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Re: Comments on USAID's Proposed Rule regarding Participation by Religious Organizations in USAID Programs, RIN 0412 AA-69

Date: May 9, 2011

Background on the Proposed Rule

A rule of the U.S. Agency for International Development (USAID) prohibits the use of USAID funds "for the acquisition, construction, or rehabilitation of structures to the extent that those structures are used for inherently religious activities." 22 CFR Section 205.1(d). When a structure is used for both eligible activities and "inherently religious activities," USAID funds cannot exceed costs attributable to eligible activities. *Id.* Further, "[s]anctuaries, chapels, or other rooms that a USAID-funded religious congregation uses as its principal place of worship . . . are ineligible for USAID-funded improvements." *Id.* This rule became effective on October 19, 2004.

In a notice published in the Federal Register on March 25, 2011, USAID argued that these provisions "go beyond the requirements of the Establishment Clause and other Federal law, are not supported by Establishment Clause jurisprudence, and constrict USAID's ability to pursue the national security and foreign policy interests of the United States overseas." 76 Fed. Register 16712, 16713 (March 25, 2011). The agency offered no further explanation of its rationale and

cited no legal authorities for its judgment. USAID proposed a new rule that would allow its funds to be used for "the acquisition, construction, or rehabilitation of structures that are used, in whole or in part, for inherently religious activities," if the program for which USAID assistance is provided:

> (i) [i]s authorized by law and has a secular purpose,
> (ii) is made generally available to a wide range of organizations and beneficiaries which are defined without reference to religion,
> (iii) has the effect of furthering a development objective,
> (iv) the criteria upon which structures are selected for acquisition, construction, or rehabilitation are religiously neutral, and
> (v) the selection criteria are amenable to neutral application.

The proposed rule and the notice do not state whether this rule would apply only to the use of government funds outside the United States or whether it would also apply to any domestic use of such funds.

According to USAID, the proposed rule "is not a major rule." The March 2011 notice also says the matter "is not a significant regulatory action and, therefore, is not subject to review under section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993." *See* 58 Fed. Reg. 51735 (October 4, 1993).

Comments on the Proposed Rule

The proposed rule would permit activities the First Amendment's Establishment Clause forbids.

The proposed rule would prohibit the government from acting simply to advance religion and from singling out religious institutions for special benefits. It would remove, however, all existing safeguards aimed at prohibiting the use of direct government aid for religious purposes. For example, if USAID had a secular purpose for its actions and treated religious and nonreligious entities alike, it could buy pieces of property for congregations and then make grants to those congregations to cover the entire cost of constructing church buildings, synagogues, temples, and mosques. Or, if a USAID program promoting education met similar neutrality requirements, USAID could extend grants that would cover the entire costs of building schools, even if all the schools receiving the grants were religious and the education offered at those schools was explicitly religious.

The proposed rule, therefore, would permit activities the Supreme Court's Establishment Clause doctrine forbids. The Establishment Clause prohibits direct government subsidization of explicitly religious activities or items and other uses of direct government aid for religious purposes. *See, e.g.*, Agostini v. Felton, 521 U.S. 203, 226-227 (1997)(upholding program in part because there was no evidence publicly subsidized instructors teaching on religious elementary and secondary school property had "attempted to inculcate religion in students"); Bowen v. Kendrick, 487 U.S. 589, 621 (1988)(on remand of case, lower court must consider whether government grant funds had been used to subsidize "specifically religious activit[ies]")(citation

omitted); *see also* Mitchell v. Helms, 530 U.S. 793, 857 (2000)(JJ., O'Connor and Breyer, concurring in the judgment)("To establish a First Amendment violation, plaintiffs must prove that the aid in question actually is, or has been, used for religious purposes.")

