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To: Department of Agriculture, RIN 0510-AA008
Department of Education, RIN 1840-AD467
Department of Health and Human Services, RIN 0991-AC13
Department of Housing and Urban Development, RIN 2501-AD91
Department of Labor, RIN 1290-AA45

Re: Partnerships With Faith-Based and Neighborhood Organizations, 88 Fed. Reg. 2395 (January 13, 2023)

[Submitted via www.regulations.gov]

The National Women's Law Center (NWLC) appreciates the opportunity to submit this comment on the Faith-Based and Neighborhood Organizations Proposed Rule for the U.S. Department of Agriculture (USDA), the U.S. Department of Education (ED), the U.S. Department of Health and Human Services (HHS), the U.S. Department of Housing and Urban Development (HUD), and the U.S. Department of Labor (DOL) (collectively "the Agencies").

NWLC fights for gender justice—in the courts, in public policy, and in our society—working across the issues that are central to the lives of women and girls. NWLC uses the law in all its forms to change culture and drive solutions to the gender inequity that shapes our society and to break down the barriers that harm all of us—especially women of color, LGBTQI+ people, and low-income women and families. For 50 years, NWLC has been on the leading edge of every major legal and policy victory for women.

NWLC writes in support of the important progress this Proposed Rule represents to protect and restore vital religious freedom protections for people who use government-funded social services. These protections are especially important for women and for LGBTQI+ individuals, as beliefs about women's proper behavior or role in society, beliefs about family structure, beliefs about gender, and beliefs about reproductive health decisions are often couched in religion. When the government funds faith-based social service organizations—such as food banks, homeless or domestic violence shelters, job training centers, and elder care providers—it can lead to women and LGBTQI+ individuals perceiving and experiencing obstacles to accessing those services, harming those in need. By privileging the interests of taxpayer-funded organizations over the individuals they serve, the Trump administration ignored the foundational principle of religious freedom, made it harder for people to get the services they need, and undermined the effectiveness of vital social service programs. The Proposed Rule will help ensure that people who use social services will not be pressured to participate in religious activities or be required to meet a religious litmus

test in exchange for the help they need, and that religion is not being used to deny people services or their rights to be free from discrimination.

The 2020 Rule put those depending on federally funded services at risk of wrongful discrimination in faith-based organization services funded through the Agencies, and thereby at further risk of food, health, employment, and economic insecurity. For example:

- Some food insecure individuals, such as unmarried mothers or LGBTQI+ families, may be uncomfortable entering a particular provider's church or other house of worship to receive government-funded services, compounding the already significant barriers to assistance that food insecure people face.
- A transgender teen experiencing homelessness would have no reason to know that they can refuse to attend religious services at their emergency housing shelter run by a religion that condemns LGBTQI+ people.
- An unmarried pregnant or parenting student may forgo participating in the only federally funded program in their area that prepares underrepresented students for college if it is operated by an organization affiliated with a faith that condemns pregnancy outside of marriage, on the belief that they will encounter discrimination if they join the program.
- A Hindu or Muslim refugee is unlikely to know that they can turn down an invitation to join in a Bible study, but still receive job training services from a faith-based provider.
- An older person would not necessarily know that a faith-based long-term care provider receiving federal funds cannot require any sort of religious participation nor membership in a particular religion.
- An atheist family seeking Head Start early learning services for their child or access to nutritional meals for their children may be forced to receive services from a faith-based provider or in a church.
- Some survivors of sexual abuse that occurred in a religious setting may be reluctant to seek shelter, counseling, or other services from a provider affiliated with a particular religion or denomination.
- Even in circumstances where a provider does not intend to discriminate against or appear hostile to program participants, religious imagery or a casual and well-intentioned invitation to join in a prayer circle or to say grace before a federally funded congregational meal may make some beneficiaries uncomfortable and unsure about whether they can refuse and still receive the help they need.

I. Women and LGBTQI+ individuals experience poverty at higher rates.

The proposed regulations are particularly important to women and LGBTQI+ individuals because these groups disproportionately experience poverty; thus, they and their families have a large stake in ensuring that taxpayer funded services are fairly administered and that religion is not used to exclude individuals from participation in those services.

The 2021 OPM shows that women faced disproportionate poverty and hardship. Over one in nine women—or nearly 15.3 million—lived in poverty. Nearly half (47.9%) of women in poverty that year lived in extreme poverty—with income at or below 50% of the federal poverty line.¹

Poverty rates were even higher for Black women (18.8%), Latinas (17%), and women with disabilities (26.5%). Among unmarried mothers, 37.4% of Black, 25.9% Latina, 19.7% of Asian, 42.6% of Native, and 25% of white, non-Hispanic Asian women experienced poverty in 2021.²

Women welcoming a new baby face particularly precarious economic circumstances. Lack of robust public investment in policies that support caregiving leaves families with young children struggling to balance work and family responsibilities.³ The combination of increased unpaid caregiving responsibilities, frequent lack of access to paid leave and affordable, high-quality child care, often interferes with paid work and strains already limited budgets. Together with the increased costs associated with raising young children, economic hardship can deepen for young families.⁴ As a result, families with young children have some of the highest rates of poverty of any age group.⁵

In 2021, COVID relief such as the stimulus checks, nutrition assistance increases, and expansions in refundable tax credits provided in the American Rescue Plan Act (ARPA) mitigated the Supplemental Poverty Measure (SPM) rates. The SPM incorporates the value of programs such as nutrition assistance, refundable tax credits, stimulus payments, and long-term housing assistance.⁶ Unfortunately, much of the COVID relief has expired, and 2022 SPM rates may likely increase given the inequitable recovery women—particularly women of color—and LGBTQI+ individuals have had.

While women’s labor force participation rates have risen and women’s unemployment rates have fallen after women (particularly women of color) bore the brunt of pandemic job losses, women’s job gains over the last three years still lag behind men’s, while

¹ Shengwei Sun, Nat’l Women’s Law Ctr., *National Snapshot: Poverty Among Women & Families*, NAT’L WOMEN’S LAW CTR. 2 (Jan. 23, 2023), <https://nwlc.org/resource/national-snapshot-poverty-among-women-families/>.

² *Id.*

³ Nat’l Women’s Law Ctr. Et al., *Transformative Public Investments in Child Care and Pre-Kindergarten Will Dramatically Cut Costs For Families*, NAT’L WOMEN’S LAW CTR. (Mar. 2, 2022), <https://nwlc.org/resource/transformative-public-investments-in-child-care-and-pre-kindergarten-will-dramatically-cut-costs-for-families/>.

⁴ Jasmine Tucker & Julie Vogtman, *WHEN HARD WORK IS NOT ENOUGH: WOMEN IN LOW-PAID JOBS*, NAT’L WOMEN’S LAW CTR. 2 (Apr. 2020), https://nwlc.org/wp-content/uploads/2022/02/Women-in-Low-Paid-Jobs-report_pp04-FINAL-4.2.pdf.

⁵ Robert Paul Hartley et al., *A Lifetime’s Worth of Benefits: The Effects of Affordable, High-Quality Child Care on Family Income, The Gender Earnings Gap, and Women’s Retirement Security*, NAT’L WOMEN’S LAW CTR. & CTR. ON POVERTY & SOCIAL POLICY (Apr. 12, 2022), <https://nwlc.org/resource/a-lifetimes-worth-of-benefits-the-effects-of-affordable-high-quality-child-care-on-family-income-the-gender-earnings-gap-and-womens-retirement-security/>.

⁶ *Id.*

women's labor force participation rate remains lower than prior to the pandemic.⁷

Just as women consistently experience higher poverty rates than men, in the years prior to the COVID-19 pandemic, LGBT adults consistently experienced poverty at higher rates than heterosexual, cisgender people in the United States. LGBT poverty as measured in CDC data was estimated at 23% overall in 2020, compared with 15.5% for non-LGBT adults.⁸ These disparities were driven by higher rates of poverty among bisexual and transgender people of all genders, and among LGBT adults with children. Over 40% of bisexual women with children, and over 50% of transgender people with children, were estimated to be living in poverty in 2020.⁹

Overall, LGBT adults benefitted slightly more than non-LGBT adults from the sharp declines in poverty experienced in 2021.¹⁰ Bisexual women and transgender people of all genders benefitted the most from declining poverty rates, while cisgender lesbian women experienced little change in poverty. Racial and ethnic disparities remained similar to those among non-LGBT adults, as they were in prior years.¹¹

As for other people in the United States, childhood poverty is a key pathway into adult poverty for LGBTQI+ people, especially for those who are Black, Latinx, or Native. Drivers of LGBTQI+ poverty disparities include bias and rejection in families of origin, early parenthood without adequate supports, employment discrimination, and related disparities in mental health and substance use, leading to barriers to advanced education, higher wage and quality jobs, and support services.¹² While more comprehensive data is needed on rural LGBTQI+ communities,¹³ existing data show that many states with large rural populations have especially large LGBT poverty disparities.¹⁴

II. Discrimination in critical programs harms women, LGBTQI+ individuals, and low-income families—particularly those also facing discrimination based on race/ethnicity, pregnant or parenting status, and/or disability—and threatens to exacerbate their economic insecurity.

