Columbia University in the City of New York | *New York, N.Y.*
SCHOOL OF LAW

TO: Interested Parties
FROM: Public Rights/Private Conscience Project
RE: **Law Professors' Analysis of a Need for Legal Guidance and Policy-Making on Religious Exemptions Raised by Federal Contractors**
DATE: May 10, 2016

I. Introduction

The Public Rights/Private Conscience Project at Columbia Law School, joined by legal scholars of religious liberty and constitutional rights,[1] offers the following analysis of the World Vision Memorandum issued by the Department of Justice's Office of Legal Counsel in 2007 ("World Vision Memo" or "the Memo"), relating to a request from faith based organizations that they be exempt from the religious nondiscrimination requirements of governing law.[2] We draw two conclusions about the soundness and scope of the legal reasoning supporting the Memo's findings.

First, contrary to the Memo's conclusions, the Religious Freedom Restoration Act of 1993 (RFRA) does not authorize government agencies to exempt grant recipients from applicable employment discrimination laws that prohibit discrimination on the basis of religion.

Second, to the extent that some faith-based organizations receiving federal funding have relied on the World Vision Memo as authority to support the assertion of religion-based exemptions from providing services to qualified beneficiaries, that reliance is misplaced. We think it both necessary and appropriate that the Office of Legal Counsel issue guidance clarifying that the World Vision Memo does not authorize accommodations that would result in discrimination against the beneficiaries of federal grants, or the denial of any material grant-funded services.[3] It is our view that RFRA does not authorize or require and the Establishment Clause does not permit the government to provide discretionary funding to religious groups that discriminate against, or deny material services to, the intended beneficiaries of said funds.

[1] See the last page of this document for the list of law professors who have endorsed this analysis.
[2] Re: Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act, 31 Op. O.L.C 162 (2007) *available at* https://www.justice.gov/olc/file/477046/download [*hereinafter* "World Vision Memo"].
[3] In some cases, an FBO policy will constitute both discrimination *and* the denial of services. For example, refusing to provide contraceptives should properly be considered a form of sex discrimination, while denial of LGBT-related health care would constitute discrimination based on sexual orientation and gender identity. Nevertheless, we discuss these problems separately as certain forms of discrimination—such as housing transgender minors in facilities that are inconsistent with their gender identities—may not involve the outright denial of services. In addition, denial of services and discrimination may trigger different legal protections.

In this memorandum we argue that the Justice Department ought to reconsider its RFRA analysis in the World Vision Memo, and that it should clarify that RFRA does not authorize government agencies to exempt grant recipients from applicable employment discrimination laws. What is more, we see a compelling need for the government to issue guidance making clear that the World Vision Memo does not authorize recipients of discretionary federal grant programs to assert a religion-based exemption from the provision of funded services.

II. The World Vision Memo Contains An Overly-Broad Interpretation Of RFRA

In 2007, under President George W. Bush, the Department of Justice's (DOJ) Office of Legal Counsel (OLC) issued a memorandum interpreting the application of the Religious Freedom Restoration Act to World Vision and other faith based organizations (FBOs) that sought to adopt a hiring preference for co-religionists in programs receiving federal financial assistance. In the absence of a RFRA accommodation, this practice would squarely violate federal law prohibiting religion-based employment discrimination in connection to programs or activities funded by DOJ grants.[4] The OLC's World Vision Memo interpreted RFRA to "reasonably require" the federal government to exempt FBOs from religious nondiscrimination laws.

RFRA prohibits the federal government from placing a substantial burden on the sincere exercise of religion unless this burden is the least restrictive means of furthering a compelling government interest. The World Vision Memo states that RFRA is "reasonably construed" to require the DOJ to afford FBOs an exemption from antidiscrimination provisions so as to allow co-religionist hiring, and that an agency is therefore "within its legal discretion" to offer such an exemption. The Memo rests this finding on the legal conclusion that applying nondiscrimination laws to organizations that receive discretionary grants (grants for which they have voluntarily applied) would impose a "substantial burden" on their exercise of religion. This analysis is mistaken, as many church-state scholars have explained,[5] and expands the notion of "substantial burden" well beyond that established by courts interpreting the term.[6]

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[4] 42 U.S.C. § 3789d(c)(1) (2000). We note that, under Title VII of the Civil Rights Act, co-religionist hiring preferences are generally permissible for religious corporations. *See* 42 U.S.C. § 2000e-1(a). This letter raises the independent issue of whether the government can condition its funding on nondiscrimination on the basis of religion in hiring without violating RFRA.

[5] *See, e.g.*, Ira C. Lupu & Robert W. Tuttle, *The State of the Law- 2008: A Cumulative Report on Legal Developments Affecting Government Partnerships with Faith-Based Organizations*, THE ROUNDTABLE ON RELIGION AND SOCIAL WELFARE POLICY 31-37 (2008), http://www.rockinst.org/pdf/faith-based_social_services/2008-12-state_of_the_law.pdf. *See also*, Martin Lederman, *Why the Law Does Not (and Should Not) Allow Religiously Motivated Contractors to Discriminate Against Their LGBT Employees*, CORNERSTONE (July 31, 2014), http://berkleycenter.georgetown.edu/responses/why-the-law-does-not-and-should-not-allow-religiously-motivated-contractors-to-discriminate-against-their-lgbt-employees. For an argument that providing government funds to an FBO that practices co-religionist hiring preferences would violate the Establishment Clause of the First Amendment, *see*, Vikram David Amar & Alan Brownstein, *The "Charitable Choice" Bill that was Recently Passed by the House, and the Issues It Raises*, FINDLAW.COM (Apr. 29, 2005), http://writ.news.findlaw.com/commentary/20050429_brownstein.html; Vikram David Amar & Alan Brownstein, *The "Charitable Choice" Bill That Was Recently Passed by the House: Why Supreme Court Precedent Renders It Unconstitutional*, FINDLAW.COM (May 13, 2005), http://writ.news.findlaw.com/commentary/20050513_brownstein.html; Vikram David Amar & Alan Brownstein,