More specifically, and directly on point with the precise subject of the proposed rule, the Court has prohibited the use of government funds for the construction or restoration of structures where worship or religious instruction takes place. In *Tilton v. Richardson*, a case involving federal grants to colleges and universities for the construction of a variety of buildings, the Supreme Court held that a twenty-year ban on the use of government-financed structures for "sectarian instruction or as a place for religious worship" was insufficient to meet constitutional demands. The Court said:

> Limiting the prohibition for religious use of the structure to 20 years obviously opens the facility to use for any purpose at the end of that period. It cannot be assumed that a substantial structure has no value after that period and hence the unrestricted use of a valuable property is in effect a contribution of some value to a religious body. Congress did not base the 20-year provision on any contrary conclusion. If, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion.

See Tilton v. Richardson, 403 U.S. 672, 683 (1971). Thus, the Court struck the twenty-year limit on the ban, effectively making it permanent instead.

The Court subsequently found that a state program of "maintenance and repair grants" for the upkeep of religious elementary and secondary schools violated the Establishment Clause. *See* Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973). In *Nyquist*, the Court noted that "[n]o attempt [had been] made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes . . . ." *Id.* at 774. Referencing the *Tilton* case, the Court concluded: "If the State may not erect buildings in which religious activities are to take place, it may not maintain such buildings or renovate them when they fall into disrepair." *Id.* at 777. In both *Tilton* and *Nyquist*, therefore, the Court held that government funds may not be used to directly finance structures where explicitly religious activities occur. [1]

Although the Supreme Court's Establishment Clause jurisprudence has changed dramatically in the past forty years, the Supreme Court has not overruled *Tilton* or the part of its decision in *Nyquist* that dealt with maintenance and repair grants. Likewise, the Court has never upheld direct government subsidization of explicitly religious activities or items or other uses of direct government aid for religious purposes. [2] Its recent decisions upholding direct government aid to

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[1] These are not cases where "any money that ultimately [flows] to religious institutions" does so " 'only as a result of the genuinely independent and private choices of ' individuals." Agostini v. Felton, 521 U.S. 203, 226 (1997)(quoting Witters v. Washington Dept. of Servs. for Blind, 474 U.S. 481, 487 (1986)).

[2] The court's decisions in *Agostini* and *Mitchell* did not turn on whether the religious institutions were "pervasively sectarian," but rather on the particular uses to which the direct government aid was put. Further, in *Tilton v. Richardson*, the Court did not find that the religious institutions involved were "pervasively sectarian," yet it held that the aid could not be used for the construction of structures where explicitly religious activities would take place. So the concerns expressed in this comment do not turn on whether the doctrine precluding aid to "pervasively sectarian" entities remains good law.

religious institutions, the *Agostini* and *Mitchell* decisions, continue to limit religious use of direct government funding, and provide that the government must ensure that such aid only supports secular activities.[3]

The proposed rule reflects the belief that government policies only need to have a secular purpose and neutral criteria to pass constitutional muster. This is wrong. It is true that a Court plurality has suggested that direct aid may be used for religious activities if the government has a secular purpose for its actions and the aid is broadly available to religious and nonreligious institutions alike without regard to religion. *See* Mitchell v. Helms, 530 U.S. 793, 801-836 (2000)(plurality opinion). The controlling opinion[4] in the *Mitchell* case, however, firmly rejected that view. *See id.* at 836-867 (2000)(JJ., O'Connor and Breyer, concurring in the judgment). The controlling opinion emphasized that the Court had "never held that a government-aid program passes constitutional muster *solely* because of the neutral criteria it employs as a basis for distributing aid." *Id.* at 839. A program may be a model of neutrality yet still invite constitutional violations if it permits direct government aid to be used for religious activities. *Id.* at 840.

USAID is not free to disregard Supreme Court precedents, even if it believes they reflect outdated interpretations of the First Amendment. *See* Agostini v. Felton, 521 U.S. at 237. In such a case, other agencies of government "should follow the case which directly controls, leaving to [the Supreme Court] the prerogative of overruling its own decisions," if overruling is in order. *Id.* (quoting *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)). In other words, it is not the place of a lower court or a government agency to elevate the *Mitchell* plurality opinion to the status of a majority opinion, for example. That is effectively what USAID proposes to do in this context.