The particular needs of women and LGBTQI+ people demonstrate their particular interest in accessible, fairly administered federally funded social service programs across several key agencies.

⁷ Brooke LePage & Jasmine Tucker, *There Are Now 10,000 More Women in the Labor Force Than in February 2020*, NAT'L WOMEN'S LAW CTR. 1 (Mar. 2023), <https://nwlc.org/wp-content/uploads/2023/03/Feb-Jobs-Day.pdf>.

⁸ Bianca D.M. Wilson, et al., *LGBT Poverty in the US: Trends at the Onset of COVID-19*, THE WILLIAMS INST. 1, 8 (Feb. 2023), <https://williamsinstitute.law.ucla.edu/publications/lgbt-poverty-us/>.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 1.

¹² *LGBT Poverty in the US: Trends at the Onset of COVID-19*, *supra* note 8, at 2.

¹³ *Id.* at 49.

¹⁴ Soon Kyu Choi et al., *State Profiles of LGBT Poverty in the United States*, THE WILLIAMS INST. (Dec. 2019), <https://williamsinstitute.law.ucla.edu/publications/state-lgbt-poverty-us/>.

- A. USDA-funded programs addressing food insecurity are particularly important to women and LGBTQI+ people and must not create barriers to service based on religion.

About one in ten U.S. households (10.2 percent) experienced food insecurity¹⁵ during 2021.¹⁶ Here are just some of the alarming statistics about food insecurity in the United States:

- In 2021, 13.2% of women living alone faced food insecurity.¹⁷
- Food insecurity heightens the risk of rape, physical violence, or stalking by an intimate partner.¹⁸
- In 2021, 4.6 million households with children experienced food insecurity.¹⁹
- In 2021, 24.3% of households with children headed by a single woman faced food insecurity.²⁰
- Studies have consistently found that households that include children with disabilities face high rates of food insecurity.²¹

LGBT adults were over 60% more likely than non-LGBT adults to report not having enough to eat in mid-2021.²² These disparities crossed income levels and racial and ethnic groups, and were greatest among bisexual and transgender people of all genders, with transgender adults being more than 2.5 as likely as cisgender adults to report food insufficiency.²³ LGBT adults were more likely to report that transportation, mobility, or health factors or safety concerns, in addition to financial ones, as reasons they didn't have enough food.²⁴

Yet LGBT adults were only slightly more likely to report using free resources such as food banks and or receiving SNAP benefits, and eligible LGBT adults overall were no more likely than non-LGBT adults to be receiving SNAP benefits.²⁵ These findings suggest that LGBT adults and their families—despite significantly greater need—face

¹⁵ The U.S. Department of Agriculture defines food insecurity as a “lack of consistent access to enough food for an active, healthy life.” ECON. RESEARCH SERV., U.S. DEP’T OF AGRIC., DEFINITIONS OF FOOD SECURITY (2018), <https://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-us/definitions-of-food-security.aspx>.

¹⁶ ECON. RESEARCH SERV., U.S. DEP’T OF AGRIC., *Household Food Security in the United States in 2021* 8 (Sept. 2022), <https://www.ers.usda.gov/webdocs/publications/104656/err-309.pdf>.

¹⁷ *Id.* at 17.

¹⁸ MATTHEW J. BREIDING ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, NAT’L CTR. FOR INJ. PREVENTION & CONTROL, INTIMATE PARTNER VIOLENCE IN THE UNITED STATES—2010, 34 (2014), https://www.cdc.gov/violenceprevention/pdf/cdc_nisvs_ipv_report_2013_v17_single_a.pdf.

¹⁹ *Household Food Security in the United States in 2021*, *supra* note 16, at 8.

²⁰ *Id.* at 17.

²¹ Susan L. Parish, et al., Food Insecurity Among U.S. Children with Disabilities, BRANDEIS UNIVERSITY (Aug. 2015), <http://nawrs.org/wp-content/uploads/2015/09/2C-Parish-Food-Insecurity.pdf>.

²² Kerith J. Conron, *Food Insufficiency Among LGBT Adults During the COVID-19 Pandemic*, THE WILLIAMS INST. 2 (Apr. 2022), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Food-Insufficiency-Apr-2022.pdf>.

²³ *Id.* at 11.

²⁴ *Id.* at 6-7.

²⁵ *Id.* at 5-6.

persistent barriers in accessing both charitable and public food assistance.²⁶

Importantly, many LGBTQI+ people living with food insecurity report concerns that they will face rejection when seeking help from food programs.²⁷ While nearly half of LGBT adults report having a religious faith themselves, many are acutely aware—sometimes from painful experience—of the possibility that they may face hostility within their own or other faith communities.²⁸ Some LGBTQI+ people report feeling persistent anxiety when seeking help, and that they try to avoid certain food banks out of fear of bias and discrimination.²⁹ While many LGBTQI+ beneficiaries report positive experiences with faith-based providers, many others also report being especially wary of these providers—even though they may be the predominant or only service providers in their region.³⁰ Others report being pressured to participate in sectarian prayers that did not reflect their personal faith.³¹

B. ED-funded programs serve key needs for women, girls, and LGBTQI+ individuals and must not create barriers to service based on religion.

LGBTQI+ students and unmarried pregnant and parenting students are at particular risk of experiencing obstacles to accessing social services funded by ED and operated by faith-based organizations in the absence of the proposed strengthened protections, yet educational vulnerabilities also put them in particular need of such services.

LGBTQI+ individuals face significant barriers to education success and attainment. Research suggests that the high rates of in-school victimization they experience is linked to reduced academic achievement. In a national survey of LGBTQI+ youth, students who faced bullying or discrimination reported lower GPAs, were three times as likely to be absent from school, and reported an increased risk of withdrawing from school, with over a quarter of students citing a hostile school climate as their reason for withdrawing.³² These disparities are even higher for LGBTQI+ youth of color, with Native and Indigenous students being more likely than students of other racial/ethnic groups to experience poor educational outcomes due to in-school victimization.³³ So too

²⁶ Intersex LGBTQ+ people rely on SNAP benefits more than non-intersex LGBTQ+ people (37% compared to 24%). Caroline Medina & Lindsay Mahowald, *Key Issues Facing People with Intersex Traits*, CTR. FOR AM. PROGRESS (Oct. 26, 2021), <https://www.americanprogress.org/article/key-issues-facing-people-intersex-traits/>. However, this survey does not have data on participation in faith-based organization nutrition assistance, such as food banks.

²⁷ Bianca D.M. Wilson, et al., *Lived Experiences with Food Insecurity and Food Programs Among LGBTQ People*, THE WILLIAMS INST. 15 (June 2020), <https://williamsinstitute.law.ucla.edu/publications/lgbtq-experiences-food-bank/>.

²⁸ Tyler Lefevor, *The Majority of LGBT Americans Are Religious: Who They Are and Why They Matter*, PRRI (Dec. 9, 2022), <https://www.prii.org/spotlight/the-majority-of-lgbt-americans-are-religious-who-they-are-and-why-they-matter/>.

²⁹ *Lived Experiences with Food Insecurity and Food Programs Among LGBTQ People*, *supra* note 27, at 15.

³⁰ *Id.* at 15, 21-23.

³¹ *Id.*

³² Joseph G. Kosciw et al., *The 2021 National Climate Survey: The Experiences of LGBTQ+ Youth in Our Nation's Schools*, GLSEN xix-xx (2022), <https://www.glsen.org/sites/default/files/2022-10/NSCS-2021-Full-Report.pdf>.