The World Vision Memo's analysis reaches beyond the established legal and scholarly understanding that a "substantial burden" on religious exercise is created by *coercive* government rules; that is, where government action "coerce[s] individuals into acting contrary to their religious beliefs."[7] The contexts considered in the World Vision Memo do not raise circumstances where religious exercise has been burdened by coercive government action, because religious entities are free to reject government grants and maintain hiring practices that favor co-religionists.[8] The legal reasoning underlying the Memo's RFRA analysis has been widely critiqued by prominent scholars of religious liberty for conflicting with language to this effect in the Supreme Court's 2004 *Locke v. Davey*[9] decision as well as lower court precedent.[10]

The "Charitable Choice" Bill That was Recently Passed by the House Further Commentary on Its Constitutional Problems, FINDLAW.COM (May 27, 2005), http://writ.news.findlaw.com/commentary/20050527_brownstein.html.

[6] The World Vision Memo recognizes that in interpreting the key terms contained in RFRA, such as "substantial burden," the Supreme Court's pre-*Smith* free exercise case law provides compelling guidance. *See* World Vision Memo at 171 ([I]it is widely accepted that the Court's pre-Smith decisions provides persuasive guidance in determining the meaning of that term."). Further, the Memo cites *Corporation of the Presiding Bishop v. Amos* in support of its aggressive reading of the kinds of burdens rendered suspect by RFRA. *Amos*, however, a case interpreting Title VII's partial exclusion of religious corporations from the statute's jurisdictional reach, merely held that the Establishment Clause *permitted* Congress to exclude religious corporations from Title VII, not that principles of religious liberty *compelled* it to do so. *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 335 (1987).

[7] *Lyng v. Northwest Indian Cemetery Protective Ass'n*. 485 U.S. 439, 450 (1988); *see also Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (Finding a Free Exercise violation where the "pressure upon [the plaintiff] to forego" her religious practice was "unmistakable."); *Thomas v.* Review Bd*., Ind. Empl. Sec. Div*. 450 U.S. 707, 717 (1981) (Finding a free exercise violation where the "coercive impact on [the plaintiff] is indistinguishable from *Sherbert.*"); *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 141 (1987); *Midrash Sephardi v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) (holding that under RLUIPA, "a 'substantial burden' must place more than an inconvenience on religious exercise; a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly."); *Vision Church v. Village of Long Grove*, 468 F.3d 975, 999 (7th Cir. 2006) (holding "a burden must be more than a mere inconvenience to rise to the level of a constitutional injury; it must place significant pressure… to forego religious precepts or to engage in religious conduct") (internal quotation marks omitted). The coercion test was acknowledged in the Supreme Court's 2014 *Hobby Lobby* opinion, which distinguished the facts of that case from prior decisions in which the Court was "unable to identify any coercion directed at the practice or exercise of [plaintiffs'] religious beliefs." *See Burwell v. Hobby Lobby*, 134 S.Ct. 2751, 2779 (2014).

[8] *See* Tuttle & Lupu, *supra* note 5, at 34.

[9] *Locke v. Davey*, 540 U.S. 712 (2004).

[10] *See*, Nelson Tebbe, *Excluding Religion*, 156 U. Pa. L. Rev. 1263 (2008)(excluding religious actors from government support is generally constitutionally permissible even where the denial *targets* religious actors, which is not the case in with the issue raised by this memorandum); *Gary S. v. Manchester School Dist.*, 374 F.3d 15 (1st Cir. 2004) (finding that a federal law that provided more services to public school than private religious school students did not violate the Free Exercise Clause or RFRA). The Court found that the "mere non-funding of private secular and religious school programs does not 'burden' a person's religion or the free exercise thereof." *Id*. at 21. *See also*, *Eulitt ex rel. Eulitt v. Maine, Dept. of Educ.*, 386 F.3d 344, 354 (1st Cir. 2004) (holding a state statute which made nonsectarian schools ineligible for receipt of public funds did not impose a substantial burden on free exercise, but was merely a "decision not to deploy limited tuition dollars toward the funding of religious education."); *Bronx Household of Faith v. Board of Educ. of City of New York*, 750 F.3d 184, 190 (2nd Cir. 2014) (holding a regulation which prohibited organizations from using school facilities for religious worship did not violate the Free Exercise Clause, as the Clause "has never been understood to require government to finance a subject's exercise of religion"); *Bowman v. U.S.*, 304 Fed. Appx. 371, 380 (6th Cir. 2008) (finding that a Department of Defense program which authorized service members to accrue retirement credit for a wide variety of community service work, but not religious activities, did not infringe on religious exercise as the plaintiff "was free to work as a youth minister but

In *Locke v. Davey* the Court held that a condition on a state scholarship funding program that barred recipients from using funds toward a degree in devotional theology imposed only a "relatively minor burden" on students' religious exercise.[11] The Court explained that in limiting the scope of the grant, the state "does not require students to choose between their religious beliefs and receiving a government benefit," but "has merely chosen not to fund a distinct category of instruction."[12] Like the scholarship program in *Davey*, in placing antidiscrimination conditions on grants, the DOJ has not created a general mandate that limits religious exercise, but has merely chosen to fund programs that do not discriminate. The terms and conditions contained in discretionary federal grant programs do not amount to coercion as the courts have interpreted that term for free exercise purposes.