The Sixth Circuit's decision in *American Atheists v. City of Detroit* and the Department of Justice's Office of Legal Counsel 2002 and 2003 opinions do not justify the proposed rule.

A 2009 federal circuit court opinion and two opinions of the Justice Department Office of Legal Counsel (OLC) have said the Establishment Clause principles described above are not violated in certain limited circumstances when the government provides aid for structures, including religious structures where some worship and other explicitly religious activities take place. *See* American Atheists v. Walker, 567 F.3d 278 (6th Cir. 2009); Office of Legal Counsel of the Department of Justice, *Authority of FEMA to Provide Disaster Assistance to Seattle Hebrew Academy: Memorandum Opinion for the General Counsel Federal Emergency Management Agency* (September 25, 2002); Office of Legal Counsel of the Department of Justice, *Authority of*

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[3] It is also noteworthy that both the *Agostini* and *Mitchell* decisions involved in-kind aid – remedial education provided by public school teachers and computers and other educational materials, respectively – not direct cash aid. The Court has said it has "recognized special Establishment Clause dangers where the government makes direct money payments to sectarian institutions. . . . " Rosenberger v. Rector and Visitors of the Univ. of Virginia, 515 U.S. 819, 842 (1995). The proposed rule would allow the government to make direct money payments to houses of worship and other sectarian institutions without any safeguards aimed at prohibiting the use of direct aid for religious purposes.

[4] *See* Marks v. United States 430 U.S. 188, 193 ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . .' ")(citation omitted).

the Department of the Interior to Provide Historic Preservation Grants to Historic Religious Properties Such as the Old North Church: Memorandum Opinion for the Solicitor Department of the Interior (April 30, 2003). Even if one believes these opinions are entirely sound, they still would not justify the proposed new rule. The proposed rule is a more significant departure from *Tilton* and *Nyquist* than the Office of Legal Council opinions and the Sixth Circuit decision in *American Atheists v. City of Detroit*.

The OLC opinions and the Sixth Circuit decision allow direct government funding of religious facilities under very specific and limited circumstances. They approved direct aid for religious structures in the context of three specific programs dealing with disaster assistance, historic preservation, and downtown development. In all of these programs, the government was indifferent to the activities occurring within the benefitted structures. In its 2002 opinion involving disaster assistance provided by the Federal Emergency Management Agency (FEMA), OLC concluded that the Establishment Clause did not prohibit such aid from benefitting religious as well as other community facilities damaged in a disaster. OLC said relief of this type is functionally like fire or police protection – it was broadly available to similarly affected entities. It did not in any way reflect the government's desire to support the activities occurring within the restored structures. In its 2003 opinion, OLC determined that the Establishment Clause did not bar the award of historic preservation grants to active houses of worship and other religious properties as well as secular structures that were historically valuable. In that opinion, OLC wrote that religious structures should be equally eligible for support, but once again, that was in a context in which the purpose of the government aid was disconnected from the use of the structure. The aid was intended to preserve the historic character of the buildings, not the religious activity occurring within them. The Sixth Circuit decision upheld a city development program that reimbursed up to half the costs of rehabilitating the exteriors of downtown buildings and parking lots, including downtown houses of worship and their parking lots. The funding program was restricted to the exterior of these buildings, and it provided funds solely for the purpose of improving the aesthetic character of the downtown area.

The rule USAID proposes is much broader. Under the proposed rule, the government would only need to show a secular purpose for providing the direct aid and formally neutral criteria for distributing it. Thus, the government presumably would be permitted to provide direct construction or maintenance grants to "all private schools" to further the purposes of "education," even if all or a very substantial portion of the program's beneficiaries were religious schools offering lessons that included prayers and explicit religious instruction. The Supreme Court has never approved such an interpretation of the Establishment Clause, and the Sixth Circuit and OLC opinions do not go nearly so far. Indeed, in its 2003 opinion on historic preservation grants, OLC stressed that the program did not encompass "programs of aid targeted to education, which the Supreme Court has subjected to far more rigorous scrutiny than aid to other sorts of religious institutions." 2003 OLC Opinion at 8. The Court, OLC acknowledged, "has been sensitive to the possibility that direct funding solely of schools might amount to an attempt to fund religious indoctrination." *Id.*