³³ *Id.* at xxvii–xxviii.

do transgender youth report increasing rates of in-school victimization, who, as compared to cisgender LGB students, report the most hostile school climates.³⁴ In the 2015 U.S. Transgender Survey (USTS), a national survey of transgender individuals, 77% of K-12 students and 24% of college students reported some form of in-school harassment (e.g., verbal, physical, or sexual),³⁵ with 17% of K-12 students and 16% of college students withdrawing from school due to such mistreatment.³⁶

There is limited demographic data on intersex people and their experiences in educational settings, creating a gap in identifying the educational barriers they face.³⁷ The available research shows that intersex LGBTQ+ respondents³⁸ are nearly twice as likely to report experiencing some form of discrimination in the past year as compared to non-intersex LGBTQ+ respondents, and that intersex LGBTQ+ respondents were more than twice as likely as non-intersex LGBTQ+ respondents to receive assistance from public benefits programs like unemployment.³⁹ As poor educational outcomes are a major factor contributing to poverty in LGBTQ+ adults,⁴⁰ these figures suggest that intersex students experience similar discrimination and victimization that create barriers to educational attainment.

Pregnant and parenting students also face discrimination and a lack of supportive services that leads to poor educational outcomes and pressure to leave school; a 2017 report surveying girls aged 14-18 found that 38% of pregnant teens reported teachers did not want them at school, with many saying this stigmatization hindered their educational success.⁴¹ Research shows that while 89% of women who are not teen mothers earned their high school diploma by age 22, only 51% of teen mothers earned a diploma by that age.⁴² And, while only 6% of women who are not teen mothers did not earn a high school diploma or GED by 22, 34% of teen mothers *earned neither* by that

³⁴ *Id.* at xxvii.

³⁵ Sandy E. James, et al., *The 2015 U.S. Transgender Survey*, NAT'L CTR. FOR TRANSGENDER EQUALITY 131, 136 (Dec. 2016) <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

³⁶ *Id.* at 135, 136.

³⁷ CHARLOTTE J. PATTERSON ET AL., NAT'L ACADS. OF SCIS., ENG'G & MED., UNDERSTANDING THE WELL-BEING OF LGBTQI+ POPULATIONS 261 (2020) <https://www.nap.edu/read/25877/chapter/1>. See also interACT: Advocates for Intersex Youth, *Intersex Data Collection: Your Guide to Question Design* (Aug. 24, 2020), <https://interactadvocates.org/intersex-data-collection/>; Sugee Tamar-Mattis et al., *Identifying and Counting Individuals with Differences of Sex Development Conditions in Population Health Research*, 5 LGBT HEALTH 320 (2018).

³⁸ Though the data cited here refers only to intersex LGBTQ+ people, it is important to note that not all intersex people identify as LGBTQ+. While intersex people face discrimination that is rooted in similar stigma as anti-LGBTQ+ discrimination is and often overlaps with the experiences of others in the LGBTQ+ community, these experiences and their impacts cannot be assumed to be equivalent.

³⁹ *Key Issues Facing People with Intersex Traits*, *supra* note 26.

⁴⁰ Bianca D.M. Wilson, *Pathways Into Poverty: Lived Experiences Among LGBTQ People*, THE WILLIAMS INST. 21 (Sept. 2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Pathways-Overview-Sep-2020.pdf>.

⁴¹ Kelli Garcia & Neena Chaudry, *Let Her Learn: Stopping School Pushout for Girls Who are Pregnant or Parenting*, NAT'L WOMEN'S LAW CTR. 5 (2017), https://nwlc.org/wp-content/uploads/2017/04/Final_nwlc_Gates_PregParenting.pdf.

⁴² Kate Perper, et al., *Diploma Attainment Among Teen Mothers*, CHILD TRENDS 1 (Jan. 2010), https://www.childtrends.org/wp-content/uploads/2010/01/child_trends-2010_01_22_FS_diplomaattainment.pdf.

age.⁴³ These disparities are likely higher for LGBTQI+ teens,⁴⁴ like bisexual teen girls—with a 2018 study finding they were almost five times as likely as heterosexual teens to become pregnant⁴⁵—and are also present in trans youth, who are just as likely to become pregnant as cisgender youth.⁴⁶

Similar disparities persist at the post-secondary level. Despite earning higher GPAs than non-parenting students, parenting college students are less likely to graduate:⁴⁷ less than 2% of all teen mothers graduate college by age 30, leading to decreased opportunities for continuing education and employment.⁴⁸ These disparities are higher for women of color: a 2019 report shows that of the almost one quarter of college students that are parents, 40% of Black college women, 30% of Asian college women, and 29% of Native and Indigenous college women are parents, compared to 21% of white college women.⁴⁹

In order to ensure the educational success of LGBTQI+ students and pregnant and parenting students, there is a particular need to ensure that ED-funded social services are available without barriers arising from religion.

C. Women and LGBTQI+ individuals need nondiscriminatory access to HUD and USDA funded housing programs.

Having safe, accessible, and affordable housing is crucial to health, nutrition, education, stable employment, access to quality childcare, and more.⁵⁰ Where we live is the foundation of our daily lives.

Unfortunately, because of discrimination in our housing, employment, and other economic systems, women, particularly single women of color and women raising children on their own, were more likely to have lower incomes in 2019.⁵¹ Given these factors and the vast supply gaps in accessible and affordable housing, single women

⁴³ *Id.*

⁴⁴ *A Call to Action to Support LGBTQI Pregnant, Expectant, and Parenting Students*, NAT'L WOMEN'S LAW CTR. 4, 5 (Mar. 2022), <https://nwlc.org/wp-content/uploads/2022/03/LGBTI-Pregnancy-Students-4.4.pdf>.

⁴⁵ Brittany M. Charlton et al., *Teen Pregnancy Risk Factors Among Young Women of Diverse Sexual Orientations*, PEDIATRICS (2018).

⁴⁶ *A Call to Action to Support LGBTQI Pregnant, Expectant, and Parenting Students*, *supra* note 44, at 1.

⁴⁷ Renee Ryberg et al., *Higher Education Can Support Parenting Students and Their Children with Accessible and Equitable Services*, CHILD TRENDS (Jan. 2021), <https://www.childtrends.org/publications/higher-education-supportparenting-students-and-their-children-with-accessible-equitable-services>. See also *Parents in College by the Numbers*, INST. FOR WOMEN'S POLICY RESEARCH (Apr. 11, 2019), <https://iwpr.org/iwpr-issues/student-parent-success-initiative/parents-in-college-by-the-numbers/>.

⁴⁸ Cynthia Costello, *Pathways to Postsecondary Education for Pregnant and Parenting Teens*, INST. FOR WOMEN'S POLICY RESEARCH 6–7 (May 2014), <https://files.eric.ed.gov/fulltext/ED556724.pdf>.

⁴⁹ *Parents in College by the Numbers*, *supra* note 47.

⁵⁰ Sammi Aibinder et al., *The Roots of Discriminatory Housing Policy: Moving Toward Gender Justice in Our Economy*, NAT'L WOMEN'S LAW CTR. (Aug. 2022), <https://nwlc.org/resource/the-roots-of-discriminatory-housing-policy-moving-towards-gender-justice-in-our-economy/>; *Gender and Racial Justice in Housing*, NAT'L WOMEN'S LAW CTR., (Oct. 2021), <https://nwlc.org/resource/gender-and-racial-justice-in-housing-2/>.

⁵¹ *The Roots of Discriminatory Housing Policy*, *supra* note 50, at 3-4.

were also more likely to be severely cost-burdened (spending more than 50% of their income on housing) in 2019 compared to single white, non-Hispanic men.⁵² With this housing and economic insecurity going into the COVID-19 pandemic, it is no surprise that women of color have consistently had higher rates of being behind on rent than white, non-Hispanic men.⁵³ Further, Black women face higher rates of eviction than white women,⁵⁴ and most unhoused women are survivors of domestic or sexual violence.⁵⁵

In addition, a large body of research shows that LGBTQI+ populations—overall, and especially among youth—are overrepresented among those experiencing homelessness or unstable housing.⁵⁶ A 2015 survey of 138 agencies serving unhoused youth found that LGBTQ youth accounted for 29% of all youth served.⁵⁷ Similarly, a survey of nearly 900,000 middle- and high-school aged youth in California, found 3.5% were unstably housed, and 25.3% of those were LGBTQ youth.⁵⁸ Several studies have also shown that this population of youth report experiencing homelessness for longer periods of time on average.⁵⁹ Among adults, a recent population-based survey found 17% of sexual minority adults reported having experienced homelessness at some point (compared to 6% in the general population).⁶⁰ Another nationally-representative sample found that LGBT adult adults ages 18-25 were twice as likely to report past-year homelessness.⁶¹ Among transgender adults in a recent nationally-representative sample, 8% reported past-year homelessness, while 30% reported moving two or more times in the past two years, compared to 1% and 11% respectively of cisgender adults.⁶² Similarly, the USTS found 30% of transgender adults had reported experiencing homelessness, including 12% in the last year—with lifetime homelessness near or exceeding 50% among Black, American Indian, or Middle Eastern transgender

⁵² *The Roots of Discriminatory Housing Policy*, *supra* note 50, at 22.

