
Protecting the Civil Rights
and Religious Liberty of
Faith-Based Organizations

*Why Religious Hiring Rights
Must Be Preserved*

WHITE HOUSE
FAITH-BASED
AND
COMMUNITY
INITIATIVES

“I recognize that government has no business endorsing a religious creed, or directly funding religious worship or religious teaching. That is not the business of the government. Yet government can and should support social services provided by religious people, as long as those services go to anyone in need, regardless of their faith. And when government gives that support, charities and faith-based programs should not be forced to change their character or compromise their mission.”

President George W. Bush



EXECUTIVE SUMMARY

For nearly forty years, the Civil Rights Act of 1964 has respected the right of religious groups to make religiously based employment decisions. Title VII of this Act—which is supported by Republicans and Democrats alike—protects Americans from employment discrimination based on race, color, religion, sex, and national origin. It also protects the ability of faith-based organizations to maintain their religious liberty and identity by hiring employees who share their religious beliefs.

President Bush believes that—regardless of whether government funds are involved—faith-based groups should retain their fundamental civil rights, including their Title VII right to take their faith into account when they make employment decisions.

Congress has enacted a number of additional civil rights provisions that apply to some Federal social service programs. With respect to religious hiring rights, these laws are confusing, and in some cases, contradictory. Some laws protect the hiring rights of faith-based groups that receive Federal funds, and others do not. There are now at least five different—and often conflicting—approaches that Congress has applied to religious organizations that receive a Federal grant. States and localities may have additional rules.

This hodgepodge of conflicting approaches has led to confusion for providers of social services, and a consequent reluctance by many faith-based groups to seek support from Federally funded programs. A faith-based organization that receives Federal funds to house the homeless, help them find work, and provide them with drug treatment and counseling could be subject to different Federal, State, or local rules on whether it can hire according to its religious beliefs.

It is simply too difficult and costly for many faith-based organizations to navigate these uncertain regulatory waters. The real losers are the homeless, the addicted, and others who are denied access to a range of effective social service providers, including faith-based providers.

President Bush believes in a commonsense and fair approach when faith-based organizations partner with the Federal government to provide social services. He believes faith-based organizations that receive Federal money should follow three key principles:

- They should not discriminate against any persons receiving a public service or make participation in religious activities a condition for receiving such services;
- They should be accountable for the public funds they receive and use them only for their intended purposes, with no Federal dollars being used to support inherently religious activities; and
- When they receive Federal funds, they should retain their right to hire those individuals who are best able to further their organizations' goals and mission.

At the President's direction, the Federal government has already taken many steps to put the first two of these principles into practice.

To implement the third principle, the President will work to safeguard the religious liberty of faith-based organizations that partner with the Federal government, so that they may respond with compassion to those in need in our country. He will work to preserve the Title VII rights of organizations that receive government funds. He will support changes to laws that currently prevent religious organizations that participate in these programs from taking religion into account when hiring.

Protecting the Civil Rights and Religious Liberty of Faith-Based Organizations: *Why Religious Hiring Rights Must Be Preserved*

BACKGROUND

President Bush signed an Executive Order on December 12, 2002, seeking to end discrimination against faith-based organizations. He believes there is a moral urgency to give Americans in need the best services available, from treatment programs for addicts, to housing for the homeless, to job training for those on welfare. The full involvement of the faith community is essential to mobilize America's "armies of compassion." Successful partnerships already exist between the Federal government and many faith-based organizations, such as Lutheran Social Services, Catholic Charities, the Salvation Army, and the Jewish Federations, among others. The President seeks to build on and expand these collaborations.

A frequently asked question about President Bush's Faith-Based and Community Initiative is whether the religious organizations that receive Federal funds may take their faith into account in making employment decisions. For nearly forty years, America's landmark civil rights law has respected the right of religious groups to make religiously based employment decisions under the authority of Title VII of the Civil Rights Act of 1964. This Act protects Americans from employment discrimination based on race, color, religion, sex, and national origin.¹ At the same time, the statute also protects the ability of faith-based organizations to maintain their religious liberty and identity by hiring employees who share their religious beliefs.