Furthermore, the World Vision Memo's reliance on *Sherbert v. Verner*,[13] *Thomas v. Review Bd. of Indiana Employment Security Division*,[14] and similar cases is misplaced. In this line of cases, the Supreme Court held that the government imposed a substantial burden on religious exercise when it conditioned "receipt of an *important* benefit"—in the case of *Sherbert* and *Thomas*, unemployment insurance— "upon conduct proscribed by a religious faith … thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs."[15] But the *Sherbert* Court repeatedly described its holding as merely restricting conditions on the receipt of public assistance.[16] These opinions do not proscribe conditions on discretionary grants to nonprofit organizations, which are significantly different in both importance and availability from public benefits. First, the plaintiffs in *Sherbert* and *Thomas* were excluded from a benefit that was otherwise widely available, whereas government grants are in general discretionary and competitive, awarded based on merit, not on the basis of generally defined qualifications or entitlement. This distinction is legally significant, as the World Vision Memo itself admits "[s]ome courts have suggested that placing conditions on the exercise of religion can constitute a 'substantial burden' only with respect to widely available benefits."[17] Additionally, while in *Sherbert* and *Thomas* the religious practitioner "would depend on [unemployment] benefits for subsistence," a nonprofit seeking a federal grant has other

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could not have that work count toward his military retirement."); *Trinity Lutheran Church of Columbia, Inc. v. Pauley*, 788 F.3d 779 (8th Cir. 2015), *cert. granted*, 136 S.Ct. 891 (2016) (finding that a state grant program that excluded religious organizations from an otherwise neutral grant program did not violate the Free Exercise Clause.).

[11] *Locke v. Davey*, 540 U.S. at 725.

[12] *Id.*at 721. *See also Bowen v. Roy*, 476 U.S. 693, 711-12 (1986) (Burger, C.J., concurring) ("Appellees may not use the Free Exercise Clause to demand Government benefits, but only on their own terms, particularly where that insistence works a demonstrable disadvantage to the Government in the administration of the program.").

[13] 374 U.S. 398 (1963).

[14] 450 U.S. 707 (1981).

[15] *Id.* at 717-18 (emphasis added).

[16] *Sherbert*, 374 U.S. at 410 ("This holding but reaffirms a principle that we announced a decade and a half ago, namely that no State may 'exclude individual … members of any [] faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.'"). *See also*, *id.* at 405 ("conditions upon *public benefits* cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms") (emphasis added).

[17] World Vision Memo at 182. *See, e.g. Gary S. v. Manchester School Dist.*, 374 F.3d 15, 19 (1st Cir. 2004) (court found *Sherbert* and *Thomas* distinguishable from a federal law that provided more services to public school than private religious school because, unlike with unemployment benefits, the plaintiffs were "not being deprived of a *generally available* public benefit. Rather, the benefits to which [they] lay claim under the First Amendment are benefits the federal government has earmarked solely for students enrolled in the nation's public schools.").

sources of funding. Therefore imposing conditions on a particular grant would not induce the same kind of "substantial pressure" to "modify behavior and violate beliefs."[18]

Conditions on discretionary government grants are not a "substantial burden" on religion for the additional reason that any burden they cause is self-imposed. A recent Fourth Circuit opinion interpreting the Religious Land Use And Institutionalized Persons Act (RLUIPA) - a statutory cousin of RFRA - affirms that no substantial burden exists when the "burden" is not actually government-mandated, but rather is the result of a religious entity's own voluntary actions. In *Andon v. City of Newport News*, the court held that there was no "substantial burden" where a church leased property knowing it violated a zoning restriction, and was then denied a variance by the local zoning board.[19] "Because the plaintiffs knowingly entered into a contingent lease agreement for a non-conforming property," the court held, "the alleged burdens they sustained were not imposed by the [zoning board's] action denying the variance, but were self-imposed hardships."[20] Further, the court held that a "self-imposed hardship generally will not support a substantial burden claim under RLUIPA, because the hardship was not imposed by governmental action."[21] When FBOs choose to apply for grants that would forbid them from adopting a co-religionist hiring preference, any burden that results is self-imposed. The government has not coerced such hiring preferences for privately-funded programs, nor does it require FBOs to apply for federal grants. As they are self-imposed, conditions contained in government grants that include a commitment to non-discrimination in hiring do not constitute a "substantial burden" as the term in used in RFRA.

The World Vision Memo misinterprets RFRA by concluding that a nondiscrimination condition on a discretionary grant places a substantial burden on religious exercise. Even assuming, *arguendo*, that there were a substantial burden, it would be outweighed by the government's clearly compelling interest in combatting discrimination in the workplace and in ensuring that public funds are not used in a discriminatory manner. When a private nonprofit agency elects to apply for funding to provide programs or services deemed important by the government, and then is awarded a grant to perform those functions, a reasonable person may attribute to the government the private agency's publicly funded actions. Congress therefore has a clear and compelling reason for refusing to allow such discrimination for programs commissioned and funded by the government.

The World Vision Memo notes that not every federal grant contains a religious nondiscrimination provision, and therefore claims that there is no compelling reason to have such a provision for the DOJ grants at issue in the Memo.[22] It is both unnecessary and unreasonable, however, to argue that the government must choose between adopting a religious nondiscrimination policy within all its government grants or none of them. This would be both

[18] *Thomas*, 450 U.S. at 717-18. *See also*, *Bowman v. U.S.*, 304 Fed. Appx. 371, 379 (6th Cir. 2008). In *Bowman*, the court held that *Sherbert* and *Thomas* could be distinguished from a federal retirement program that provided credits for community service but not religious activities, as "any loss of an incremental increase in [the plaintiff's] retirement pay burdened him much less than losing unemployment compensation altogether." *Id.*
[19] *Andon v. City of Newport News*, No. 14–2358, 2016 WL 502714 (4th Cir. Feb. 9, 2016).
[20] *Id.* at *4.
[21] *Id*.
[22] World Vision Memo at 185-6.

bad law and bad policy, as finding that the existence of *any* accommodation defeats an otherwise compelling interest would mean that only the most rigid laws could be found "compelling," and would create a perverse incentive against adopting even sensible and limited accommodations.[23] Thus even if religious nonprofits experience *some* burden by antidiscrimination conditions on DOJ grants, which is doubtful, these conditions are nevertheless supported by several compelling state interests.

