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Charitable Choice Rules and Faith-Based Organizations

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Joe Richardson
Specialist in Social Legislation
Domestic Social Policy Division

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Summary

President Bush's administration has advanced a "Charitable Choice" agenda aimed at expanding the ability of faith-based organizations to provide federally funded social services. Charitable Choice rules are intended to ensure that faith-based organizations participate more fully in federally funded social service programs and offer services without abandoning their religious character or infringing on the religious freedom of applicant/recipients. They deal with issues such as faith-based organizations' ability to remain independent of governmental controls, to discriminate in their hiring practices, and to conduct "inherently religious" activities.

Prior to the Administration's initiative, Congress enacted Charitable Choice rules for Temporary Assistance for Needy Families (TANF), the Community Services Block Grant (CSBG), and substance abuse prevention and treatment programs. But, after Congress failed to enact Charitable Choice rules for more programs, the Bush Administration issued an executive order (EO 13279) that directed that most rules covered under the Charitable Choice rubric be followed by a wide range of social service programs, unless otherwise directed by law. In addition, the Administration and Congress have provided money for a range of specific grants/projects in which faith-based organizations play a substantial role.

Charitable Choice rules represent a shift in how government treats religious organizations applying for social service grants. They effectively deny aid for "inherently religious" *activities* — as opposed to the preexisting rule that generally barred assistance to *organizations* that are "pervasively sectarian." State and federal courts are currently reviewing aspects of Charitable Choice rules.

For Congress, there is a continuing debate over whether to accept the existing situation — where the executive order has effectively put in place most, but not all, Charitable Choice principles for the bulk of social service programs, except where barred by law — or challenge it, or enact the provisions of the executive order (and possibly added rules) and cover more programs. Proponents of congressional action are concerned that an executive order may not be "enough" to support the policy in the longer term and would like to see some rules and programs not included in the order added. Opponents of the executive order or writing Charitable Choice rules into law are primarily worried over their implications for hiring discrimination and the prospect that religious content may be infused into federally funded programs.

Most recently, proposed amendments to the Workforce Investment Act (WIA) and Head Start law would exempt grantees that are religious organizations from employment discrimination rules relating to religion.

This report will be updated as events warrant.

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Charitable Choice Rules and Faith-Based Organizations

“Charitable Choice” refers to a set of rules, established by legislation or regulation, intended to enhance the ability of faith-based organizations to provide federally funded services without impairing their religious character or the religious freedom of beneficiaries/applicants.¹ These rules have been strongly supported by the Bush Administration. At present, only three federal program areas have specific Charitable Choice rules stipulated *in law*: Temporary Assistance for Needy Families (TANF), the Community Services Block Grant (CSBG), and substance abuse prevention and treatment grants administered by the Substance Abuse and Mental Health Services Administration (SAMHSA) under the Public Health Service Act. Perhaps the broadest example of Charitable Choice rules are those established, primarily for TANF, by the 1996 welfare reform law (P.L. 104-193).

After the 107th Congress took up, but did not approve, legislation to extend Charitable Choice rules to cover many more programs (Title II of H.R. 7, the Charitable Choice Expansion Act of 2001), the Bush Administration issued an executive order that directed that most, but not all, rules covered under the Charitable Choice rubric be followed by a wide range of social service programs — Executive Order (EO) 13279, December 12, 2002. Attempts to expand the coverage of Charitable Choice rules by law also failed in the 108th Congress.

The second session of the 109th Congress faces a continuing debate over whether to accept the existing situation — where the EO has by regulation effectively put in place most, but not all, Charitable Choice principles for the bulk of social service programs, except where barred by law — or challenge it, or enact the provisions of the EO (and possibly other rules it does not include) and cover more programs than now are covered by law.

Other items of related interest in the Charitable Choice arena include the role of states/localities (which actually administer many social service grants involving federal money), litigation over the constitutionality of Charitable Choice rules (whether set by law or regulation), and the status of, and funding for, the Compassion Capital Fund (a program providing direct grants to faith- and community-based organizations to help them expand their services).