To do this, the Civil Rights Act created a special exemption for religious groups, which allows them

to maintain their religious identity and hire individuals supportive of their mission and vision without running afoul of the Civil Rights Act. In 1972, Congress expanded this exemption to cover all positions offered by a faith-based employer (as opposed simply to positions directly related to their ministries), and in 1987, the United States Supreme Court unanimously upheld this special protection. So for more than three decades, Title VII has permitted Jewish organizations to hire only Jewish employees, Catholic organizations to hire only Catholics, and people of faith generally to hire like-minded co-religionists. As Justice Brennan wrote in upholding this law, "[d]etermining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is ... a means by which a religious community defines itself." Title VII has thus helped protect the civil rights of people of faith.

Although many faith-based groups have flexible employment practices and have voluntarily chosen to hire both adherents and non-adherents, other religious organizations rely on the Title VII exemption in making employment decisions. The past forty years have seen no concerted effort to repeal this civil rights protection. Far from any great outcry accusing religious groups of "discriminating" in hiring, there has been nothing but support—from Republicans and Democrats alike—for this established law allowing faith-based organizations to further their purpose and vision through the people they hire.

1. Additional statutes may also protect against other types of employment discrimination, such as the Age Discrimination in Employment Act of 1967 and the Americans with Disabilities Act of 1990.

WHAT HAPPENS WHEN A FAITH-BASED ORGANIZATION RECEIVES FEDERAL FUNDS?

What has come into question during the past decade, however, is a different issue—whether the Title VII exemption continues to apply when a religious organization receives government funds, either directly from the Federal government or from a State or locality through a block grant.

President Bush believes that—regardless of whether government funds are involved—faith-based groups should retain their fundamental civil rights, including their ability, protected under Title VII, to take their faith into account when they make employment decisions. As the Civil Rights Act of 1964 recognizes, for a faith-based organization to define or carry out its mission, it must be able to choose its employees based on its unique vision and beliefs. Such a right is rooted in the values of religious pluralism on which our nation was founded. At the same time, the President opposes using direct government funds for proselytizing and believes no recipient of a service that is supported with such funds should be forced to pray as a condition to receive that service.

Some might argue that allowing Federally funded religious groups to hire like-minded individuals is an unfair form of special treatment. But in fact this right—an organization’s ability to select employees that share its common values and sense of purpose—is vital to all organizations, not just faith-based groups. A secular group that receives government money is currently free to hire based on its ideology and mission. Allowing religious groups to consider faith in hiring when they receive government funds simply levels the playing field—by making sure that, when it comes to serving impoverished Americans, faith-based groups are as welcome at the government’s table as non-religious ones.

Imagine the reaction of the World Wildlife Fund—which has received more than \$115 million in Federal support since 1996—if it were required to hire employees without regard to their position on environmental conservation. Or that of Planned Parenthood—the recipient of millions of Federal dollars each year—if it had to hire staff without considering their views on abortion or birth control. Some people agree with the missions of these organizations, others do not. But no one can deny that these organizations’ ability to execute their goals hinges on whether they may choose to hire like-minded people.

That is why President Bush believes that the right of all organizations—including faith-based groups—to keep their identity when they receive Federal funds should be a straightforward proposition. But in the past several decades, Congress has enacted a number of civil rights provisions that apply to Federal social service programs. The problem is that, with respect to religious hiring rights, these laws are confusing, and in some cases, contradictory. Some laws protect the hiring rights of faith-based groups that receive Federal funds, and others do not. In fact, as described below, there are now at least five different—and often conflicting—approaches that Congress has applied to religious organizations that receive a Federal grant.

To make matters even more complicated, a number of States and localities have statutes, regulations, and ordinances that contain express language prohibiting discrimination on the basis of religion and/or sexual orientation. Most of these laws exempt religious organizations that receive government funds, but some do not.