⁵³ *NWLC Analysis of U.S. Census Bureau COVID-19 Household Pulse Surveys*, NAT'L WOMEN'S LAW CTR. (last modified Mar. 9, 2023), <https://nwlc.org/resource/nwlc-analysis-of-u-s-census-bureau-covid-19-household-pulse-surveys/>.

⁵⁴ *The Roots of Discriminatory Housing Policy*, *supra* note 50, at 3.

⁵⁵ *Gender and Racial Justice in Housing*, *supra* note 50, at 7.

⁵⁶ Adam P. Romero et al., *LGBT People and Housing Affordability, Discrimination, and Homelessness*, THE WILLIAMS INST. 14 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Housing-Apr-2020.pdf>.

⁵⁷ Soon Kyu Choi et al., *Serving Our Youth 2015: The Needs and Experiences of LGBTQ Youth Experiencing Homelessness*, THE WILLIAMS INST. (2015), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Serving-Our-Youth-June-2015.pdf>. See also Laura E. Durso & Gary J. Gates, *Serving Our Youth: Findings From a National Survey of Service Providers Working With LGBT Youth Who are Homeless or at Risk of Becoming Homeless*, THE WILLIAMS INST. (2012), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Durso-Gates-LGBT-Homeless-Youth-Survey-July2012.pdf>.

⁵⁸ Laura Baams et al., *LGBTQ Youth in Unstable Housing and Foster Care*, 143 PEDIATRICS (2017), <https://pediatrics.aappublications.org/content/pediatrics/143/3/e20174211.full.pdf>.

⁵⁹ *Id.*; Lance Freeman & Darrick Hamilton, *A Count of Homeless Youth in New York City*, CITY LIMITS (2008), http://www.citylimits.org/images_pdfs/pdfs/HomelessYouth.pdf.

⁶⁰ Bianca D.M. Wilson et al., *Homelessness Among LGBT Adults in the U.S.*, THE WILLIAMS INST. (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Homelessness-May-2020.pdf>.

⁶¹ Matthew H. Morton et al., *Prevalence and Correlates of Youth Homelessness in the United States*, 62 J. ADOL. HEALTH 14 (2018).

⁶² *Homelessness Among LGBT Adults in the U.S.*, *supra* note 60.

women.⁶³

For all these reasons, women and LGBTQI+ individuals have specific needs for housing and homeless services to widely accessible and responsive to their needs. Unfortunately, faith-based homeless shelters can have burdensome processes for women to access shelter and have strict rules that fail to recognize women's dignity and autonomy.⁶⁴ Pregnant single people or single parents, especially women and LGBTQI+ parents, may avoid shelters affiliated with a religion that condemns sex outside of marriage. In addition, research also shows that LGBTQI+ people face grave and widespread discrimination in housing and homeless services. The 2015 USTS, for example, found that among respondents who experienced past-year homelessness or shelter stays, 70% reported being harassed, assaulted, or kicked out because they were transgender. Unsurprisingly, 26% of those who experienced past-year homelessness *avoided* staying in a shelter out of fear of mistreatment.⁶⁵ Other research confirms that the discriminatory practice of permitting transgender individuals access only to shelter placements consistent with their assigned sex at birth remains widespread, and makes them a target for harassment and violence.⁶⁶ For all of these reasons it is particularly critical that religion not be permitted to serve as an additional barrier to accessing federally funded housing and homeless services.

D. DOL-funded workforce training programs are important ladders to opportunity for women and LGBTQI+ people.

Although women make up just under half of the workforce in the United States, they represent nearly two thirds of the workforce in the 40 lowest-paying jobs in the economy. Women of every race—especially Latinas, Native American women, and Black women—are overrepresented in low-paid jobs.⁶⁷ Women born outside the United States, too, make up a larger share of the low-paid workforce than they do of the workforce overall.⁶⁸ More than one in four women in the low-paid workforce (27 percent) have at least one child under 18 at home, and the vast majority of mothers in the 40 lowest paying jobs are the sole or primary breadwinners for their families— especially Black mothers.

LGBTQI+ individuals, too, face workplace discrimination and barriers that often leave

⁶³ *The 2015 U.S. Transgender Survey*, *supra* note 35, at 176-78.

⁶⁴ Asia A. Eaton et al., *A culture of care: How Lotus House Women's Shelter heals program participants through genuineness, space, high expectations, dignity, individualized attention, and community*, 50 J. COMMUNITY PSYCH. 1793, 1794-1795, 1801 (2022).

⁶⁵ *The 2015 U.S. Transgender Survey*, *supra* note 35, at 176-78.

⁶⁶ Deborah Coolhart & Maria T. Brown, *The Need for Safe Spaces: Exploring the Experiences of Homeless LGBTQ Youth in Shelters*, 82 CHILD & YOUTH SERVS. REV. 230 (2017); Jama Shelton, *Transgender Youth Homelessness: Understanding Programmatic Barriers Through the Lens of Cisgenderism*, 59 CHILD & YOUTH SERVS. REV. 10 (2015).

⁶⁷ Jasmine Tucker & Julie Vogtman, *When Hard Work is Not Enough: Women in Low-Paid Jobs*, NAT'L WOMEN'S LAW CTR. 1 (Apr. 2020), https://nwlc.org/wp-content/uploads/2020/04/Women-in-Low-Paid-Jobs-report_pp04-FINAL-4.2.pdf.

⁶⁸ *Id.*

them in low-paid and less-secure jobs.⁶⁹ While there are limited data on LGBTQI+ people's wages,⁷⁰ given employment barriers they experience, many LGBTQI+ people are likely working in low-wage jobs.⁷¹ In addition, transgender people in particular have low household incomes: 47 percent of transgender respondents to the 2015 U.S. Transgender Survey reported making under \$25,000 a year, compared to 39 percent in the overall U.S. adult population.⁷² Furthermore, 15% of transgender respondents to the 2015 USTS reported working part-time.⁷³

For all these reasons, it is important that DOL-funded workplace and training efforts operated by faith-based providers have strong protections in place to ensure that women, pregnant people, mothers, and LGBTQI+ people aren't purposefully or inadvertently excluded from services because of religion.⁷⁴

E. HHS-funded social services provide critical supports to women and LGBTQI+ people.

As outlined above, women, LGBTQI+ individuals, and pregnant and parenting individuals, face disproportionately high barriers to food security, housing, educational access, and job security. Accordingly, HHS social service programs provide critical—and, in many cases, lifesaving—services for these communities, such as long-term care services, Head Start, educational programs on avoiding sexual risk and teen pregnancy, and much more. Women, LGBTQI+ people, and pregnant and parenting individuals must be able to seamlessly access these services free from discrimination or stigma, whether motivated by religion or otherwise.

⁶⁹ See, e.g., Kathryn O'Neill, *Economic Vulnerabilities to COVID-19 Among LGBT Adults in California*, THE WILLIAMS INST. (May 2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-COVID-CA-Economics-May-2020.pdf> (finding LGBT adults were more likely than non-LGBT adults to be employed in “arts, entertainment, recreation, accommodation, and food services”).

⁷⁰ For a discussion of the LGBTQ+ wage gap in the United States, see *The Wage Gap Among LGBTQ+ Workers in the United States*, HRC, <https://www.hrc.org/resources/the-wage-gap-among-lgbtq-workers-in-the-united-states> (last visited March 14, 2023). However, this analysis did not include wages of part-time and temporary workers.