¹ Throughout this report, the terms “religious organization” and “faith-based organization” are used interchangeably. When asked for a definition of “faith-based” by one commentator on its Charitable Choice regulations, the Department of Health and Human Services (HHS) said that it used the terms “religious organization” and “faith-based organization” interchangeably and added that neither the U.S. Constitution nor relevant Supreme Court precedents contain a comprehensive definition of religion or religious organization.

What Are Charitable Choice Rules?

Charitable Choice rules are aimed at ensuring that faith-based organizations can participate in federally funded social service programs “on the same footing” as other nongovernmental providers and can offer services without abandoning their religious character or infringing on the religious freedom of recipients.² So far, they have taken five different forms: (1) the original rules established by the 1996 welfare reform law; (2) the rules enacted for the CSBG in 1998; (3) the rules legislated for Public Health Service Act substance abuse prevention and treatment programs in 2000; (4) the provisions in H.R. 7 of the 107th Congress; and (5) the principles set forth (and implemented by regulation) under the Bush Administration’s EO 13279.

The Original 1996 Charitable Choice Rules. Charitable Choice rules were first laid out in the 1996 welfare reform law — Section 104 of the Personal Responsibility and Work Opportunity Reconciliation Act, P.L. 104-193 — and cover all states’ TANF activities, and, to a lesser degree (i.e., where *services* are provided), states’ administration of food stamps, Medicaid, and the Supplemental Security Income (SSI) program.

The provisions of the 1996 law are probably the most far-ranging set of rules so far set out and have been a basic model for Charitable Choice provisions since enacted, proposed, or established by regulation. The law’s major Charitable Choice provision bars government from discriminating against an organization applying to provide publicly funded services on the basis of its religious character, so long as the program is implemented in a manner consistent with the Establishment (of religion) Clause of the First Amendment to the U.S. Constitution. Moreover, it stipulates the following rules with regard to faith-based organizations applying for or receiving public funds and applicants for/recipients of services —

- Religious organizations remain independent of government and retain control over the definition, development, practice, and expression of their religious belief.
- Government may not require religious organizations to change their form of internal governance or to remove religious art and other symbols as a condition of participation.
- Faith-based organizations may discriminate on religious grounds in their employment practices, *regardless of their receipt of public funds.*

² For details as to how the various Charitable Choice laws, proposals, and regulations differ see (1) CRS Report RL31043, *Public Aid to Faith-Based Organizations (Charitable Choice) in the 107th Congress: Background and Selected Issues*, by David Ackerman; (2) CRS Report RL31042, *Charitable Choice: House-Passed Version of H.R. 7 Compared with Existing Charitable Choice Laws*, by Vee Burke; (3) CRS Report RS21924, *Charitable Choice: Expansion by Executive Action*, by Joe Richardson; and (4) CRS Report RL31030, *Comparison of Proposed Charitable Choice Act of 2001 with Current Charitable Choice Law*, by Vee Burke.

- Like other grantees/contractors, religious organizations' use of public funds is subject to audit — except that, when government funds are segregated, only those moneys are subject to audit.
- Any party seeking to enforce its rights under Charitable Choice provisions of law can assert a civil court action for relief against the entity/agency allegedly committing a violation.
- No funds provided *directly* (as opposed to indirectly through vouchers) may be spent for sectarian worship, instruction, or proselytization.³
- Federal Charitable Choice rules are not to be construed as preempting any provision of a state's constitution or laws regarding aid to or through religious organizations.
- Faith-based organizations may not discriminate against beneficiaries or potential beneficiaries on the basis of religion or religious belief.
- Government must provide accessible alternative providers where individuals have an objection to the religious character of the organization/institution from which they receive or would receive services.

Community Services Block Grant (CSBG) Charitable Choice Rules.