CONGRESS'S FIVE DIFFERENT APPROACHES TO RELIGIOUS HIRING

• **No special rules.** Many programs have no special civil rights rules. These are the so-called “silent statutes.” An example of such a law is the Older Americans Act, which funds many important programs for elders in need. If a statute authorizing Federal funds contains no additional civil rights language, then the background rules of the Civil Rights Act—including the religious hiring exemption for religious employers—apply. Thus, an organization that receives funds from this type of program may continue to take its faith into

account in making employment decisions without running into problems with Title VII—just as it did before receiving a grant.

Numerous courts have recognized that religious organizations that receive Federal financial assistance retain their exemption under the Civil Rights Act of 1964 to hire on a religious basis.²

• **Charitable Choice rules.** The Charitable Choice statutes apply to the Department of Health and Human Services’ (HHS) Temporary Assistance to Needy Families (TANF) and Community Services Block Grant (CSBG) programs, as well as to programs administered by the Substance Abuse and Mental Health Services Administration (SAMHSA). These statutes expressly protect a religious organization’s Title VII exemption even if it is Federally funded. Thus, just as for programs governed by “silent statutes,” organizations that receive funds from the Charitable Choice programs can continue to take their faith into account in making employment decisions, without running into problems with Title VII. Nor are they subject to any additional hiring restrictions.³ President Clinton signed the first of four “charitable choice” laws passed by Congress in 1996, thus expressly permitting faith-based organizations to hire according to their religious beliefs while receiving Federal funds. These laws have worked well and there has been no record of any adverse impact from them.



President Bush's support of Charitable Choice is instrumental in allowing faith-based organizations to play the vital role they do in serving the nation's poorest, most underserved communities. Faith-

based organizations must be protected from the kind of discrimination that would prevent us from hiring the people who are best equipped to fulfill our mission and do the work, work that has been proven to be effective time and again. This discrimination is a violation of the civil rights of religious groups and would effectively prevent the delivery of services to this country's black and brown urban poor.

Reverend Eugene F. Rivers III
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2. See *Hall v. Baptist Memorial Health Care Corp.*, 215 F.3d 618 (6th Cir. 2000); *Siegel v. Truett-McConnell College*, 13 F. Supp. 1335 (N.D. Ga. 1994), *aff'd*, 73 F.3d 1108 (11th Cir. 1995); *Young v. Shawnee Mission Med. Center*, 1988 U.S. Dist. Lexis 12248, at 4-5 (D. Kan. 1988); see also *Pedreira v. Kentucky Baptist Home for Children*, 186 F. Supp. 2d 757 (W.D. Ky 2001).

3. The one exception is the SAMHSA block grant programs, which are subject to an additional rule, along the lines of the first “special rule” described below. This statutory provision, which applies to sex and religious discrimination, makes clear that people who receive SAMHSA services may not be discriminated against based on sex or religion. To carry out Congress’s intention in enacting the Charitable Choice laws, the Administration has proposed a rule clarifying that this statutory provision does not apply to the employment practices of religious organizations that receive funding, if it would substantially burden their exercise of religion. The proposed regulation relies on the Religious Freedom Restoration Act (RFRA), which applies to all Federal agencies. In RFRA, Congress said that Federal agencies could not substantially burden religious exercise without a compelling interest.

• **Three special rules.** A number of Federal assistance programs are subject to additional civil rights provisions in the laws authorizing these programs. In a sense, these provisions are an overlay or an add-on to the Title VII rules. That is, although organizations that receive funds from these programs retain their Title VII exemption, they must also comply with these other civil rights provisions, which contain no exemption for religious organizations.⁴ Social service programs that contain special rules like this are of three types:

1. Programs with additional statutory civil rights language that does not specifically mention employment, such as Community Development Block Grant (CDBG) and the Head Start programs. These statutes have language along the following lines:

No person shall on the ground of race, color, national origin, religion or sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity funded in whole or in part with funds made available under this chapter.