Further, in distinguishing *Tilton*, the Sixth Circuit specifically noted that the challenged program "did not construct the buildings by paying for them in full; it merely improved the exterior of the buildings and did so by paying just half of the approved costs." 567 F.3d at 299. USAID's

proposed rule, however, allows the government to pay the entire cost of building houses of worship, including both interiors and exteriors, and with full knowledge that the structures will be used for religious purposes. This stretches much farther beyond the boundaries of existing Supreme Court precedent than any rule or policy announced during the Bush Administration's Faith-Based and Community Initiative.

The proposed rule is inconsistent with Obama administration policy, as reflected in Executive Order 13559.

An executive order signed by President Obama on November 17, 2010, states that direct social service aid may not be used for explicitly religious activities, meaning activities that have overt religious content, and provides that "[o]rganizations that engage in explicitly religious activities . . . must perform such activities and offer such services outside of programs that are supported with direct Federal financial assistance (including through prime awards or sub-awards), separately in time or location from any such programs or services supported with direct Federal financial assistance. . . ." Section 2(f) of Executive Order 13559, *Fundamental Principles and Policymaking Criteria for Partnerships with Faith-Based and Other Neighborhood Organizations*, 75 Fed. Register 71319 (November 22, 2010). This rule requires the segregation of funds and activities to ensure that federal aid does not directly support explicitly religious activities. USAID's proposed rule, however, rejects the principle of segregation, and replaces it with the principles of secular purpose and neutral eligibility. Thus, USAID proposes a rule that conflicts with administration policy.[5]

Further, although it is only a minor point in this context, we must note that the proposed rule also is inconsistent with Executive Order 13559 because it uses terminology that order rejected. The proposed rule employs the term "inherently religious activities" as the appropriate characterization of activity that may not be directly supported by government. Executive Order 13559 rejected this phrase and substituted the phrase "explicitly religious activities."

The executive order did so, at least in part, because President Obama's Advisory Council on Faith-Based and Neighborhood Partnerships specifically recommended this change in nomenclature.[6] The term "inherently religious activities" was confusing, the Council said, and it did not closely match constitutional standards. It recommended that the administration use the

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[5] We understand that some support a prohibition on the use of direct social service funds for explicitly religious activities and the separation of privately funded religious activities from social services funded by direct government aid, while also supporting the extension of direct government aid for the acquisition, construction, or rehabilitation of houses of worship, among other structures. *See, e.g.*, Advisory Council on Faith-Based and Neighborhood Partnerships, Recommendations 5 and 6 of the Reform of the Office of Faith-Based and Neighborhood Partnerships Report and Recommendation 2 of the Environment and Climate Change Report of *A New Era of Partnerships: Report of Recommendations to the President* (March 2010) at http://www.whitehouse.gov/sites/default/files/microsites/ofbnp-council-final-report.pdf. In our view, however, the prohibition on the use of direct social service aid for religious activities and the separation principle bar the use of such funds for the construction, rehabilitation, or acquisition of houses of worship and other structures where worship and religious instruction occur. *Id.*

[6] *See* Advisory Council on Faith-Based and Neighborhood Partnerships, Recommendation 5 of the Reform of the Office of Faith-Based and Neighborhood Partnerships Report of *A New Era of Partnerships: Report of Recommendations to the President* (March 2010) at http://www.whitehouse.gov/sites/default/files/microsites/ofbnp-council-final-report.pdf.

term "explicitly religious activities" instead. The Council explained:

> [T]he Government [is prohibited] from directly subsidizing any explicitly religious activity, meaning any activities that involve overt religious content. Thus, direct Federal aid should not be used to pay for activities such as religious instruction, devotional exercises, worship, proselytizing or evangelism; production or dissemination of devotional guides or other religious materials; or counseling in which counselors introduce religious content. Similarly, grant or contract funds may not be used to pay for equipment or supplies to the extent they are allocated to such activities. The term "explicitly religious activities" would not include, however, activities that may be the result of religious motivation like serving meals to the needy or using a nonreligious text to teach someone to read. From the standpoint of the Government, these activities lack religious content.[7]

Especially given the fact that the 2010 executive order emphasizes the importance of uniformity across agency rules in this area, any new USAID rule should echo the terminology used in that order. *See* Section 3 of Executive Order 13559.

