing whether a government action endorses religious practice. That standard’s roots in the now discredited *Lemon v. Kurtzman* decision ought to have warned the Agencies that *Zelman* is perhaps not the best guide for applying the Establishment Clause.¹⁵ But setting that concern aside, *Zelman* still cautioned that “the reasonable observer in the endorsement inquiry must be deemed aware of the history and context” underlying a challenged program.¹⁶ And a reasonable observer, aware of the neutrality and breadth of the programs administered by the Agencies, would not interpret the

⁹ *Zelman v. Simmons-Harris*, 536 U.S. 639, 651 (2002).

¹⁰ *Id.* at 650 (emphasis added).

¹¹ *Id.* at 651 (emphasis added).

¹² *Id.* (emphasis added) (quotation marks omitted).

¹³ *Carson as next friend of O. C. v. Makin*, 142 S. Ct. 1987, 1989 (2022) (citing *Zelman*, 536 U.S. at 652–653); see also *Freedom from Religion Found., Inc. v. McCallum*, 324 F.3d 880, 884 (7th Cir. 2003) (discussing *Zelman*: “It is a misunderstanding of freedom (another paradox, given the name of the principal plaintiff) to suppose that choice is not free when the objects between which the chooser must choose are not equally attractive to him.”).

¹⁴ *Mitchell v. Helms*, 530 U.S. 793, 809–10 (2000) (“We have viewed as significant whether the “private choices of individual parents,” as opposed to the “unmediated” will of government . . . if numerous private choices, rather than the single choice of a government, determine the distribution of aid pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment.”).

¹⁵ See *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2080 (2019) (describing the growth of the “reasonable observer” standard from the *Lemon* “effects test”); see *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427–28 (2022) (recognizing the abrogation of *Lemon v. Kurtzman*) (“[T]his Court long ago abandoned *Lemon* and its endorsement test offshoot.”).

¹⁶ *Zelman*, 536 U.S. at 655 (quotation marks omitted).

circumstantial difficulties individual beneficiaries may face in reaching a secular service provider as a federal effort to establish religion. Rather where, as here, “the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government.”¹⁷

The lower court cases cited in the Notice do nothing to detract from that reasoning.¹⁸ While those cases restated *Zelman*’s private choice standard, most of those cases sustained government programs against Establishment Clause challenges, and none relied solely on the isolated experience of an individual beneficiary to hold a funding program unconstitutional. The only (non-overruled) case to countenance an Establishment Clause challenge arose in a state penitentiary, where a Christian rehabilitation program was the sole option available to inmates.¹⁹ In that state-controlled environment, the complete absence of secular alternatives was readily attributable to the unmediated will of the state government, all the more so because the state failed to use neutral criteria when selecting the prison’s sole provider.²⁰ Consequently, the general operation of the state program was not neutral towards religion, making it fundamentally distinct from the programs offered by the Agencies here.

Returning to *Zelman* itself, the decision makes it clear that a standard based on the endlessly varied, ever-changing circumstances of individual beneficiaries cannot be the measure of a federal funding program’s compliance with the Establishment Clause; “[s]uch an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such [] evidence might be evaluated.”²¹ Rather than avoiding Establishment Clause concerns, the Agencies’ proposed approach would tend to manufacture concerns where none should exist. *Zelman* does not allow, let alone require, that approach.

B. More Recent Cases Belie the Agencies’ Establishment Clause Concerns

Of course, *Zelman* was hardly the last or latest word on the constitutionality of federal funding to religious organizations. And the Agencies’ views on the Supreme Court’s more recent Establishment Clause and Free Exercise jurisprudence raise additional concerns about the justification for the proposed revisions and how they would be applied.

The Supreme Court’s decisions in *Trinity Lutheran Church v. Comer*, *Espinoza v. Montana Department of Revenue*, *Carson v. Makin*, and *Kennedy v. Bremerton*, make it still more evident than *Zelman* that the Agencies’ purported Establishment Clause concerns are overwrought if not wholly imaginary.²² The disconnect is most apparent in the Agencies’ concern “that the Government [] not [be] responsible for the use of the aid to support explicitly religious

¹⁷ *Mitchell*, 530 U.S. at 809.