⁷¹ Caroline Medina & Lindsay Mahowald, *Discrimination and Barriers to Well-Being: The State of the LGBTQI+ Community in 2022*, CTR. FOR AM. PROGRESS (Jan. 12, 2023) <https://www.americanprogress.org/article/discrimination-and-barriers-to-well-being-the-state-of-the-lgbtqi-community-in-2022/>; Brad Sears et al., *LGBT People's Experiences of Workplace Discrimination and Harassment*, THE WILLIAMS INST. (Sept. 2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Workplace-Discrimination-Sep-2021.pdf>; Ctr. for Am. Progress & Movement Advancement Project, *Paying an Unfair Price: The Financial Penalty for LGBT Women in America* 4-5 (Mar. 2015), available at <http://www.lgbtmap.org/file/paying-an-unfair-price-lgbtwomen.pdf>; Ctr. for Am. Progress & Movement Advancement Project, *Paying an Unfair Price: The Financial Penalty for LGBT Women in America* 4-5 (Mar. 2015), <http://www.lgbtmap.org/file/paying-an-unfair-price-lgbtwomen.pdf>; *Economic Vulnerabilities to COVID-19 Among LGBT Adults in California*, *supra* note 69.

⁷² Nat'l Women's Law Ctr. Calculations of transgender survey respondents reporting incomes between \$1 and \$24,999 a year on the 2015 U.S. Transgender Survey, which had 27,715 transgender respondents, compared to income data from the U.S. Census Current Population Survey (CPS). *The 2015 U.S. Transgender Survey*, *supra* note 35, at 56.

⁷³ *The 2015 U.S. Transgender Survey*, *supra* note 35, at 56.

⁷⁴ *Id.* at 6.

- F. In the absence of strong protections, women and LGBTQI+ people are particularly at risk of employment discrimination by federally funded faith-based organizations, such as those receiving funding from the Agencies.

Moral or religious beliefs should not excuse employment discrimination against women, LGBTQI+ individuals, pregnant and parenting individuals, and individuals with a different faith than the faith-based organization or no faith, particularly when organizations are receiving federal funds.

Yet women workers have been subjected to a range of discrimination based on sex, justified by claims of religious beliefs. Religious beliefs about a woman's decisions about her private life—such as her decision whether and whom to marry, and whether, when, and how to have children—have frequently motivated employment discrimination. Women workers have been fired for their decisions about whether and how to start a family, including becoming pregnant outside of marriage,⁷⁵ becoming pregnant while in a LGBTQ relationship, using in vitro fertilization to start a family, or having an abortion.⁷⁶ Some employers may refuse to hire women altogether based on a religious belief that women, or mothers, should not work outside the home. For instance, a religious school failed to renew a pregnant employee's contract because of a belief that mothers should stay at home with young children.⁷⁷

Women workers also have been discriminated against in terms of pay and benefits and working conditions because of religious beliefs about the appropriate role of women in society. For example, a religious school denied women health insurance by providing it only to the "head of household," which it defined to be married men and single persons, based on its belief that a woman cannot be the "head of household."⁷⁸ Some individuals hold religious beliefs dictating that women should not be alone with men to whom they are not married, which, if applied in the workplace, could unlawfully compromise women's ability to do their jobs, in addition to impeding their advancement and access to mentorship, training opportunities, and senior leadership positions.⁷⁹

In addition, discrimination against LGBTQI+ workers is rampant, even among secular employers. The 2015 USTS found that 27% of transgender individuals who held or

⁷⁵ See, e.g., *Ganzy v. Allen Christian Sch.*, 995 F. Supp. 340, 345 (E.D.N.Y. 1998) (an unmarried teacher at a religious school was fired because, as explained by the school, her pregnancy was "clear evidence that she had engaged in coitus while unmarried"). See also Dana Liebelson & Molly Redden, *A Montana School Just Fired a Teacher for Getting Pregnant. That Actually Happens All the Time*, MOTHER JONES (Feb. 10, 2014), <https://www.motherjones.com/politics/2014/02/catholic-religious-schools-fired-lady-teachers-being-pregnant/>.

⁷⁶ *Why You Can't Get Fired for Having an Abortion: The Latest Sex Discrimination Ruling From a Louisiana Federal Court*, NAT'L WOMEN'S LAW CTR. (July 26, 2019), <https://nwlc.org/blog/why-you-cant-get-fired-for-having-an-abortion-louisianas-latest-sex-discrimination-ruling/>.

⁷⁷ *Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 623 (1986).

⁷⁸ *EEOC v. Fremont Christian School*, 781 F.2d 1362 (9th Cir. 1986).

⁷⁹ See Joanna L. Grossman, *Vice President Pence's "never dine alone with a woman" rule isn't honorable. It's probably illegal*, VOX (Dec. 4, 2017), <https://www.vox.com/the-big-idea/2017/3/31/15132730/pence-women-alone-rule-graham-discrimination>; Gillian Tan & Katia Porzecanski, *Wall Street Rule for the #MeToo Era: Avoid Women at All Cost*, BLOOMBERG (Dec. 3, 2018), <https://www.bloomberg.com/news/articles/2018-12-03/a-wall-street-rule-for-the-metoo-era-avoid-women-at-all-cost>.

applied for a job reported being fired, denied a promotion, or not hired for a job they applied for because of their gender identity or expression.⁸⁰ An aggregation of a number of studies found that 16% to 68% of lesbian, gay, or bisexual respondents reported experiencing employment discrimination, and 7 to 41% of lesbian, gay, or bisexual workers reported being verbally or physically abused, or having their workplace vandalized because of their sexual orientation.⁸¹ Religion is a frequently asserted basis for discrimination on the basis of sexual orientation or gender identity. In the absence of robust protections, federal funds may be used to enable such discrimination by faith-based organizations,

III. Faith-based organizations provide important food, housing, education, and health assistance services to women, LGBTQI+ people, and their families, making safeguards to protect these beneficiaries' ability to access these services essential.

Many faith-based organizations receive funding from the Commodity Supplemental Food Program (CSFP), Community Foods Projects Competitive Grants, or The Emergency Food Assistance Program (TEFAP) that helps them provide important social services for women, LGBTQI+ people, pregnant and parenting individuals, and families with low or no income who need help putting food on their table or accessing rural housing assistance. Faith-based food pantries are prevalent in rural communities, especially in the South. This is an important aspect of our social service delivery, and these partnerships have developed over many years.

Precisely because of their important role in serving rural communities, no organization receiving funds from the Agencies should be allowed to take government funds and then refuse to serve all people in need on equal terms. Any such discrimination could create significant barriers for women, LGBTQI+ people, and their families to receive vital food, housing, and other assistance, critically undermining the purposes for which Congress and the Agencies established these programs.

Community organizations affiliated with any faith, and no faith, have a role to play in serving communities across the country through these agency programs, and this role must include strong safeguards to ensure people can seamlessly access the assistance they need.

To improve access to food, housing, educational, health, and other social services, the Agencies adopted regulations in 2016 compliance with President Obama's Executive Order 13559,⁸² which set out "Fundamental Principles and Policymaking Criteria for Partnerships With Faith-Based and Other Neighborhood Organizations." These principles were based on unanimous recommendations from the President's Advisory Council on Faith-Based and Neighborhood Partnerships (the "Council"). The Council

⁸⁰ *The 2015 U.S. Transgender Survey*, *supra* note 35, at 148.

⁸¹ M.V. Lee Badgett et al., *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination*, THE WILLIAMS INST. (June 2007), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Badgett-Sears-Lau-Ho-Bias-in-the-Workplace-Jun-2007.pdf>.

⁸² Exec. Order No. 13,559, 75 Fed. Reg. 72,317 (Nov. 22, 2010).

was comprised of a diverse group, describing itself as follows: “As far as we know, this is the first time a governmental entity has convened individuals with serious differences on some church-state issues and asked them to seek common ground in this area.”⁸³ The Council stressed that “policies that enjoy broad support are more durable.”⁸⁴ These principles, reflected in the Agencies’ 2016 Rule, included prohibiting religious discrimination against program participants; requiring that participants who object to sectarian elements of a program be offered referred to alternative service providers; providing participants with clear notice of these rights; ensuring expressly religious activities are voluntary and separate from federally funded services; and requiring that federal awards be based on merit, not religious affiliation.⁸⁵

The Trump administration reversed the Council’s hard work. The Council reached consensus and adopted bipartisan principles, outlined above, so that people could access food assistance and social services. The Agencies designed the 2016 Rule based on these principles to protect beneficiaries, including women, LGBTQI+ people, and families with low incomes. When the Trump administration replaced the 2016 Rule with the 2020 Rule,⁸⁶ it removed these critical protections.