In 1998, the 105th Congress enacted Charitable Choice language covering the CSBG — Section 201 of P.L. 105-285. This law generally follows the provisions of the 1996 welfare reform act but does *not* include its authority for civil actions for relief in cases of violations, its stipulation that federal Charitable Choice rules do not preempt state constitutions/laws, its requirement for alternative providers, or its prohibition on discrimination against applicants/recipients based on religion or religious beliefs. Efforts to reauthorize the CSBG during the 108th Congress failed, in part due to disagreement over provisions that would have amended the program's Charitable Choice rules.

Substance Abuse Prevention and Treatment Program Charitable Choice Rules. In 2000, the 106th Congress enacted two measures adding Charitable Choice amendments to the law governing substance abuse prevention and treatment services under Titles V and XIX of the Public Health Service Act — Section 3305 of P.L. 106-310 and Section 1 of P.L. 106-554. These provisions generally track those of the 1996 welfare reform law, except that it is unclear to what extent their federal Charitable Choice rules would preempt state constitutions/laws and to what degree basic Public Health Service Act employment nondiscrimination provisions apply.

H.R. 7 Charitable Choice Rules. On July 19, 2001, the House passed the Charitable Choice Expansion Act of 2001, Title II of H.R. 7 of the 107th Congress, but it died in the Senate. This is the most recent comprehensive congressional action on Charitable Choice rules.⁴

³ Provision of indirect aid in the form of vouchers means that a faith-based organization that redeems a voucher may avoid this prohibition.

⁴ In other action, the House voted to eliminate provisions in Head Start law and the (continued...)

As with earlier laws, this measure generally followed the Charitable Choice provisions of the 1996 welfare reform act, with some significant differences. It would have extended coverage of Charitable Choice rules to a list of *new programs*: e.g., juvenile delinquency/justice programs, crime prevention and aid to crime victims' and offenders' families, housing programs, Workforce Investment Act (WIA) programs, Older Americans Act (OAA) programs, programs dealing with domestic violence, hunger relief activities, assistance for students obtaining secondary school diploma equivalents and activities relating to outside-of-school-hour programs. But it included *no* language regarding federal preemption of state constitutions/laws and *added* provisions (1) stating that organizations getting direct public funds must offer any religious activities on a voluntary basis and separate from the assisted program and (2) when consistent with the purpose of a covered program, allowing the federal government to require that some or all of the funds in a given program be in the form of indirect aid like vouchers (aimed at permitting a faith-based organization redeeming vouchers to avoid the general prohibition on using funds for worship, instruction, or proselytization).

EO 13279 Charitable Choice Principles/Regulations: Expansion of Charitable Choice by Executive Order. After the Senate failed to approve the House-passed bill (H.R. 7 of the 107th Congress) to extend Charitable Choice rules on new terms to a wider range of programs, President Bush issued an Executive Order (EO) directing most cabinet departments and the Agency for International Development to adopt what he identified as Charitable Choice “principles” in the regulations governing their social service programs, *except where barred by law*.⁵ With some notable exceptions, these principles (and the regulations implementing them) largely follow the rules set out in H.R. 7 as passed by the House in 2001.

⁴ (...continued)

Workforce Investment Act (WIA) that forbid religious service providers to discriminate on religious grounds in their employment practices; votes were taken on May 8, 2003 (H.R. 1261, WIA) and July 25, 2003 (H.R. 2210, Head Start). On Apr. 3, 2003, the Senate passed S. 476 (the CARE Act) without provisions that Senator Santorum had sought for “equal treatment” of religious organizations as providers of federally funded social services. To win passage of the CARE Act, which contained provisions that would have expanded tax incentives for charitable giving, increased funding for the Social Services Block Grant, and established new tax-credit-financed Individual Development Accounts, Senator Santorum agreed to a compromise version that added technical assistance (a “Compassion Capital Fund”) and funding for maternity group homes, but lacked an equal treatment (Charitable Choice) title. On Sept. 17, 2003, a new version of H.R. 7, entitled the Charitable Giving Act, was passed by the House. It provided for tax incentives for charitable donations, would have authorized Compassion Capital Fund grants and funding for maternity group homes, and would have extended expiring provisions for Individual Development Accounts. However, it did not include Charitable Choice language or more funding for the Social Services Block Grant.