Furthermore, there is no less restrictive way to ensure that the government does not fund religious discrimination within a particular grant program than to condition receipt of the grant on nondiscriminatory hiring. Allowing the recipient of a federal grant to practice coreligionist hiring would result in government funds being used to directly support discrimination—precisely the harm antidiscrimination provisions are intended to address. In addition, no accommodation that allowed a federally-funded FBO to discriminate could mitigate the specter of government endorsement for a particular religion. Therefore, since the DOJ's religious nondiscrimination condition is the least restrictive means of furthering a compelling government interest that the program not facilitate or endorse religious discrimination, no RFRA accommodation is necessary.

For all of these reasons, the World Vision Memo's RFRA analysis misstates the law by concluding that RFRA reasonably requires the federal government to exempt FBOs from religious nondiscrimination laws, and therefore should be reconsidered. We support requests from a number of sources that the World Vision Memo be withdrawn insofar as it is not based on sound legal analysis of the meaning and scope of RFRA.

III. FBOs Are Now Relying On The World Vision Memo To Justify Broad Accommodations That Exceed The Memo's Intended Scope

While the reasoning of the World Vision Memo as it relates to hiring of co-religionists is itself suspect, there is ample evidence that it is being relied upon by FBOs to demand religious exemptions far beyond even its problematic scope. By its clear terms, the Memo was limited to RFRA exemptions from antidiscrimination law so as to permit preferential hiring of co-religionists by FBOs that receive federal grants. That notwithstanding, a coalition of FBOs has recently relied on a capacious interpretation of the Memo's reasoning and spirit to call for broad religion-based exemptions from the provision of particular *programs or services*, funded by federal grants, that an FBO regards as objectionable.

On February 20, 2015, the United States Conference of Catholic Bishops (USCCB) – a private entity that will receive more than $31 million in grants and contracts from the federal

[23] *See Burwell v. Hobby Lobby*, 134 S.Ct. 2751, 2800-01 (2014) (Ginsberg, J., dissenting) (explaining why the existence of exemptions for small and grandfathered health plans from the contraceptive mandate does not defeat the government's compelling interest in ensuring access to cost-free contraceptive care.). Moreover, many government-funded programs may have a particularly strong need to prohibit coreligionist hiring. For example, the perceived State endorsement of a particular religion could be especially stigmatizing to beneficiaries of an invasive and mandatory government program, such as a juvenile or immigration detention program.

government in 2016[24] – wrote to the U.S. Department of Health and Human Services' Office of Refugee Resettlement (ORR) on behalf of a coalition of FBOs that are existing and/or prospective grantees, contractors, sub-grantees or subcontractors of ORR grants to provide services to unaccompanied migrant children.[25] The USCCB expressed a religious and moral objection to ORR programs that include services designed to prevent, detect, and respond to sexual abuse involving unaccompanied minors. Specifically, it objected to a provision of the program that beneficiaries of ORR-funded programs be provided access to emergency contraception and information about all lawful pregnancy-related medical services, including abortions.[26]

Based on the World Vision Memo's analysis of RFRA, the USCCB February 2015 letter—and a similar letter submitted by Catholic Charities of the Archdiocese of Galveston-Houston[27]— argues that a requirement to provide or refer services to which an organization has a religious objection as a condition of receiving a government grant would impose a substantial burden on its exercise of religion.[28] The USCCB letter self-servingly extrapolates from the World Vision Memo's analysis of RFRA in the context of hiring to cover limitations in the provision of services, claiming that "accommodating the religious beliefs of existing and prospective grantees, contractors, subgrantees and subcontractors is [...] required as a matter of law."[29] Were this argument accepted, accommodating their religious beliefs in this context would exempt the USCCB and other FBOs from providing unaccompanied children access to contraception and other pregnancy related services, services that ORR has deemed important to provide to unaccompanied migrant children. The ORR has yet to render a decision on the requested accommodation set forth in the USCCB February 2015 letter.

Social service providers and advocates working in the field report that migrant minors currently face barriers and delays to accessing reproductive care, sometimes having to cross state lines to obtain services.[30] Thus significant harms to the intended beneficiaries of these programs,

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[24] *Recipient Profile: U.S. Conference of Catholic Bishops*, USASPENDING.GOV, https://www.usaspending.gov/transparency/Pages/RecipientProfile.aspx?DUNSNumber=003260072&FiscalYear=2016 (last visited Mar. 2, 2016).

[25] Letter from U.S. Conference of Catholic Bishops, Nat'l Ass'n of Evangelicals, World Vision, Inc., Catholic Relief Servs. and World Relief to Elizabeth Sohn, Policy Analyst, Division of Policy, Office of Refugee Resettlement, Admin. for Children & Families (February 20, 2015), *available at* http://www.regulations.gov/#!documentDetail;D=ACF-2015-0002-0024 [hereinafter USCCB Letter].

[26] *See* USCCB Letter at 3. The language in the letter extends beyond providing. The Conference also objects to "facilitating the provision of, providing information about, or referring or arranging for, items or procedures" related to emergency contraception.