This statutory approach clearly protects individuals that receive Federally funded services from being denied assistance simply because they are of a different faith or no faith at all. However, some older U.S. Supreme Court cases indicate that these

4. Under all three of these special rules, however, faith-based organizations may be entitled to additional protection under the Religious Freedom Restoration Act.



The right of religious organizations to select staff on the basis of religious belief is an essential element of religious freedom. The Civil Rights Act safeguards this right, and the Supreme Court unanimously declared it constitutional.

Overwhelmingly, federal and state courts have ruled that religious organizations do not lose this right when they receive government funds. Crucial public policy considerations show why this is so important.

*As Justice Brennan argued in *Corporation of Presiding Bishop v. Amos* (1987), choosing staff that share its beliefs is a crucial part of how a religious organization defines itself. In a free society, Planned Parenthood should be free to hire only pro-choice employees and Jewish organizations should be free to hire only Jewish staff. Court cases and longstanding practice show that private religious agencies do not become an arm or agent of government and thus lose this right merely by accepting some government funds.*

Since government is now asking religious organizations to do more because they are so effective, government must respect their unique identity. If it does not, the poor will suffer.

A secular worldview is just as much a religious perspective as historic theism. The only way to implement the First Amendment is for government to evenhandedly fund all effective private programs rather than only fund those with a secular worldview.

Ronald J. Sider
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statutes may also apply to employment decisions. If they do, then faith-based groups may forfeit their ability to make employment decisions on a religious basis when they receive funds from these programs.

2. Programs with additional statutory civil rights language that specifically mentions employment, such as the Department of Labor's Workforce Investment Act and the Omnibus Crime and Control & Safe Streets Act. These statutes have civil rights language identical to the CDBG and Head Start laws, but they also specifically mention employment. Again, for these programs, Federally funded religious organizations may forfeit their religious hiring rights.

3. Programs with additional statutory civil rights language that specifically mention employment and also eliminate the Title VII religious hiring exemption for faith-based organizations. For these programs, Congress has made very clear its intention to prohibit faith-based organizations from taking religion into account when it hires new staff or selects program participants.



The Orthodox Jewish community strongly supports President Bush's initiative to rally America's "armies of compassion." We agree with the President's view that it is wrong to exclude faith-based social welfare agencies from government-funded partnerships for no reason other than their faith character and that these agencies are often best suited to serve people in need. Critical to this effort is the continued protection of the religious liberties afforded by the Constitution and civil rights laws to faith-based institutions. For only by protecting the character of these entities, including their right to hire personnel who share their religious mission and values, can we leverage their unique capacities for the benefit of more Americans in need. We deeply appreciate President Bush's principled approach to this issue and his determination to defend religious freedom in America.

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THE NEED TO PRESERVE HIRING RIGHTS FOR FAITH-BASED ORGANIZATIONS

What is the result of this patchwork quilt of conflicting approaches? Confusion for providers of social services, and a consequent reluctance by many faith-based groups to administer Federally funded programs. It is simply too difficult and costly for many faith-based organizations to navigate these uncertain regulatory waters. For example, a faith-based organization that receives Federal funds to house the homeless, help them find work, and provide them with drug treatment and counseling could be subject to different Federal, State, or local rules and regulations on whether it can hire according to its religious beliefs. In other words, this organization might be permitted to take religion into account in hiring employees that provide the drug treatment parts of its program, but not be permitted to take religion into account for those employees who help that same person in need find work. This makes absolutely no sense. Why should a single homeless shelter be subject to different—and diametrically opposing—hiring policies?

President Bush believes this tangle of laws has discouraged many effective faith-based providers from competing to provide government-funded services. The real victims of this contradictory statutory scheme are, of course, the needy Americans who could be helped by faith-based providers. The President is committed to providing these citizens with access to the most effective programs, regardless of the provider's religious affiliation or non-affiliation. He is committed to

making sure that providers that receive direct Federal funds never discriminate against beneficiaries of Federally funded services on any basis, including religion, race, national origin, sex, personal views, or sexual orientation. He is committed to making sure that Federal funds are properly used, and he has instructed Federal agencies to guard zealously against the use of direct government aid to support worship or other inherently religious activities.