The proposed rule should be withdrawn.

The proposed rule would permit activities the First Amendment's Establishment Clause forbids, conflict with administration policy, and bring about a dramatic shift in the federal government's policies. It would do so without offering an explanation of its legal reasoning and presumably without benefit of review by the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA).[8] For all these reasons, the signers respectfully urge USAID to withdraw its proposed rule.

At minimum, however, any new rule should explicitly state that it is not intended to apply to direct funding of religious facilities inside the United States but only to the use of government funds abroad, where the way in which the Establishment Clause applies is uncertain.[9] Moreover,

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[7] Advisory Council on Faith-Based and Neighborhood Partnerships, Recommendation 5 of the Reform of the Office of Faith-Based and Neighborhood Partnerships Report, *A New Era of Partnerships: Report of Recommendations to the President* (March 2010)(footnotes omitted) at http://www.whitehouse.gov/sites/default/files/microsites/ofbnp-council-final-report.pdf.

[8] In its notice, USAID said the proposed rule was neither "a major rule" nor a "significant regulatory action" under section 6(b) of Executive Order 12866 *Regulatory Planning and Review*, 58 Fed. Reg. 51735 (October 4, 1993).

[9] The extent to which the Establishment Clause applies to the activities of the United States government abroad has divided scholars and other experts in this area. *See, e.g.,* The Chicago Council on Global Affairs, Report of the Task Force on Religion and the Making of U.S. Foreign Policy, *Engaging Religious Communities Abroad: A New Imperative for U.S. Foreign Policy* (2010) at 62-65 and 84-85 http://www.thechicagocouncil.org/UserFiles/File/Task%20Force%20Reports/2010%20Religion%20Task%20Force_Full%20Report.pdf As the *Engaging Religious Communities Abroad* report noted, however, saying the Establishment Clause applies to government activities abroad certainly is not the same as saying the United States government cannot engage religious communities abroad. The best proof is the active engagement of the United States government with religious communities domestically on a daily basis. *See, e.g.,* Partnerships Blog of the White House Office of Faith-Based and Neighborhood Partnerships at http://www.whitehouse.gov/administration/eop/ofbnp/blog The Establishment Clause does not apply in a stricter

in attempting to justify any such new rule, USAID must grapple with the decision of the only court to have squarely faced this issue, the Second Circuit Court of Appeals' decision in *Lamont v. Woods*. In that case, the Second Circuit concluded that "general principles of Establishment Clause jurisprudence provide no basis for distinguishing between foreign and domestic establishments of religion." Lamont v. Woods, 948 F.2d 825, 840 (2d Cir. 1991) The *Lamont* Court rejected arguments that the issue was a nonjusticiable political question, finding that the application of Establishment Clause standards was "a task traditionally vested in the federal courts." *Id.* at 833. At the same time, the Second Circuit acknowledged a certain amount of flexibility in Establishment Clause doctrine, saying that, "[g]iven the possible foreign policy ramifications of invalidating grants under [Foreign Assistance Act programs], it would be particularly inappropriate to adopt a mechanical approach in this case." *Id.* at 842. In light of *Lamont*, and the general uncertainty surrounding these issues, USAID should address in any new agency action the particular question of the constraints of the Establishment Clause on extraterritorial activities of the United States.

Conclusion

We hope these comments are useful as you make decisions about the proposed rule. Thank you for your consideration of our views.

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way abroad than it does at home, although there may sometimes be a special need to explain U.S. constitutional standards to an international audience.