[27] *See* Letter from Catholic Charities of the Archdiocese of Galveston-Houston to Elizabeth Sohn, Policy Analyst, Division of Policy, Office of Refugee Resettlement, Admin. for Children & Families (February 23, 2015), *available at* http://www.regulations.gov/#!documentDetail;D=ACF-2015-0002-0013.

[28] *See* USCCB Letter at 5–6.

[29] *See* USCCB Letter at 5.

[30] *See* Brigitte Amiri, *Bishops' Policy for Immigrant Teenagers: Sorry You Were Raped, But We Won't Help You*, WASHINGTONPOST.COM (Apr, 16, 2015), https://www.washingtonpost.com/posteverything/wp/2015/04/06/bishops-policy-for-immigrant-teenagers-sorry-you-were-raped-but-we-wont-help-you/; Letter from Georgeanne Usova *et al* to Robert Carey, Director, Office of Refugee Resettlement, Admin. For Children & Families (July 28, 2015) (on file with author).

identifiable third parties, are already flowing from the USCCB's infelicitous interpretation of RFRA.

This is not the first time that the USCCB has taken this position. In November 2005, USCCB submitted an application to U.S. Department of Health and Human Services (HHS) for a contract to provide services to victims of human trafficking, noting it would decline to provide services included in HHS's program contracts that were contrary to its religious beliefs. Specifically, the USCCB's proposal stated that it would not provide abortion or contraceptive services to program beneficiaries were it awarded the grant. Despite HHS's concerns about the effect that this kind of refusal would have in addressing the urgent needs of program beneficiaries, it nevertheless awarded the master contract to the USCCB, incorporating by reference the USCCB's abortion and contraception restrictions.[31] The ACLU sued HHS in 2009, arguing that the agency's capitulation to the USCCB violated the Establishment Clause of the First Amendment. Evidence supplied in the case emphasized the importance of providing reproductive health care to a highly vulnerable population, explaining that "[m]any trafficking victims are forced or coerced to undergo unsafe abortion procedures by their traffickers. In fact, infertility from botched or unsafe procedures is a common health problem seen in trafficking victims."[32] Following public outcry, HHS ended its contract with USCCB in 2011. The following year, a federal district court found that HHS had violated the Establishment Clause in allowing USCCB to "impose a religiously based prohibition on the use of" federal funds.[33]

Furthermore, in letters from March and November of 2015, USCBB and other FBOs cited the World Vision Memo as authority that justified the granting of accommodations from provisions of an Executive Order[34] and the Affordable Care Act,[35] respectively, which barred recipients of federal grants and contracts from discriminating on the basis of sex. Relying on the Memo's flawed RFRA analysis, these letters claim that FBOs that apply for and receive government contracts and grants should be allowed to discriminate against intended beneficiaries

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[31] *Am. Civil Liberties Union of Mass. v. Sebelius*, 821 F. Supp. 2d 474, 476–77 (D. Mass. 2012).

[32] Brief for Commonwealth of Massachusetts as Amicus Curiae Supporting Plaintiff-Appellee, *Am. Civil Liberties Union of Mass. v. Sebelius*, 705 F.3d 44 (1st Cir. 2012), (Nos. 12-1466, 12-1658), 2012 WL 5457626 (C.A.1) (Appellate Brief) at *13.

[33] *Am. Civil Liberties Union of Mass*., 821 F. Supp. 2d at 482. The lower court's order was vacated by the First Circuit when it found that the case had become moot when the contract ended. *See Am. Civil Liberties Union of Massachusetts v. U.S. Conference of Catholic Bishops*, 705 F.3d 44, 52 (1st Cir.2013). Despite this history, USCCB was again awarded a contract to provide services to victims of human trafficking in September 2015, and the ACLU has filed suit to determine the terms of the contract. *See*, AM. CIVIL LIBERTIES UNION, *ACLU Sued for Federal Records on Grant to Religious Group That Obstructs Trafficking Victims' Access to Reproductive Health Care*, https://www.aclu.org/news/aclu-sues-federal-records-grant-religious-group-obstructs-trafficking-victims-access (Mar. 17, 2016).

[34] Letter from U.S. Conference of Catholic Bishops to Debra A. Carr, Director, Division of Policy, Planning, and Program Development, Office of Federal Contract Compliance Programs (March 30, 2015), *available at* http://www.usccb.org/about/general-counsel/rulemaking/upload/Comments-Discrimination-Basis-of-Sex-March-2015.pdf.

[35] Letter from U.S. Conference of Catholic Bishops, Nat'l Ass'n of Evangelicals, Christian Medical Ass'n, Institutional Religious Freedom Alliance, Christian Legal Society, World Vision, Inc., The Ethics & Religious Liberty Commission of the Southern Baptist Convention, Liberty Institute, The National Catholic Bioethics Center, and Family Research Council to U.S. Department of Health and Human Services Office for Civil Rights (November 6, 2015), *available at* http://nae.net/wp-content/uploads/2015/11/HHS_OCR_Regulations.110615.pdf.

of publicly funded programs based on the beneficiaries' sexual orientation and/or gender identity, and that they were entitled to deny health insurance coverage for contraception and abortion even in cases where a woman's life or health is endangered.

The World Vision Memo, for the reasons outlined earlier in this memo, offers a questionable analysis of RFRA's requirements even with respect to co-religionist hiring. Even *if* the Memo's analysis were legally correct (which we dispute), it clearly provides no authorization or justification for religion-based exemptions outside of the hiring context. Despite the clear boundaries of the Memo's reach, FBOs have taken to citing the Memo and adopting its legal analysis in calling for far-reaching accommodations that would allow them to discriminate against third parties and deny material services to grant beneficiaries. In effect, the World Vision Memo has metastasized in ways that have undermined the federal government's ability to provide important programs and services to particularly vulnerable populations on terms and conditions that it deems compelling.