At the same time, he will continue to work to protect the civil rights and religious liberty of faith-based organizations that partner with the Federal



Effective organizations know their mission and stick to it. They do so by gathering a like-minded, passionate team that fully embraces that mission. Many faith-based organizations see their mission, and their day-to-day work, as inspired, motivated, and uniquely shaped by their faith commitments. These community healers need to be allowed to select staff that identify with, and live out, that shaping faith. Depriving them of that right strikes at the heart of their ability to contribute to the very work so needed in our country's distressed communities.

Amy L. Sherman, Ph.D.
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President Bush demonstrates strong leadership in his support for the rights of religious organizations to hire staff in accord with their religious principles.

The health and human service ministries of the Archdiocese of Philadelphia currently serve nearly two hundred thousand people of all faiths. Services include nursing homes, residential and community based programs for children, the homeless and developmentally disabled adults. The people whom we serve benefit from the government funding which our programs receive. While we do not discriminate based on religion in our hiring, all our employees are invited to fully embrace our mission to help people in need. Employees are required to carry on their job-related duties in a manner which is consistent with the teachings of the Roman Catholic Church.

I welcome President Bush's appreciation for what we do, and his belief that we should not be forced to compromise our religious principles. We seek to work in partnership with government in order to better the lives of all people in our community.

Reverend Monsignor Timothy C. Senior
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government, so that they may respond with compassion to those in need in our country. As a step in this direction, on December 12, 2002, he amended Executive Order 11246 to permit faith-based organizations with Federal contracts to take their faith into account in making employment decisions, consistent with the long-established rights that faith-based organizations have enjoyed under the Civil Rights Act of 1964.⁵ Religious organizations will no longer be required to forfeit their Title VII exemption in order to bid for one of these contracts. This Executive Order applies primarily to government contracts, as opposed to the billions of dollars that are awarded annually in Federal grants that are administered pursuant to Congress's direction.

President Bush will continue to work to make clear that faith-based organizations that receive Federal funds retain their civil rights to base employment decisions on their beliefs and vision. At the Federal level, this means that the Administration will support changes to laws, like the Workforce Investment Act and the Head Start statute, that currently prevent religious organizations that participate in these programs from taking religion into account when hiring.

With respect to States and localities, the President will urge the courts to provide guidance on whether faith-based organizations are required to comply with State and local ordinances that restrict their ability to participate in Federally funded formula and block grant programs.

5. EO 11246 sets out a number of equal opportunity employment rules that apply to Federal contracts in excess of \$10,000 and authorizes the Department of Labor to enforce its provisions. Until President Bush's action, the EO did not contain an exemption for religious groups like Section 702 of the Civil Rights Act of 1964. While no figures are available on the number of contracts affected, each year the Federal government executes over 30,000 contracts in excess of \$25,000, covering a wide range of Federal services.

CONCLUSION

Faith-based groups are an essential resource to the neediest citizens in our country. The effectiveness of these organizations comes from their commitment to serving others—a commitment that is grounded in their faith. But to remain effective, these groups must be allowed to maintain their religious identity, central to which is the ability to select employees who share their vision. Without this essential right, an organization loses its ability to promote common values, a sense of community and unity of purpose, and shared experiences through service.

President Bush will strive to ensure that faith-based organizations that receive Federal funds retain their civil right to base employment decisions on their ideals and mission. These efforts will enable Americans in need to have access to the widest array of social service providers and receive the most effective assistance available.

President Bush launched the faith-based and community initiative as “a determined attack on need” so that America’s “armies of compassion” can be mobilized to feed the hungry, house the homeless, treat the addicted, and help those who despair. He remains hopeful that people of all faiths or no faith at all, as well as Democrats, Republicans and Independents alike, can unite in this effort.

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