The 2020 Rule prioritized the interests of faith-based providers over those of program beneficiaries with limited access to critical services, like food, housing, educational, and health assistance. Moreover, the 2020 Rule removed protections for populations at particular risk of being economically insecure and are also condemned and/or discriminated against by some religious communities—such as LGBTQI+ people, single mothers and their children, and immigrants.

Individuals may be uncomfortable receiving services from faith-based providers, even though social service programs that receive direct Federal financial assistance are supposed to be secular. In removing essential provisions protecting beneficiaries from encountering discrimination when seeking social services, like the alternative provider provision, the 2020 Rule therefore imposed an additional burden on people seeking critical assistance. Absent an alternative provider, people are forced to receive services from a faith-based organization, in violation of their religious freedom rights, or forgo services altogether.

⁸³ PRESIDENT’S ADVISORY COUNCIL ON FAITH-BASED AND NEIGHBORHOOD PARTNERSHIPS, A NEW ERA OF PARTNERSHIPS: REPORT OF RECOMMENDATIONS TO THE PRESIDENT 127 (Mar. 2010), <https://obamawhitehouse.archives.gov/sites/default/files/microsites/ofbnp-council-final-report.pdf> [hereinafter “COUNCIL REPORT”]. Members included Nathan J. Diament, Director of Public Policy, Union of Orthodox Jewish Congregations of America; Dr. Frank Page, Vice-President of Evangelization, North American Mission Board, and Past President of the Southern Baptist Convention; Anthony R. Picarello, Jr., General Counsel, United States Conference of Catholic Bishops; The Reverend Larry J. Snyder, President and CEO, Catholic Charities USA; and Richard E. Stearns, President, World Vision United States.

⁸⁴ *Id.* at 120.

⁸⁵ Federal Agency Final Regulations Implementing Executive Fundamental Principles and Policymaking Partnerships With Faith-Based and Other Organizations, 81 Fed. Reg. 19357 (April 4, 2016) [hereinafter “2016 Faith-Based Rule”].

⁸⁶ Equal Participation of Faith-Based Organizations in the Federal Agencies’ Programs and Activities, 85 Fed. Reg. 82,039 (Dec. 17, 2020) [hereinafter “2020 Faith-Based Rule”]

In this respect, the 2020 Rule significantly undervalued the harm that beneficiaries faced by additional hurdles to receiving food, housing, health, and other assistance. For example, an LGBTQI+ senior seeking food packages under the CSFP program may be forced to pick up packages from a church that condemns LGBTQI+ people. Removing the alternative provider requirement forces seniors to face an impossible decision between obtaining food assistance at the risk of their mental health and forgoing vital food assistance altogether. LGBTQI+ seniors often already struggle to access culturally competent support services, and the 2020 Rule therefore further jeopardized their food, housing, and overall economic security.

IV. The Proposed Rule provides important protections that would eliminate many of the harms from the 2020 Rule but could be further strengthened to protect program participants.

In general, NWLC strongly supports the Proposed Rule, as explained below. NWLC also recommends revisions to strengthen the Proposed Rule and ensure appropriate protections for program participants.

A. Application to all program participants

NWLC urges the Agencies to ensure that the Rule’s protections apply to all individuals who participate in their programs, as well as all prospective participants. As currently written, the Proposed Rule could invite unnecessary questions or unduly narrow interpretations regarding which individuals are “beneficiaries” of those programs. Notably, the 2020 Rule partially addressed this question by referring throughout to “beneficiaries or prospective beneficiaries.”⁸⁷ These protections in the Proposed Rule should apply to all persons participating or seeking to participate in covered programs—including prospective participants, and all family members participating in or benefiting from a program. The Agencies could ensure this clarity by including a definition of using the potentially clearer, broad term “participants,” and by including a broad definition that includes prospective participants, as well as any person participating in or receiving benefits or services from a covered program.

B. Beneficiary protections (proposed USDA § 16.4, ED §§ 75.52 and 76.52, HUD § 5.109, DOL§ 2.33, and HHS § 87.3)

In general, NWLC supports the Agencies’ proposed revisions to strengthen and clarify beneficiary protections and offers the following comments and recommendations.

Nondiscrimination

NWLC strongly supports the proposed revisions to ensure nondiscrimination and noncoercion for all program participants. Eligible individuals in need, seeking assistance through programs funded by Congress to meet those needs, should never face a religious litmus test or be required to conform to others’ religious dictates to receive that

⁸⁷ See generally 2020 Faith-Based Rule.

help. Federally funded services must be open to people of all faiths and no faith, on an equal basis.

In particular, NWLC supports—and urges all of the Agencies to adopt—USDA’s express proposed language in § 16.4(a) making clear that prohibition on religious discrimination against persons in need applies to all services with respect to both direct and indirect assistance, and also to federally funded outreach activities with respect to indirect assistance. This language is a model of clarity that USDA should finalize and the other Agencies should follow.

In addition, NWLC supports the rescission of the 2020 Rule’s mandatory participation provision, which states that beneficiaries may be required to attend “all activities that are fundamental to the program.”⁸⁸ For example, a low-income family who lost their home in a rural area may only know of one federally funded shelter in their area, which happens to be run by a faith-based organization. If any other provider exists in the area, the family is given no information about such options. This faith-based provider invites people staying in the shelter to engage in daily prayer. Although the form of prayer is contrary to the family’s own deeply-held religious beliefs, they think that they have no choice but to participate in order to receive the help they need from the only available federally funded service provider. While the 2020 Rule allows organizations to make religious participation a condition-precedent of federal aid, which contravenes the foundational principles of our country, the Proposed Rules would eliminate the mandatory participation provision—thereby protecting beneficiaries from being forced to engage in religious activities to gain access to critical services. NWLC applauds the Agencies for making this change.

Noncoercion requirements for direct aid programs

NWLC supports the continued requirements protecting program participants from coercion by requiring that explicitly religious activities: (1) not be funded by direct aid, (2) be separate in time and location from activities supposed by direct aid, and (3) be voluntary to participate in and not a requirement of receiving federally assisted services.

Notification of rights

NWLC strongly supports the Agencies reinstating the requirement to provide beneficiaries with explicit notice of their rights under the Rule to be free from discrimination, proselytization, and coercion to participate in religious activities. Without such notice, beneficiaries will not know their rights or how to exercise them. Moreover, the Agencies should strengthen this provision in three key ways.

First, the Agencies should expressly extend this requirement to organizations providing indirect aid, which are similarly bound not to discriminate in services. There is no good reason why the notification requirement should not extend as far as the nondiscrimination requirement it supports. This is all the more true for programs where

⁸⁸ 2023 Proposed Rule at 2409.

the Agencies are “responsible for selecting service providers in [these] program[s].”⁸⁹ Inasmuch as the Agencies’ proposed cost analysis did not differentiate between costs for direct and indirect aid programs, and the Agencies found the estimated costs to be modest and justified by the benefit, this change is equally justified.⁹⁰

Second, USDA should follow the approach of the other Agencies by requiring that written notices include information on how to file a complaint of religious discrimination or coercion.⁹¹ A beneficiary’s knowledge of their right to be free from religious discrimination has little value if they do not know how to enforce it. Accordingly, all the Agencies should clearly require, as DOL proposes, that notices include specific contact information for filing complaints. NWLC offers further recommendations regarding creation and implementation of complaints and enforcement processes in Section III.F. below.

Third, to ensure participants actually, consistently receive adequate notice, USDA, ED, and HUD should follow the example of DOL and HHS by providing a model written notice to program participants as an appendix.⁹² Model notices were included by all the Agencies in the 2016 Rule and will not only help ensure participant rights are respected, but also assist federal awardees and minimize administrative burdens.⁹³

By requiring clear written notice that includes information on where to file a complaint, and offering a model notice, the Agencies can help ensure the nondiscrimination and noncoercion requirements of the Rule are effective in minimizing the risk that beneficiaries will encounter discrimination when accessing critical services.