IV. Allowing FBOs To Discriminate Among Grant Beneficiaries Or Refuse To Provide Important Grant-Funded Services Is Not Required By RFRA And Conflicts With Fundamental Constitutional Principles

Neither RFRA nor the Constitution's Religion Clauses would permit — much less require — the DOJ or other federal agencies to grant accommodations to FBOs allowing them to discriminate against, or deny necessary services to, beneficiaries of a federally-funded grant program. As outlined above, the World Vision Memo misconstrues the circumstances under which the imposition of a condition on a competitive, discretionary grant would be a "substantial burden" on a non-profit's exercise of religion. However even if a grant condition did burden the exercise of religion under RFRA's demanding test, FBOs are not entitled to an accommodation that would allow them to effectively license discrimination against beneficiaries or substantially limit services in ways that undermine a compelling governmental interest.

Where FBOs seek a religious liberty right to refuse to perform contractual obligations required by discretionary grants for which they have applied, any burden they might assert would be outweighed by at least three compelling government interests: i) preventing discrimination and other dignitary harms; ii) ensuring that the government can effectively fund necessary services; and iii) avoiding Establishment Clause violations. Furthermore, conditioning grants on the nondiscriminatory provision of material services is the least restrictive means of constructing a functioning discretionary grant program.

i. The Government Has A Compelling Interest In Preventing Discrimination Against Grant Beneficiaries And Other Dignitary Harms

As has long been acknowledged, the government has a compelling interest in preventing discrimination on the basis of suspect or semi-suspect classifications such as race, national

origin, religion, sex, sexual orientation or gender identity.[36] These are fundamental equality interests at heart. The nature of the government's interest in promoting values based in equality is particularly compelling in the context of programs that are funded with public money and undertaken on the public's behalf. When private organizations choose to apply to participate in a publicly-created program, delivering services that are funded with general tax revenues, and that are intended to benefit particular communities and meet specific needs that have been identified by Congress or the funding agency, the public has a particularly compelling interest in seeing that the delivery of those services advances public values, including the value of non-discrimination. Ceding to FBOs' expectations that they can apply for and receive public funding for discretionary grant-based projects, while then opting out of the equality-enhancing aspects of these programs that they find objectionable, risks creating the perception that the government has endorsed discriminatory service-delivery done in its name and with its funding. The government has a compelling government interest in not just limiting all discrimination, but especially in avoiding any perceived endorsement of discrimination.

In addition to banning discrimination outright, the government also has a strong interest in ensuring that particular services are not withheld in ways that cause dignitary harms to beneficiaries. Refusing to provide emergency contraception or abortion services, for example, not only materially discriminates against girls as the primary recipients of such services, but also sends a disapproving message about the care of which they are in need and to which they are entitled under law.[37] Ensuring that women and girls have control over when, whether, and under what circumstances to bear a child is essential to their physical and psychological health, as well as their ability to fully participate in education, employment, and civic life.[38] The stakes are even higher for disadvantaged populations such as migrant minors. Denial of adequate reproductive health care in this context places an additional burden on those who already face a disproportionate risk of sexual assault and violence. The government has a very compelling interest in ensuring that when it awards funds to FBOs to provide services, these services are not withheld either for discriminatory reasons or in ways that would cause dignitary harms.

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[36] *See, e.g.*, *Burwell v. Hobby Lobby*, 134 S.Ct. 2751, 2783 (2014) ("The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal."); *Bob Jones Univ. v. U.S.*, 461 U.S. 574, 604(1983) ("the Government has a fundamental, overriding interest in eradicating racial discrimination in education"); *Miller v. Johnson*, 515 U.S. 900, 920 (1995) ("There is a 'significant state interest in eradicating the effects of past racial discrimination.'"); *Schlesinger v. Ballard*, 419 U.S. 498, 514 (1975) (upholding a Navy promotion scheme favorable to women that served "to provide women officers with 'fair and equitable career advancement programs'"); *United States v. Virginia, 518 U.S. 515 (1996) (gender classifications may be upheld only if government demonstrates an "exceedingly persuasive" justification)*. In *Hobby Lobby*, both Justice Kennedy's concurrence and Justice Ginsburg's dissent found that the Government had a compelling interest in ensuring access to cost-free contraception, in part because pregnancy imposes unequal costs on women. *See* 134 S.Ct. at 2786 (Kennedy, J., concurring) (finding that the government had a compelling interest in providing health care to women that is "significantly more costly than for a male employee"); 134 S.Ct. at 2768 (Ginsburg, J., dissenting) (finding that the contraceptive mandate served the compelling interest "women's well being.").

[37] *See* Kara Loewentheil, *When Free Exercise is a Burden: Protecting Third Parties in Religious Accommodation Law*, 62 DRAKE L. REV. 433, 442-444 (2014).

[38] *See generally,* Neil S. Siegel & Reva B. Siegel, *Contraception as a Sex Equality Right*, 124 YALE L.J. FORUM 349 (2015).

ii. The Government Has A Compelling Interest In Ensuring That Material Services Included As Part Of A Grant Program Are Provided To Beneficiaries

The government has a compelling interest in ensuring that it, and not the recipient of a grant, is able to define the services to be provided by a grant. Allowing FBOs to selectively withhold services that they have voluntarily undertaken to provide when applying for the grant would make it impossible for the government to effectively carry out its policy goals.[39] Imagine the disorder that would result from such an interpretation of RFRA: the government could be required to award a grant funded by Title X, a federal program intended solely to provide family planning services, to an organization opposed to contraception, a stem cell research grant to a Catholic University opposed to the use of human embryos in research, or a grant to develop science programs in schools to a nonprofit that refuses to include any lessons in the curriculum that reference evolution. Further, the government would have to provide this funding knowing that the grantees' religious objections could undermine the policies and programs that lie at the core of the grant-funded programs. In the case of grants awarded for refugee resettlement, providing religious accommodations to FBOs could defeat entirely a primary purpose of the grant—to provide essential medical care to migrant minors. The government therefore has a strong interest in its ability to effectively budget and direct funds for particular services.