⁵ It appears that the Departments of Commerce, Defense, and State may not necessarily be covered by the EO’s directive. But the Commerce Department and the Small Business Administration are covered by another EO setting up Centers for Faith-Based and Community Initiatives (see later discussion of the Administration’s Faith-Based Initiative).

The EO says that faith-based organizations “should be eligible” to compete for federal financial assistance used to support social service programs without impairing their independence, autonomy, and religious expression/character, and that no organization “should be discriminated against” as a provider of federally funded services on the basis of religion or religious belief. Social service programs are defined broadly to cover all programs administered by the federal government, or by a state/local government using federal financial assistance, that provide services directed at reducing poverty, improving opportunities for low-income children, revitalizing low-income communities, helping low-income families and individuals to become self-sufficient, or otherwise aiding people in need.⁶

The principles set forth in EO13279 bar faith-based organizations from using *direct* federal financial assistance to support any “inherently religious” activity (such as worship, religious instruction, or proselytization) and specify that organizations that engage in inherently religious activities must offer them to beneficiaries separately in time and location from programs/services supported with direct federal funds. Participation in religious activities must be voluntary for service recipients. On the other hand, faith-based organizations may use their facilities to provide federally funded social services without removing or altering religious symbols or changing religious terms in their name, select board members on a religious basis, and include religious references in mission statements and other chartering/governing documents. As with most earlier Charitable Choice initiatives, the EO forbids a religious organization from discriminating against beneficiaries or potential beneficiaries on the basis of religion, religious belief, or lack of religious belief.

Absent from EO 13279 are three major provisions of H.R. 7 as passed by the House in 2001: (1) authority to convert assistance into vouchers (or some other form of indirect aid),⁷ (2) a provision dealing with a faith-based organization’s right to discriminate on religious grounds in their employment practices,⁸ and (3) language

⁶ Examples given in the EO include child care services, protective services for children and adults, foster care and adoption services, services to meet special needs, transportation assistance, job training and employment services, information/referral/counseling services, services related to soup kitchens and food banks, health support services, literacy promotion activities, mentoring services to prevent and treat juvenile delinquency and substance abuse, services related to domestic violence, and housing assistance. Expansion under the EO is covered in somewhat more detail by CRS Report RS21924, *Charitable Choice: Expansion by Executive Action*, by Joe Richardson.

⁷ As noted earlier, indirect aid may be used for religious activities because organizations would receive funds only as a result of private choices of beneficiaries.

⁸ The EO does not include language on employment discrimination. But two publications of the White House Office of Faith-Based and Community Initiatives make clear the Administration’s stance that, barring contrary provisions of law (like the laws governing the Head Start program and Workforce Investment Act programs), faith-based organizations receiving federal funds are to be allowed to discriminate in employment — (1) *Protecting the Civil Rights and Religious Liberty of Faith-Based Organizations: Why Religious Hiring Rights Must Be Preserved* and (2) *Guidance for Faith-Based and Community Organizations on Partnering with the Federal Government*. Moreover, in the SAMSHA’s final rule implementing the EO, the Bush Administration held that the Public Health Service Act’s

(continued...)

requiring that alternative service providers be furnished for beneficiaries objecting to the religious character of a provider. Also missing from EO 13279 are provisions in the original 1996 welfare reform law dealing with: (1) audits, (2) enforcement through court action, and (3) preemption of state/local laws.⁹

To carry out the principles set out by the Executive Order, the Departments of Agriculture, Education, Health and Human Services, Housing and Urban Development, Justice, Labor, and Veterans Affairs, as well as the Agency for International Development have issued regulations. Details about these regulations are available at [<http://www.whitehouse.gov/government/fbci/reg-changes.html>].