¹⁸ Notice at 2400, note 7. The cases cited in the notice date from 2003 to 2011, meaning that none of those courts had the benefit of the Supreme Court’s more recent Establishment Clause jurisprudence.

¹⁹ *Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 425 (8th Cir. 2007).

²⁰ *Id.*

²¹ *Zelman*, 536 U.S. at 658 (quotation marks omitted).

²² 137 S. Ct. 2012 (2017); 140 S. Ct. 2246 (2020); 142 S. Ct. 1987 (2022); 142 S. Ct. 2407 (2022).

activities.”²³ The Agencies attempt to bolster this concern by stating that neither *Carson v. Makin* nor anything else in the Supreme Court’s recent decisions “affects the longstanding doctrine that the Establishment Clause generally prohibits the use of aid received directly from the government for ‘specifically’ or ‘inherently’ religious activities,” as described in *Bowen v. Kendrick*, 487 U.S. 589, 621-22 (1988).²⁴ That interpretation of *Carson*’s effect and *Bowen*’s continued viability is sorely mistaken.

In *Carson*, the Court rejected attempts by the state of Maine, the lower courts, and the dissenting justices to justify discrimination against religious schools based on the schools’ use of government funds for, among other things, religious instruction. The Court stated unequivocally that its decisions have “never suggested that use-based discrimination is any less offensive to the Free Exercise Clause,” and that “the prohibition on status-based discrimination under the Free Exercise Clause is not a permission to engage in use-based discrimination.”²⁵ In light of this, the idea that government can still discriminate based on religious use if that religious use is “inherently religious” is fanciful, if not disingenuous.

How, as a legal matter, the Agencies (or any government arm) could consistently distinguish an inherently religious use from ordinary or acceptable religious use is mysterious. It is equally unclear how the Agencies could separate the two in practice, but “[a]ny attempt to give effect to such a distinction by scrutinizing whether and how a religious [provider] pursues its [] mission would also raise serious concerns about state entanglement with religion and denominational favoritism.”²⁶ Thus, the Agencies’ solution would create more First Amendment concerns than it resolves.

Contrary to the Agencies’ assertion,²⁷ it is *Carson* that applies to their proposal and *Bowen* that is irrelevant. *Bowen* is a relic that “assess[ed] the constitutionality of an enactment by reference to the three factors first articulated in *Lemon v. Kurtzman*,” which decision the Supreme Court has since repudiated as a misguided attempt at a “grand unified theory” for assessing Establishment Clause claims.²⁸ *Bowen*’s ban on funding “inherently” religious activities derived from the *Lemon* framework, and thus, it is no more alive than *Lemon* itself. *Bowen*’s paradigmatic example of an inherently religious activity was where grantees “use[d] materials that have an explicitly religious content or are designed to inculcate the views of a particular religious faith.”²⁹ This is precisely the use of government funding that the Court blessed in *Carson* without so much as a word of concern for whether that activity was “inherently,” and thus unacceptably, religious. That is because the distinction is a fiction and a dead one at that.

Still more recently, the Supreme Court affirmed in *Kennedy v. Bremerton School District* that the “Establishment Clause does not . . . compel the government to purge from the public sphere anything an objective observer could reasonably infer endorses or partakes of the religious.”³⁰

²³ Notice at 2401.

²⁴ Notice at 2401, note 8.

²⁵ *Carson*, 142 S. Ct. at 2001.

²⁶ *Id.*

²⁷ Notice at 2401, note 8.

²⁸ *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427 (2022) (quotation marks omitted).

²⁹ *Bowen v. Kendrick*, 487 U.S. 589, 621 (1988).

³⁰ *Kennedy*, 142 S. Ct. at 2427 (internal quotations omitted).

Thus, it is untenable to maintain, as the Agencies do, that *Bowen*'s carve-out for inherently religious activities somehow survived the Supreme Court's most recent Establishment Clause decisions.