Of course granting religious accommodations does not just hamper the government's ability to channel funding toward programs and services it deems important; it also harms the intended beneficiaries of government grants.[40] Federal grants are designed to provide critical coverage to often vulnerable populations, such as communities impacted by violence or unaccompanied refugee children. The repercussions of an FBO's refusal to provide services may result in harm to the health and social welfare of these populations. For example, denying sexually abused girls access to emergency contraception, could result in serious health ramifications. This is particularly acute amongst marginalized and low-income populations who may not have the funds, knowledge, or other resources to access such care if not provided by a grantee.[41] Even if contraceptive services are available through a separate, privately-funded

[39] *Bowen v. Roy*, 476 U.S. 693, 699 (1986) ("The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens.").

[40] We note that in mandating a religious exemption in *Sherbert*, the Court observed that "the recognition of the appellant's right to unemployment benefits under the state statute [did not] serve to abridge any other person's religious liberties." *See*, *Sherbert v. Verner*, 374 U.S. at 409. Nor did the exemption defeat the purpose of unemployment benefits, as this was "not a case in which an employee's religious convictions serve to make him a nonproductive member of society." *Id.* at 410. By contract in the present context, permitting an accommodation would both harm beneficiaries and defeat the purpose of the grant.

[41] In some of the most critical contexts the FBOs that receive government grants are the *only* providers with the resources to address the needs of intended beneficiaries of crucial government programs. As a result, there are often no other social service providers equipped to step in to provide service the FBOs find religiously objectionable. This means that young women who have been sexually assaulted during their transit from their home countries will have no access to reproductive health care and other core services included in governmental programs, such as the ORR programs for unaccompanied minors. The substantial role these organizations have in providing services to the public is implied, *inter alia*, in the World Vision Memo, which recognized that World Vision was specifically identified and expected to be reviewed as a grant candidate in a Congressional report, and was therefore more likely than other petitioners to receive the grant. As predicted, World Vision was then solicited by the DOJ to apply for the grant. The outsized role of FBOs is also implied in the USCCB's comments letter, stating that: "[F]aith-based

organization, in many cases the FBO's staff is the only source of information about referrals and other available options. If FBOs do not inform beneficiaries of, or facilitate access to, reproductive or other exempted services, the practical result is that they will not be provided. The government has an exceedingly compelling interest in ensuring that vulnerable populations are not denied the material[42] services entitled to them under a grant.

iii. The Government Has A Compelling Interest In Avoiding Conflicts With The Establishment Clause

What is more, the government has a compelling interest in avoiding any violations of the Establishment Clause that could arise if it shifted the cost of FBOs' religious accommodations on to third parties. A government entity violates the Establishment Clause when it supports or accommodates religious actors in ways that impose meaningful harms on other citizens.[43] Most notably, in *Estate of Thornton v. Caldor*, the Supreme Court struck down a state statute that gave workers the right to a Sabbath day of rest regardless of any burdens this imposed on employers or co-workers. The Court held that the statute impermissibly advanced religion in violation of the Establishment Clause by "impos[ing] on employers and employees an absolute duty to conform their business practices to the particular religious practices of the [observing] employee."[44] In *Texas Monthly, Inc. v. Bullock*, the Court found that a state tax exemption for religious periodicals violated the Establishment Clause, as it had no secular purpose and forced non-religious publications to "become indirect and vicarious donors"[45] to religious entities. In upholding a broad religious accommodations law for prisoners in *Cutter v. Wilkinson*, the Court emphasized that specific accommodations need not be granted where they "impose unjustified

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organizations represent such a significant proportion of grantees serving the unaccompanied minor population. Indeed, it is likely that the federal government would not be able to achieve its goal of caring for this and similar populations assisted by ORR without faith-based organizations." USCCB Letter at 2. That is the case however, partly *because* such organizations continue to receive large amounts of federal funding. By continually awarding large grants to FBOs, the government preserves and reinforces their disproportionate resources, and discourages the growth of other nonprofit organizations. If government agencies refused to permit discrimination and other harmful exemptions within their programs, nonprofits willing to adhere to grant terms would have a stronger incentive to scale up their operations in order to compete for these grants. This is what has occurred in states like Massachusetts, where due to a nondiscrimination condition that required adoption agencies to provide services to same sex couples, a prominent FBO decided in 2006 to close its doors rather than continue to comply. *See* Press Release, Archdiocese of Boston, Catholic Charities of Boston To Discontinue Adoption Services (Mar. 10, 2006) *available at* http://www.bostoncatholic.org/uploadedFiles/News_releases_2006_statement060310-1.pdf. Following its closure, other agencies that had no qualms working with same-sex couples stepped up to fill the gap. *See* Nelson Tebbe, *Religion and Marriage Equality Statutes*, 9 HARV. L. & POL'Y REV. 25, 35 (2015) ("observers report that the need for foster care and adoption placement services in Boston itself has been met by other agencies").

[42] While it is possible that a grant recipient may request an accommodation allowing them to deny services that may not be considered "material," all requested accommodations thus far involve the denial of material medical and social services related to reproductive health and LGBT care, and would therefore not survive a RFRA challenge.