EO 13279 also amended an existing executive order (EO 11246, dating from 1965) concerning employment discrimination to specify that religious organizations that contract to provide goods or services directly to the federal government or participate in federally assisted construction contracts can discriminate on religious grounds in their employment practices.¹⁰

What Is the “Faith-Based Initiative”?

Soon after taking office, President Bush put forward an agenda to “enlist, equip, empower, and expand the heroic works of faith-based and community groups across America.” It included an expansion of tax incentives for charitable giving — covered in a separate report (CRS Report RS21144, *Tax Incentives for Charity: An Overview of Legislative Proposals*) — and extension of Charitable Choice rules (see the discussion above) to most federally supported social service programs. As already discussed, Congress has not enacted an extension of Charitable Choice rules beyond those put in law in 1996, 1998, and 2000, but the Administration has put in place most Charitable Choice rules for many federally supported social service programs through an executive order.

⁸ (...continued)

general nondiscrimination hiring rules are “inapplicable” to religious organizations demonstrating that they would substantially burden their exercise of religion. The Administration maintained that the Religious Freedom Restoration Act of 1993 (P.L. 103-141) forbids the government from substantially burdening a person’s exercise of religion unless this is the least restrictive way of furthering a compelling government interest. See the Federal Register of September 30, 2003 (68 *FR* 56429-56449).

⁹ Although the EO contains no provisions as to audits, a publication of the White House Office of Faith-Based and Community Initiatives — *Guidance to Faith-Based and Community Organizations on Partnering with the Federal Government* — notes that, like the rule in the 1996 law, audits should be limited to federal funds (when segregated).

¹⁰ EO 11246 defines “construction contract” to mean a “contract for the construction, rehabilitation, alteration, conversion, extension, or repair of buildings, highways, or other improvements to real property.” Its requirements are applicable to all federally assisted construction contracts that arise in the course of carrying out a “federal grant, contract, loan, insurance, or guarantee....” See also CRS Report RL32195, *Charitable Choice: Legal and Constitutional Issues*, by Angie Welborn.

As part of his faith-based initiative, the President also has established a White House Office of Faith-Based and Community Initiatives (EO 13199) and has set up Centers for Faith-Based and Community Initiatives in 10 agencies: the Departments of Agriculture, Commerce, Education, Health and Human Services, Housing and Urban Development, Justice, Labor, and Veterans Affairs, as well as the Small Business Administration and the Administration for International Development (EO 13198, EO 13199, EO 13280, EO 13342). These offices have the role of ensuring that faith-based and community organizations have improved access to the programs operated by their agencies.

According to the White House Office of Faith-Based and Community Initiatives, in FY2004, a total of \$2 billion in funding for faith-based organizations was provided through 151 *federally administered* competitive grant programs for domestic social services run by six departments (Agriculture, Education, Health and Human Services, Housing and Urban Development, Justice, and Labor) and 17 program areas at the Agency for International Development. This represented 10% of the \$19.5 billion spent by the surveyed programs.¹¹ The three agencies having the largest pools of funding available for competitive grant programs reported 7% (the Department of Health and Human Services, 73 programs), 23% (the Department of Housing and Urban Development, 11 programs), and 14% (the Agency for International Development). For the five departments for which there is information for both FY2003 and FY2004, funding for faith-based organizations increased by 14%, and the number of grants jumped by 20%.

A fourth component of the initiative is the Compassion Capital Fund, a program operated by the Department of Health and Human Services' Administration for Children and Families that provides direct grants to faith- and community-based organizations to help them expand their services. This program (its funding is included in the totals noted above) is covered in a separate report, CRS Report RS21844, *The Compassion Capital Fund: Brief Facts and Current Developments*.

In addition to the Compassion Capital Fund, the initiative also is perceived to encompass a number of *specific projects* in which faith-based organizations play (or are expected to play) a substantial role: e.g., the SAMSHA's "Access to Recovery" grants for substance abuse treatment, a matching grant program to mentor children of prisoners, a prisoner pre-release pilot project, a maternity group home program, a pilot project to increase participation of faith-based organizations in community development programs, responsible fatherhood projects, construction projects involving historic religious structures, and "anti-gang" efforts directed at youth.