The sole exception that the *Carson* court left intact was not *Bowen*, but *Locke v. Davey*.³¹ And that decision in no way supports the Agencies' contorted views of the Establishment Clause. *Locke* held that a state government did not violate the Free Exercise Clause when it denied a theology student a publicly funded scholarship to prepare for ministry. However, concerning the Establishment Clause, the *Locke* Court explained that "there is no doubt that the State could, consistent with the Federal Constitution, permit Promise Scholars to pursue a degree in devotional theology," belying the Agencies' concerns over religious use.³² If that were not clear enough, *Carson* reminds us that "*Locke* cannot be read to generally authorize the State to exclude religious persons from the enjoyment of public benefits on the basis of their anticipated religious use of the benefits."³³ *Carson*'s discussion of *Locke* forecloses the Agencies' attempt to rely on fears of indirectly funding "explicitly" or "inherently" religious activities as a valid basis for the proposed changes.

To interpret the Establishment Clause, the Agencies must embrace, not resist, the application of *Carson v. Makin* to their efforts. That decision covered much the same problem that the Agencies address here, namely, the permissible intersection between government funding and religious activities where beneficiaries in remote regions would struggle to access necessary services because the government would not or could not provide them directly. Nothing in *Carson* suggested that the constitutionality of Maine's program hinged on a beneficiary-by-beneficiary assessment of how practical it was for students to reach secular schools from their rural Maine towns. And so, the Agencies' attempts to escape the shadow of *Carson* here are unavailing.

C. The Agencies' Failure to Consider the Nation's History and Traditions Leads to a Deficient View of the Establishment Clause

Agencies fail to engage in reasoned decision making when they fail to consider a relevant aspect of the problem at issue.³⁴ Where, as here, the Establishment Clause is motivating agency action, recent Supreme Court precedent dictates that history is a factor which must be considered. The Supreme Court has made clear that Establishment Clause objections to a particular government program or practice cannot be divorced from a historical inquiry into the role religion has played in the sphere under scrutiny.³⁵ Here, the relevant history is the robust tradition from the founding era onward of partnership between government and religious organizations in the pursuit of vital social ends.

³¹ *Carson*, 142 S. Ct. at 2001 (citing *Locke v. Davey*, 540 U.S. 712 (2004)).

³² *Locke*, 540 U.S. at 719.

³³ *Carson*, 142 S. Ct. at 1989.

³⁴ *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1905 (2020).

³⁵ *Kennedy*, 142 S. Ct. at 2428; *Town of Greece, N.Y. v. Galloway*, 572 U.S. 565, 576 (2014).

There is no doubt that since the nation’s founding religious organizations have played an indispensable role in providing social welfare services to the public.³⁶ There is even evidence that religious organizations received public funds, including federal aid, to provide education and other social services to the public both before and after the Civil War.³⁷ Portions of that historical record, particularly those relating to the pervasive public funding of religious educational institutions, have been discussed at length in the Supreme Court’s recent jurisprudence.³⁸

Such deeply rooted historical practices tend to belie concerns that federal funding of religious social service providers raises any Establishment Clause concerns. Yet, no consideration of history prior to 2002 is apparent from the Notice. That failure only highlights the deficiency of the Agencies’ Establishment Clause analysis.

III. The Agencies’ Proposals Raise Serious Free Exercise Concerns

The Agencies’ fundamental error is that they read the Establishment Clause too broadly and the Free Exercise Clause too narrowly. In their zeal to maximize the rights of beneficiaries, they give short shrift to the Free Exercise rights of religious organizations.

Particularly concerning is the Agencies’ proposal to require religious providers to abide by the restrictions placed on direct funding recipients when the Agencies determine that a beneficiary’s decision to use the religious organization’s services is insufficiently voluntary.³⁹ Compliance with those restrictions would require religious organizations to purge their services of all religious elements. The Agencies envision this secularizing requirement as a solution to the obvious constitutional problem they would face if they terminated their relationship with a religious organization because of the organization’s religious character. But the Agencies are mistaken.