Information on alternative providers

The requirement to provide referral information about alternative providers was intended to be a core feature of the 2016 Rule’s protections for program participants. President George W. Bush included this protection in his signature faith-based initiative legislation,⁹⁴ and President Barack Obama’s Advisory Council on Faith-Based and Neighborhood Partnerships unanimously recommended adding the alternative provider requirement, “in order to provide adequate protection for the fundamental religious liberty rights of social service beneficiaries.”⁹⁵

Consider, for example, a religious minority or nonreligious person who forgoes receiving services because the only program they know of is in a church adorned with Christian iconography. Consider also an unmarried mother who is deeply uncomfortable receiving services for her family from a provider organization that explicitly promotes religious

⁸⁹ Partnerships With Faith-Based and Neighborhood Organizations, 88 Fed. Reg. 2395, 2401 (Jan. 13, 2023) [hereinafter “2023 Proposed Rule”].

⁹⁰ *Id.* at 2405.

⁹¹ *Id.* at 2421, proposed 29 CFR § 2.34, Appx. C (DOL); *id.* at 2426–27, proposed 45 CFR § 87.3, Appx. A (HHS).

⁹² *Id.* at 2421, proposed 29 CFR § 2.34, Appx. C; *id.* at 2426–27, proposed 45 CFR § 87.3, Appx. A.

⁹³ 2016 Faith-Based Rule at 19365.

⁹⁴ CARE Act of 2002, H.R. 7, 107th Cong. § 201 (2001).

⁹⁵ Council Report at 141.

views that disapprove of having or raising children outside of marriage. For these individuals, referral information about alternative providers serves a critical need.

Under the 2020 Rule, however, providers receiving federal financial assistance no longer needed to undertake “reasonable efforts,” or any even minimal efforts, to provide such information to anyone.⁹⁶ Even if a participant objects to the religious character of a faith-based organization, the organization does not need to inform the beneficiary of an alternative provider under the 2020 Rule. Absent such basic information, people in dire need of food assistance and other social services may find themselves presented with a nearly impossible dilemma: either accept social services in a sectarian context that they believe contradicts their deeply held faith, values, or dignity, or forego needed assistance. The 2020 Rule rescinded these provisions even while acknowledging that they “d[id] not expect ... that referral costs will be appreciable for small service providers.”⁹⁷

NWLC supports the Agencies’ goal of reinstating a “modified” referral provision; however, USDA must ensure that this provision and its implementation result in all program participants having meaningful, timely access to accurate information. NWLC cannot identify any reason why it should not be “appropriate and feasible” for all service providers receiving funding from the Agencies to provide participants and prospective participants with this information, or at least clear and direct notice of where to find it.

To the extent that the Agencies choose to compile and disseminate this information themselves—rather than relying on local service providers themselves, who are often best positioned to know to do so—they must ensure that this information is accessible, accurate, and easy to understand. The Agencies could do this not only by providing information on their websites, but by working with local service providers, local or state agencies, and other passthrough entities to compile and disseminate provider lists or directories that include relevant service providers who may or may not be federally assisted.

C. Direct vs. indirect aid

NWLC supports the Agencies’ efforts to revise the definition of “indirect aid,” and related provisions, to better reflect the constitutional requirements for voucher programs and to better protect the rights and well-being of individuals in need. Ensuring that funding of explicitly religious activities results only for “wholly,” “genuinely,” “private” choices, in the context of actual alternatives, is essential to avoid coercion and comply with the First Amendment.⁹⁸

Prior to the 2020 Rule, the Agencies’ regulations made clear that participants in indirect federal financial assistance programs, such as vouchers, were entitled to at least one

⁹⁶ *Id.*

⁹⁷ 2020 Faith-Based Rule at 82123.

⁹⁸ *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406 (8th Cir. 2007); *Am. Jewish Congress v. Corp. for Nat’l and Comm’y Serv.*, 399 F.3d 351, 358 (D.C. Cir. 2005); *Freedom from Religion Found., Inc. v. McCallum*, 324 F.3d 880, 881-82 (7th Cir. 2003).

adequate secular option to receive needed services. The 2020 Rule removed that requirement.⁹⁹ Now, people who rely on vouchers may have no choice but to accept assistance from an organization associated with a particular religion, fundamentally undermining the concept of “private choice.”

NWLC urges the Agencies to strengthen these protections in the Final Rule in three ways. First, NWLC urges all the Agencies to state plainly what both fundamental fairness and constitutional law require: that the presence of adequate secular alternatives is a *requirement*, not merely “a significant factor.” While other factors are relevant to determining whether an activity constitutes indirect aid, both fundamental fairness and constitutional law make it a non-negotiable prerequisite.¹⁰⁰

Second, NWLC urges USDA, ED and HUD to revise these provisions to bring them into line with the approach of DOL, HHS, and other agencies that use the phrase “adequate secular alternatives,” (rather than “an adequate secular alternative.”¹⁰¹ Using the plural phrase more accurately reflects the reality that the presence of a single alternative service provider in a geographic region is rarely likely to be practically and constitutionally *adequate* to ensure meaningful private choice across diverse participant populations and circumstances.

Third, NWLC urges ED to incorporate language proposed by USDA, HUD, DOL, and HHS further clarifying that receipt of indirect aid must be a choice of the participant and “not a choice of the government.”¹⁰² This disjunctive language comes directly from the Supreme Court’s opinion in *Zelman v. Simmons-Harris*,¹⁰³ currently appears in some Agencies’ regulations, and provides greater certainty and clarity that private choices must not be merely subsidiary to choices made by the government.

D. Religious exemption or accommodation requests

NWLC supports the elimination of overbroad language throughout the 2020 Rule, which

⁹⁹ *Id.*

¹⁰⁰ *E.g.*, *Ams. United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 425 (8th Cir. 2007) (quoting *Witters v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481, 488 (1986)) (prison program not “indirect aid” because people did not “have full opportunity to expend . . . aid on wholly secular’ programs”); *Moses v. Ruzskowski*, 458 P.3d 406, 414 (N.M. 2018) (*Zelman* requires “an independent choice regarding whether to enroll in public or private school”) (emphasis added); *Anderson v. Town of Durham*, 895 A.2d 944, 955 (Me. 2006) (“public tuition subsidies to students to attend sectarian educational institutions may be permissible under the Establishment Clause if the financial assistance program . . . provides benefits to a broad spectrum of individuals who can exercise genuine private choice among religious and secular options”) (emphasis added); *Eulitt ex rel. Eulitt v. Maine Dep’t. of Educ.*, 386 F.3d 344, 348 (1st Cir. 2004) (same).

¹⁰¹ Compare 2023 Proposed Rule at 2410, proposed 20 CFR § 75.52, 76.52 (ED); *id.* at 2414, proposed 7 CFR § 16.2 (USDA); *id.* at 2417, 5 CFR § 5.109 (HUD); *with id.* at 2420, proposed 29 CFR § 2.31 (DOL; *id.* at 2425, proposed 45 CFR § 87.1 (HHS). The Departments of Homeland Security (DHS) and Veterans Affairs (VA) also proposed to adopt the plural phrase. *Id.* at 2412, proposed 6 CFR § 19.2 (DHS), *id.* at 2422, proposed 38 CFR §§ 50.1, 61.64, 62.62 (VA).

¹⁰² *Id.* at 2414, proposed 7 CFR § 16.2 (USDA); *id.* at 2417, 5 CFR § 5.109 (HUD); *id.* at 2420, proposed 29 CFR § 2.31 (DOL; *id.* at 2425, proposed 45 CFR § 87.1 (HHS). The Department of Justice (DOJ) also proposes to maintain this existing verbiage in its rule. *Id.* at 2419, proposed 28 CFR § 38.3.

¹⁰³ 536 U.S. at 652.

could be misconstrued to require sweeping exemptions from important beneficiary protections. The Proposed Rule replaces this problematic language by providing instead that the Agencies must evaluate religious exemption or accommodation claims on a “case-by-case basis.”¹⁰⁴ This is a significant improvement towards developing a regulation that is appropriately consistent with the highly fact-sensitive standards for religious accommodations under the First Amendment and federal statutes. However, the insertion of this language in the program requirements provision may create confusion similar to the 2020 Rule. This is because the placement of this language—which says that program requirements are “subject to any accommodations that are granted to organizations on a case-by-case basis”—immediately after the constitutionally-required ban on the direct funding of explicitly religious activities creates the danger of it being misconstrued to provide that a religious exemption could be granted to this requirement, when it cannot. Moreover, including this language in the program requirements section is unnecessary since the Proposed Rule includes similar language in a stand-alone provision, which states that nothing precludes an Agency “from making an accommodation with respect to one or more program requirements on a case-by-case basis in accordance with the Constitution and laws of the United States.”¹⁰⁵ As such, NWLC supports the addition of the stand-alone language, but urges that similar language be eliminated from the program requirement provision.