¹¹ Further details on federal competitive grant spending through faith-based organizations are available at the website for the White House Office of Faith-Based and Community Initiatives [<http://www.whitehouse.gov/government/fbci>], under the heading *Data Collection*. Spending figures do not include sub-grants through intermediary organizations or grants of federal funds administered by states and localities. As such, they are underestimates.

How Do Charitable Choice Rules Differ from Preexisting Practices?

Charitable Choice rules represent a shift in how the government treats faith-based organizations applying for social service grants. The pre-existing general rule often barred aid to “pervasively sectarian” *organizations* (unless they segregated their government-provided funding or government-supported services, or provided a service/benefit that was effectively secular in nature). Under Charitable Choice rules, aid is denied for “inherently religious” *activities*, like worship or proselytization (unless they are indirectly funded through vouchers and the like). Examples of this change include allowing religious organizations and staff to receive government funds (as long as they separate their religious activities from the provision of government-funded services in time and place), permission to use government money for construction projects (to the extent money is devoted to non-religious purposes), allowing religious symbols and mission statements, and authority for discrimination in employment practices.

Under pre-Charitable Choice practices, many faith-based organizations participated in federally supported programs. Federal grants typically provided that private or nonprofit entities were eligible to participate, including religious and other private organizations. For example, religious organizations have and continue to run major portions of Head Start, housing, Older Americans Act, employment and training, emergency feeding/housing (like soup kitchens and homeless housing initiatives), and school meal programs, as well as activities financed through Child Care and Development Block Grants and Social Services Block Grants. Such entities as religiously-sponsored schools and local organizations, Catholic Charities USA, Lutheran Services in America, the Salvation Army, United Jewish Communities, Habitat for Humanity, and numerous other religiously affiliated or religiously sponsored organizations have long participated in publicly funded social service programs. These groups often are incorporated separately from their sponsoring religious organization and have tax-exempt status under Section 501(c)(3) of the Internal Revenue Code; they also tend to be relatively large organizations.

However, interpretations and applications of the Establishment (of religion) Clause of the First Amendment to the U.S. Constitution, as well as policy decisions by administrators, generally required programs operated by religious groups that receive direct federal funding to be essentially secular in nature if they wish to receive federal funds.¹² Religious symbols and art have sometimes had to be removed; religious worship, instruction, proselytizing have been barred as a condition for receipt of government money; and construction financed with federal money has been denied to faith-based groups. Moreover, faith-based entities in which religion is a pervasive element in all that they do, have (until recently) been found to be “pervasively sectarian” and, in many cases, forbidden government aid.

This view was put forward by the Clinton Administration in statements following on or accompanying signing the 1996 welfare reform law, the 1998 CSBG

¹² For more information, see CRS Report RL32195, *Charitable Choice: Legal and Constitutional Issues*, by Angie Welborn.

amendments, and the two substance abuse prevention and treatment program measures enacted in 2000 mentioned above. These statements typically noted that it was the Administration's position that it would be "unconstitutional if and to the extent it [the Charitable Choice provision] were construed to permit governmental funding of pervasively sectarian organizations, as the term has been defined by the courts" and construed the law in question as "forbidding the funding of pervasively sectarian organizations and as permitting Federal, State, and local governments involved in disbursing ... funds to take into account the structure and operations of a religious organization in determining whether such an organization is pervasively sectarian."¹³

Why Are Charitable Choice Rules Controversial?

Charitable Choice rules effectively overturn long-standing practice governing how faith-based organizations are treated when applying for government assistance.