Requiring religious organizations to become secular in practice is no solution at all—it is simply religious discrimination in a subtler guise. The federal government “need not subsidize private [service providers]. But once a State decides to do so, it cannot disqualify some private [providers] solely because they are religious.”⁴⁰ The Free Exercise Clause prohibits not only the termination of a service provider’s contract on religious grounds but “indirect coercion or penalties on the free exercise of religion,” as well.⁴¹ And ““It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.””⁴² Thus, the Agencies cannot avoid the implications of cases like *Carson* and *Trinity Lutheran* simply by resorting to less drastic forms of religious discrimination than contract termination.⁴³

³⁶ Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part i: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2169-74 (2003).

³⁷ *Id.* at 2170-72.

³⁸ *Espinoza v. Montana Dep’t of Revenue*, 140 S. Ct. 2246, 2258 (2020).

³⁹ Notice at 2400-01.

⁴⁰ *Espinoza*, 140 S. Ct. at 2261.

⁴¹ *Carson*, 142 S. Ct. at 1996 (quotation marks omitted).

⁴² *Id.* (quoting *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)).

⁴³ See Notice at 2401 (citing 142 S. Ct. at 1997 and *Trinity Lutheran*, 137 S. Ct. at 2021).

Moreover, while the Notice leaves the precise consequences of noncompliance unclear, the implication is that if an affected religious provider refused to segregate religious activities from its services, then the Agencies would terminate their relationship and funding. The Agencies indicate that such an outcome might be constitutionally acceptable because they would simply be treating religious organizations the same “as all other providers.”⁴⁴ But that framing misunderstands the issue.

By requiring religious providers to become effectively secular as a condition of their continued receipt of funding, the Agencies would be committing the same error as the State of Maine in *Carson*. Maine defended its policy of excluding religious schools from its funding program on the theory that the program was meant to provide “a rough equivalent of the public school education.”⁴⁵ And in this regard religious schools were unlike the public schools and their secular private counterparts.

But the Supreme Court did not allow the state to avoid the constitutional issue through a semantic reframing of the condition. At bottom, Maine sought to require schools to be secular to participate in an otherwise available public benefits program.⁴⁶ That is, in essence, what the Agencies would require here; to remain eligible once an agency has determined that some beneficiary has no secular alternatives, the religious organization would be forced to secularize or else be excluded. Here, as in *Carson*, “the definition of a particular program can always be manipulated to subsume the challenged condition,” but allowing the Agencies to recast their secularization requirement as a form of impartial treatment “would be to see the First Amendment ... reduced to a simple semantic exercise.”⁴⁷ That outcome is not permissible.

Making a secular alternative available to the affected beneficiary would be a valid alternative whether that is accomplished by establishing a new service provider or by making resources such as transportation available to the beneficiary to ameliorate difficulties in accessing secular alternatives.⁴⁸ When a religious service provider declines to separate out the religious aspects of its programming, I submit that pursuing these alternatives, rather than forcing secularization or terminating the partnership, is necessary to avoid a violation of the Free Exercise Clause.

Still, this solution raises other concerns. The Agencies’ ability to establish secular options in all cases is doubtful. Of course, it’s difficult to assess just how practical that approach is because the Agencies offer no sense of the scale of the problem, namely the frequency with which secular options are unavailable to beneficiaries. In any event, considerations of scarce resources, the same considerations which led the federal government to partner with private service providers in the first place, incentivize the Agencies to compel religious service providers to purge the religious aspects of their services rather than take up the time and expense of creating a secular alternative. This is particularly so if one assumes that there will be a delay in creating the

⁴⁴ See Notice Note 8.

⁴⁵ *Carson*, 142 S. Ct. at 1998 (quotation marks omitted).

⁴⁶ *Id.* at 1999 (2022).

⁴⁷ *Id.* (quotation marks omitted).

⁴⁸ *Cf. id.* at 2000 (“The State retains a number of options: it could expand the reach of its public school system, increase the availability of transportation, provide some combination of tutoring, remote learning, and partial attendance, or even operate boarding schools of its own.”).

alternative during which the affected beneficiary is left to rely on the religious organization or go without services. One also must assume that the government would be willing to invest the resources necessary to create or accredit a new provider even though the circumstances giving rise to the need make it likely that the new secular provider will have few beneficiaries to attend to, presumably just the dissenters from the local religious program. Thus, when, whether, and how the Agencies plan to create new secular alternatives for isolated beneficiaries is unclear. This casts doubt on whether “expanding the universe of reasonably available . . . secular options” is a viable alternative to the impermissible compulsion of religious organizations.