[43] *See* Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion,* 49 HARV. C.R.-C.L. L. REV. 343, 357 (2014). *See also*, Cutter v. Wilkinson, 544 U.S. 709, 720 (2005) ("courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries"); *Board of Education of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687, 725 (1994) ("There is a point, to be sure, at which an accommodation may impose a burden on nonadherents so great that it becomes an establishment") (Kennedy, J., concurring).

[44] *Estate of Thornton v. Caldor*, 472 U.S. 703, 709 (1985).

[45] *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14 (1989) (internal quotations omitted).

burdens on other institutionalized persons" or on the prison itself.[46] The Court's unwillingness to permit significant cost-shifting from religious to secular persons was evident in its recent *Hobby Lobby* decision, which granted an accommodation to certain for-profit religious companies that sought to avoid providing contraceptive coverage to their employees. The Court repeatedly emphasized in *Hobby Lobby* that employees' access to cost-free contraceptives would not be impeded by their employer's accommodation.[47] The government therefore runs the risk of violating the Establishment Clause if it grants FBOs religious accommodations that result in harms to third parties, such as the beneficiaries of government grants.

In addition to improperly causing third party harms, the government's grant of a religious accommodation to recipients of discretionary grants may also violate the Establishment Clause by unconstitutionally endorsing religious beliefs. In accommodating FBOs that have been awarded discretionary grant funding, the federal government "conveys or attempts to convey a message that religion or a particular religious belief is favored or preferred."[48] Awarding a grant to FBOs that refuse to provide contraception or transgender-related healthcare to migrant youth could cause a reasonable observer to believe that the government has endorsed the religious belief that this necessary medical care is sinful. Accommodating FBOs is *not* a matter of merely providing funds for the same services to secular and religious organizations in a neutral way. Nor do grant accommodations lift a government-imposed burden, as they did for prisoners in *Cutter v. Wilkinson*. Rather, by permitting faith-based grant recipients to refuse to provide funded services, the government allows the grant recipients to redefine federal programs in religious terms, to the benefit of religion, and to the detriment of non-adherents and program recipients. This violates the Establishment Clause, which forbids the government from supporting FBOs that "impose religiously based restrictions on the expenditure of taxpayer funds."[49]

Finally, in addition to the government's compelling interest that its grants not be used in ways that are discriminatory in nature, there is no less restrictive means for the government to provide non-discriminatory social services than to *provide those services* without accommodations. Allowing religious organizations to opt out of providing the care they have voluntarily applied to undertake would be unworkable. For example, allowing a FBO caring for migrant minors in detention to refuse to provide access to, or information about, emergency contraception would force the government to seek out entirely separate organizations to provide these services. These other organizations would in turn need to contact minors about their right to emergency contraception in a timely manner and without involving the objecting grant

[46] *Cutter*, 544 U.S. at 726.

[47] *See Burwell v. Hobby Lobby Stores, Inc.* 134 S.Ct. 2751, 2759 (2014) ("The effect of the HHS-created accommodation on the women employed by Hobby Lobby and the other companies involved in these cases would be precisely zero. Under that accommodation, these women would still be entitled to all FDA-approved contraceptives without cost sharing."). This aversion to cost-shifting was echoed in Justice Kennedy's concurrence. *See* 134 S.Ct. at 2786-7 (Kennedy, J., concurring) ("Among the reasons the United States is so open, so tolerant, and so free is that no person may be restricted or demeaned by government in exercising his or her religion. Yet neither may that same exercise unduly restrict other persons, such as employees, in protecting their own interests…").

[48] *Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 593 (1989) (internal citations and quotation marks omitted).

[49] *Am. Civil Liberties Union of Mass. v. Sebelius*, 821 F. Supp. 2d 474, 488 (2012) (finding that it violated the Establishment Clause for a nonprofit to place religious conditions on the use of federal funds).

recipient in any way. Such a system would not only be highly impractical and expensive, but would run a substantial risk of resulting in coverage gaps.

Furthermore, no accommodation could mitigate the dignitary harms that result from being denied services from an FBO on the basis of sexual orientation or gender identity, or being required to seek essential reproductive health services elsewhere; no accommodation could avoid the risk of the government violating the Establishment Clause by endorsing religious beliefs or by shifting the cost of an accommodation onto third parties. Thus, the requirement that a FBO provide all material services contemplated by a grant or contract, and provide these services in a non-discriminatory manner, would be narrowly tailored to achieve the government's compelling interests described above. No viable accommodation process exists for providing services to beneficiaries if a grant recipient refuses to provide them. FBOs receive grants precisely *because* services are necessary, and the government is unable to provide them itself. This is especially true when it comes to institutionalized persons and other marginalized populations, who have limited access to funds and services.

V. Recommendations

We recommend that the DOJ withdraw its 2007 World Vision Memo. Its conclusions are based on substantial misreadings of religious liberty law that unreasonably interpret RFRA to authorize the federal government to exempt FBOs from religious nondiscrimination laws. Complete withdrawal of the World Vision Memo is therefore wise, justified, and legally appropriate.

In addition, we have identified a pressing need for the government to issue guidance clearly stating that the World Vision Memo does not authorize religion-based accommodations that would allow discrimination against, or denial of material services to, the intended beneficiaries of federally funded programs. Such accommodations are clearly not required by RFRA and are likely to run afoul of the Establishment Clause if they were to be granted in the broad manner requested by the USCCB and similar organizations. At the very least, providing guidance that the Memo does not apply to the provision of services is necessary in order to prevent substantial harms to beneficiaries, protect the government's ability to create and fund grant programs, advance the government's compelling interest in promoting equality, and avoid potential Establishment Clause violations.

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