To minimize burdens on beneficiaries seeking essential services, NWLC urges the Agencies to go further and include language in the Final Rule making clear that these case-by-case determinations will consider, among other factors, the potential impacts of proposed exemptions or accommodations on program participants or other third parties.¹⁰⁶

Additionally, NWLC urges the Agencies to clarify proposed language in two respects. First, consistent with the proposed changes and to avoid confusion, NWLC urges DOL to bring the language of proposed Appendix A in line with that of its proposed § 2.32 and that of the other Agencies by removing the word “exercise” from paragraph (a).¹⁰⁷ Second, while USDA proposes to retain a revised definition of the phrase “Discriminate against an organization on the basis of the organization's religious exercise,” it does not appear that this defined term would appear anywhere else in the Proposed Rule; USDA should eliminate this now-moot definition.¹⁰⁸

¹⁰⁴ *E.g.*, Proposed Rule at 2426, proposed § 87.3(g) (HHS).

¹⁰⁵ *E.g.*, *id.*, proposed § 87.3(b) (HHS).

¹⁰⁶ See Rescission of Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption Rule, 88 Fed. Reg. 12842, 12855 (Mar. 1, 2023) (“the First Amendment requires the Government to consider burdens that granting an exemption or accommodation would impose on third parties”); *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (“Properly applying [the Religious Land Use and Institutionalized Persons Act], courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries”); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 18, n. 8 (1989) (Brennan, J., plurality op.) (courts must assess whether religious exemptions “impose substantial burdens on nonbeneficiaries”); *Estate of Thornton v. Caldor, Inc.*, 709-10 (1985) (an “unyielding weighting in favor of [religious accommodation claims] over all other interests contravenes a fundamental principle of the Religion Clauses”).

¹⁰⁷ Compare 2023 Proposed Rule at 2422, proposed 29 CFR § 2.32, with *id.* at 2422, proposed Appx. A.

¹⁰⁸ Compare *id.* at 2414, proposed 7 CFR § 16.2, with *id.* at 2414-15, proposed §§ 16.3-16.6, Appx. A-B.

E. Employment discrimination

NWLC supports the elimination of overbroad language throughout the 2020 Rule that could be misconstrued to require sweeping exemptions from long standing employment discrimination protections, contrary to settled law. The Proposed Rule returns to well-established, consistent interpretations of Title VII and other federal equal employment opportunities requirements. Notably, DOL recently reaffirmed this settled understanding in a separate rulemaking.¹⁰⁹

However, NWLC maintains its long-held view that the Agencies may and should go further and provide that organizations receiving direct federal aid may not rely on Title VII's religious-discrimination exemption with respect to staff employed in their direct-aid programs. While Title VII entitles certain religious employers to prefer coreligionists in programs that are not federally funded, and the ministerial exemption permits them to do so with respect to ministerial positions, nothing in federal law entitles direct-aid recipients to do the same with respect to directly federally funded programs. To the extent that the Agencies maintain any contrary legal view, it should be revisited.

It is well-established that, across all types of work sectors, diverse and equitable workplaces are more productive and effective ones, and that discrimination on the basis of non-merit personal factors amounts to a costly waste of talent and undermines productivity.¹¹⁰ In federally funded social services, such discrimination amounts to a waste of federal resources that must be used to best support individuals and families in need and their communities, in accordance with program goals. Thus, these changes will help ensure compliance with law and help ensure that agency programs effectively reach those that were designed to serve.

To the extent that the Agencies maintain the proposed approach to these provisions, and consistent with the Agencies' intent to remove any language that "could mistakenly suggest" exemptions from civil rights laws that are contrary to settled law,¹¹¹ NWLC urges HUD to follow ED and DOL in removing the phrase "and employees" from its provision regarding religious tenets and board membership.¹¹²

¹⁰⁹ Rescission of Implementing Legal Requirements Regarding the Equal Opportunity Clause's Religious Exemption Rule, 88 Fed. Reg. 12842 (Mar. 1, 2023).

¹¹⁰ See, e.g., Government Contractors, Prohibitions Against Pay Secrecy Policies and Actions, Final Rule, 80 Fed. Reg. 54934, 54934–38, 54955 (Sept. 11, 2015) (reviewing studies on the economic, health, and other benefits of nondiscrimination protections); Exec. Order No. 13559 § 2(a) (Nov. 17, 2010) ("Federal financial assistance for social service programs should be distributed in the most effective and efficient manner possible"); Implementation of Executive Order 13672 Prohibiting Discrimination Based on Sexual Orientation and Gender Identity by Contractors and Subcontractors; Final Rule, 79 Fed. Reg. 72985, 72987 (Dec. 9, 2014) (employment discrimination "may have economic consequences," including "reduced productivity").

¹¹¹ 2023 Proposed Rule at 2402.

¹¹² Compare current 88 FR 2395, 2417, proposed 5 CFR § 5.109 (no proposed change to paragraph (d)(2)), *with id.* at 2410, proposed 20 CFR §§ 75.52, 76.52 (revising paragraph (d)(2)(iv)); *id.* at 2420, proposed 29 CFR § 2.32 (revising paragraph (b)(2)).

F. Monitoring and compliance

Though the Proposed Rule requires that service providers give beneficiaries notice of their right to be free from discrimination when accessing federally funded services and that they can file complaints for violations of their rights, the Proposed Rule does not propose any complaint or enforcement processes. NWLC thus urges the Agencies to adopt clear rules and procedures that enable effective monitoring and compliance efforts, and afford meaningful remedial procedures when beneficiaries report potential discrimination, coercion, or other violations of these rules. Remedial mechanisms should include channeling beneficiary complaints to offices with existing systems and expertise for handling civil rights complaints.

To date, the Agencies have not had effective mechanisms in place to determine how both the substantive and procedural requirements of these rules are understood and implemented by service providers. Disparate program offices have had little idea, and no effective systems for determining, how service providers receiving federal assistance are interpreting and ensuring compliance with these rules, and where confusion or noncompliance may arise. As a result, program beneficiaries who experience discrimination, coercion, or other violations of these rules will also typically lack effective recourse.

Civil rights offices within the Agencies are better equipped to handle these complaints than disparate grantmaking offices or passthrough entities, with whom they should coordinate to ensure appropriate oversight, remedial steps, and program improvements.

NWLC commends DOL for proposing to adopt this approach and recommends that:

- USDA should charge its Office of the Assistant Secretary for Civil Rights with handling complaints regarding the participant protections in these rules.
- ED should charge its Office for Civil Rights with handling complaints regarding the participant protections in these rules.
- HHS should charge its Office for Civil Rights with handling complaints regarding the participant protections in these rules, rather than merely providing “consultation” to grantmaking offices.
- HUD should charge its office of Fair Housing and Equal Opportunities with handling complaints regarding the participant protections in these rules. This is consistent with HUD’s current practice for handling complaints under its department-wide Equal Access Rule, as well as complaints under the Violence Against Women Act’s (VAWA) housing protections.¹¹³

Finally, NWLC urges the Agencies to elucidate how they will monitor possible violations by service providers of constitutional and regulatory requirements. These efforts by Agencies should include, for example: providing training for program staff, Office for Civil Rights (or an Agency’s equivalent) staff, and service providers; creating uniform

¹¹³ See U.S. DEP’T OF HOUSING AND URBAN DEVELOPMENT, *Get Help Before Filing a Complaint*, https://www.hud.gov/program_offices/fair_housing_equal_opp/get_help_filing_complaint; U.S. DEP’T OF HOUSING AND URBAN DEVELOPMENT, *Your Rights Under VAWA: How to File a Complaint, Coverage, and Protections*, https://www.hud.gov/program_offices/fair_housing_equal_opp/VAWA.

processes for monitoring compliance; and, making use of data collection and similar measures to assess both the effectiveness of the improved beneficiary protections and how delivery of essential services could be improved.

V. The Agencies should move swiftly to make the proposed changes above and issue a Final Rule that strengthens protections for program participants.

For the reasons listed above, NWLC generally supports the Proposed Rule by the Agencies and urges the Agencies to make the above recommendations for the Final Rule.

Sincerely,
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