IV. The Proposed Revisions Create Needless Confusion for Religious Service Providers

The Agencies assert that the 2020 rule sowed confusion among providers and beneficiaries. They contend that their proposed redefinition, by contrast, will offer providers “clarity” and “consistency.” But the proposal’s standardless, agency-by-agency, beneficiary-by-beneficiary approach to assessing the voluntary nature of every individual choice threatens to create considerable uncertainty, not to mention inconsistent—if not outright arbitrary—results.

The Agencies propose to reintroduce a third step to the test for indirect federal funding that asks whether a “beneficiary has at least one adequate secular option for the use of the voucher, certificate, or other similar means of government-funded payment.”⁴⁹ When “providers that offer secular programs are as a practical matter unavailable” to any beneficiary, the Agencies indicate that a beneficiary’s choice of a religious organization would not be “genuine and independent private choice.”⁵⁰

Putting aside the constitutional infirmities of this approach, it has few guiding principles and even fewer limiting principles. The Agencies speak in terms of “the *potential* availability to beneficiaries of a *practical* [secular] option,” the absence of which will be “significant” in determining whether a beneficiary is capable of a “wholly,” “genuine and independent private choice” among providers.⁵¹ This grab-bag of modifiers does nothing to elucidate the Agencies’ intended approach; it merely creates interpretive space in which the Agencies can muse in their discretion about whether an apparently independent choice is, in fact, not “wholly” voluntary.⁵²

What, for instance, does it mean for a secular option to be “practically” available? What personal or circumstantial difficulties will an agency consider to determine availability? What weight would geography, limited transit options, inflexible work schedules, or unreliable childcare options receive in assessing a beneficiary’s ability to reach a more distant secular option when a religious one is nearby? At what point on the sliding scale of voluntariness does an individual’s choice become less than “wholly” independent? Never mind that many of the

⁴⁹ Notice 2400.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² By drafting a regulation with ambiguous standards for application, the Agencies are conferring on themselves enormous interpretive discretion to determine when or if the prerequisites for wholly independent choices have been met. See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2412 (2019) (stating that agencies retain “considerable latitude to interpret the ambiguous rules they issue.”). While expedient for agencies, such an approach does nothing to clarify the restrictions by which regulated parties must abide.

considerations driving the inquiry will be well outside the control of religious organizations whose status and daily operations will now depend to a “significant” extent on these accidents of chance.

This is not an instance where agencies are adopting a well-developed standard. Neither *Zelman* nor any of the lower court cases cited by the Agencies provide a test for assessing when an individual’s choice is sufficiently free and independent. Nor could they because, as explained above, those decisions assessed the challenged government funding programs only at the level of their general operation, not at the level of an individual beneficiary’s access.

Apart from general confusion, the likely effect of this approach is to reduce provider participation and, by extension, the availability of services offered under the Agencies’ programs. The redefinition’s focus on individual beneficiaries’ difficulties would herd religious organizations out of the category of indirect federal funding recipients and into the category of direct recipients, in which the Agencies insist providers can be forced to secularize their activities. When one affected beneficiary is enough to bring about this status change, many existing religious service providers will find their positions too precarious and decline to participate in the Agencies’ programs to maintain their religious activities.

The same logic would dissuade other religious organizations from becoming providers in the Agencies’ programs. And attrition is likely to occur in areas where service providers are scarcest. It is in remote or rural regions that beneficiaries are less likely to have secular alternatives, making their choice of religious organizations not wholly voluntary according to the Agencies. So, it will be these areas where religious organizations will most often face the choice of secularizing or losing federal funding. A decision to preserve their religious nature would cost religious providers revenues, but it would also cost rural beneficiaries, who might lose their only option for accessing services. This is contrary both to the Agencies’ general goal of expanding participation and to their more specific goal of advancing support for “underserved communities” including rural populations.⁵³

V. Concluding Thoughts on the Redefinition Proposal

The Agencies should abandon their misguided proposal for the same reasons the Supreme Court abandoned *Lemon*: the test “invited chaos” in application, “led to differing results in materially identical cases, and created a minefield” for those bound by its assessments.⁵⁴ The same outcomes are likely to result from so broad and formless an approach as the Agencies’ propose in the Notice.