While government aid to religious organizations, in itself, is not the major issue, the *conditions* of this assistance are.¹⁴ In effect, Charitable Choice rules change the ground rules for faith-based organizations applying for government grants; they are to be judged by whether their "activities" are government-funded rather than their religious "character." Moreover, specifics of Charitable Choice rules are of particular concern to opponents: hiring discrimination rules, provisions for benefits to be converted to indirect (e.g., voucher) aid in order to avoid prohibitions against spending on religious activities, rules regarding alternative service providers where an applicant/recipient objects because of the religious character of the program, and provisions that may allow recipient faith-based organizations to infuse religious content into their federally funded social service programs (e.g., the potential weakness of audit mechanisms, the vagueness of provisions dealing with the religious content of services provided).

Charitable Choice supporters claim that:

- Pre-Charitable-Choice rules effectively discriminated against religious organizations, particularly smaller "congregation-based" projects/organizations;

¹³ See (1) comments accompanying the Clinton Administration's "Proposed Correcting Amendments to P.L. 104-193, the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), (2) comments in President Clinton's "Statement on Signing the Community Opportunities, Accountability, and Training and Educational Services Act of 1998 [P.L. 105-285], October 27, 1998," (3) comments in President Clinton's "Statement on Signing the Children's Health Act of 2000 [P.L. 106-310], October 17, 2000," and (4) comments in President Clinton's "Statement on Signing the Consolidated Appropriations Act, FY2001 [P.L. 106-554], December 21, 2000." It is important to note that court interpretations relating to the "pervasively sectarian" test (and other related issues) have been changing; see CRS Report RL32195, *Charitable Choice: Legal and Constitutional Issues*, by Angie Welborn.

¹⁴ Charitable Choice opponents have not objected to the array of government aid through faith-based organizations pre-dating Charitable Choice rules.

- Pre-Charitable-Choice rules often interfered with what supporters see as religious organizations’ right (under Title VII of the Civil Rights Act) to use religious criteria in their hiring practices, limiting their access to federal aid;¹⁵
- Faith-based programs can attract volunteer time; staff have a “sense of mission” that inspires those they serve; these organizations often help in ways typical government aid cannot (providing love and friendship, as well as services, meals, training, and guidance);
- Charitable Choice rules have been written to protect constitutional values regarding the practice of religion and the religious liberty of beneficiaries;
- Charitable Choice rules protect the religious character of faith-based service providers.

Opponents maintain that:

- Charitable Choice rules may lead to the use of government funds to promote specific religious practices or beliefs;
- Since money is fungible, government funds given for a secular purpose could indirectly help fund a faith-based organization’s religious purposes, undermining governmental neutrality toward religion;
- Charitable Choice rules can require the government to decide what is a legitimate “religion,” and what constitutes “worship” “preaching,” and “proselytizing”;
- Expansion of direct grants to religious groups could make churches dependent on government, eroding their mission and tending to secularize them; and
- Charitable Choice rules promote government-funded discrimination by allowing religious organizations to hire and fire on the basis of religion, using federal dollars.¹⁶

Are Faith-Based Programs More Effective than Others?

There is much anecdotal evidence on the effectiveness of social service programs operated by faith-based organizations, but there are no rigorous studies comparing their performance with other initiatives. For example, programs often cite impressive outcomes for graduates, but fail to report what fraction of participants stayed to graduate, or how participants were chosen. Three reports shed some light on this issue: (1) *Faith-Based vs. Secular: Using Administrative Data to Compare the Performance of Faith-Affiliated and Other Service Providers* (this report is available from the Roundtable on Religion and Social Welfare Policy at

¹⁵ For more information on the “Title VII” employment discrimination debate, see (1) CRS Report RL32195, *Charitable Choice: Legal and Constitutional Issues*, by Angie Welborn, and (2) the March 2, 2005, House floor debate over H.R. 27 (amendments to the Workforce Investment Act).

¹⁶ See note 15 above.

[<http://www.religionandsocialpolicy.org>]), (2) *Charitable Choice: Overview of Findings on Implementation* (Government Accountability Office, GAO Report 02-337), and (3) *Charitable Choice: Federal Guidance on Statutory Provisions Would Improve Consistency of Implementation* (GAO Report 02-887).