The practical implausibility of developing a principled, consistent means of applying this new standard points us back to the constitutional concerns. “The protections of the Free Exercise Clause do not depend on a ‘judgment-by-judgment analysis’ regarding whether discrimination against religious adherents would somehow serve ill-defined interests.”⁵⁵ Further, the Agencies’

⁵³ Notice at 2397; *see also* Executive Order 14058 of December 13, 2021 at 71359 (defining underserved communities).

⁵⁴ *Kennedy*, 142 S. Ct. at 2427 (internal quotations omitted).

⁵⁵ *Espinoza*, 140 S. Ct. at 2260 (quotation marks omitted).

approach, which would allow the circumstances of one beneficiary to affect the religious practice of an entire organization, raises a considerable risk of reinstating the “modified heckler’s veto, in which ... religious activity can be proscribed based on perceptions or discomfort” of certain beneficiaries.⁵⁶ That, like so many other effects of this proposal, would be unconstitutional.

Because the Agencies’ rulings will determine whether religious organizations can maintain the faith-based aspects of their services, too much is at stake for a discretionary ad-hoc approach to prevail. All the more so because while the rule’s negative implications for providers and beneficiaries are real, the supposed Establishment Clause problems are not. “And in no world may a government entity’s concerns about phantom constitutional violations justify actual violations of an individual’s First Amendment rights.”⁵⁷

VI. The Call for New Definitions of Financial Assistance Cannot Support Final Agency Action.

The Agencies’ “Request for Comments on Regulatory Definitions of ‘Federal Financial Assistance’ or ‘Financial Assistance’” affords an inadequate basis for final rulemaking. First, the impetus for a change in the definition is unclear. The Notice criticizes a 2020 Rule for adopting definitions of Federal Financial Assistance that deviated from the one contained in Executive Order 13279. After criticizing the 2020 rule for its deviation, the Notice then solicits comment on whether the Agencies should deviate in another fashion by “us[ing] any definition other than that in Executive Order 13279.”

The putative problem with the definition in the 2020 rule is “confusion and possible misunderstandings” in some undefined sense. But the Agencies offer no clue regarding their assessment of the definition contained in Executive Order 13279, whether it is overinclusive or underinclusive, whether it has been workable in application, whether the balance struck by the current definition aligns with Agency priorities, etc.

Meaningful comment is not possible when parties are left to “divine [the agency’s] unspoken thoughts.”⁵⁸ Because the Notice contains no specific proposal, no discussion of the problems with Executive Order 13279’s definition, nor even a discussion of the ends to be achieved through redefinition of federal financial assistance, the public can only guess at what course the Agencies may adopt and their reasons for doing so.⁵⁹ Thus, any final rule would not be the “logical outgrowth” of this Notice.⁶⁰ Any reformulation of the definition that the Agencies intend to pursue must be the subject of a separate notice with additional opportunity for public comment.

⁵⁶ *Kennedy*, 142 S. Ct. at 2427 (internal quotations omitted).

⁵⁷ *Id.* at 2432.

⁵⁸ *Ass’n of Priv. Sector Colleges & Universities v. Duncan*, 681 F.3d 427, 461 (D.C. Cir. 2012) (quotation marks omitted).

⁵⁹ “[A] notice of proposed rulemaking must provide sufficient ... rationale for the rule to permit interested parties to comment meaningfully.” *Honeywell Int’l, Inc. v. EPA*, 372 F.3d 441, 445 (D.C. Cir. 2004) (internal quotation mark omitted).

⁶⁰ *Horsehead Res. Dev. Co., Inc. v. Browner*, 16 F.3d 1246, 1268 (1994) (noting that “general notice that a new standard will be adopted affords the parties scant opportunity for comment”).

Respectfully,

/s/ John Fitzhenry

John Fitzhenry