Are Charitable Choice Rules Being Litigated?¹⁷

Yes. According to two recent publications by the Roundtable on Religion and Social Welfare Policy — *Partnerships Between Government and Faith-Based Organizations: The State of the Law - 2004* and *The State of the Law 2005: Legal Developments Affecting Partnerships Between Government and Faith-Based Organizations*¹⁸ — several significant court cases relating to Charitable Choice rules are of particular interest.

- In *Locke v. Davey*, the U.S. Supreme Court upheld states' authority to maintain their own policies regarding church-state separation.
- In *American Jewish Congress v. Corporation for National and Community Service*, the U.S. District Court for the District of Columbia held unconstitutional various religion-related aspects of the AmeriCorps Educational Award program. However, the U.S. Court of Appeals for the District of Columbia Circuit reversed this decision. The Court of Appeals' primary holding was that AmeriCorps rules are *not* unconstitutional in that individuals who fulfill their AmeriCorps service at religious institutions and opt to teach religion may count only time spent on non-religious activities toward their counted service hours, are prohibited from wearing the AmeriCorps logo when doing so, and have made a personal choice to do so.
- In *Catholic Charities v. Superior Court*, the California Supreme Court rejected both federal and state constitutional arguments against a state legislative decision that requires that most employers (including Catholic Charities) include contraceptive drugs in insurance coverage.
- In *Freedom from Religion Foundation, Inc. v. Montana Office of Rural Health et al.*, a U.S. District Court ruled unconstitutional a government-financed, faith-based program run by the Montana Office of Rural Health.¹⁹
- In *Freedom from Religion Foundation, Inc. (and others) v. Jim Towey, Director of the White House Office of Faith-Based and Community Initiatives et al.*, a U.S. District Court dismissed

¹⁷ See also (1) CRS Report RL32195, *Charitable Choice: Legal and Constitutional Issues*, by Angie Welborn, and (2) CRS Report RL31043, *Public Aid to Faith-Based Organizations (Charitable Choice) in the 107th Congress: Background and Selected Legal Issues*, by David Ackerman.

¹⁸ These reports and updates on current cases are available at the Roundtable's website, [<http://www.religionandsocialpolicy.org>].

¹⁹ This decision was very narrowly focused on a specific "parish nurse center" grant that involved the state agency's director.

virtually all of the claims challenging the general purport of federal Charitable Choice rules. However, the U.S. Court of Appeals for this Circuit has *reinstated* significant portions of the lawsuit.

- In *Lown (and others) v. the Salvation Army, Inc.; Commissioner, New York City Administration for Children’s Services (and others)* a U.S. District Court was asked to decide the extent to which civil rights laws or the Constitution preclude government financing of faith-based organizations that prefer co-religionists in their employment practices. The Court dismissed significant portions of the plaintiffs’ case, but other major issues are still pending.
- In *Americans United for Separation of Church and State v. Prison Fellowship Ministries (and others)*, a U.S. District Court is called on to decide on a challenge to constitutionality of a program that uses religious means to prepare prisoners to return to society as “productive and law-abiding citizens.”
- In *Moeller v. Bradford County*, a U.S. District Court is asked to rule on a challenge that a program run under a government grant to a correctional facility is unconstitutionally suffused with religious activities and employs only those of its faith in violation of constitutional and statutory prohibitions.

What Are States Doing?

A major item on the Bush Administration’s Charitable Choice agenda is encouraging states to pursue Charitable Choice initiatives. To date, over 30 states have set up offices or liaisons for faith-based and community initiatives that perform outreach and other functions similar to those carried out by federal offices for faith-based and community initiatives.²⁰ State actions are important because the majority of social service assistance is administered through state agencies that receive federal support. However, a number of states (and localities) have rules built into their constitution, or set up by law, that may limit their ability to expand the use of faith-based organizations in providing services — e.g., employment discrimination provisions, limits on the use of funds for religious organizations.²¹

2005 Gulf Coast Hurricane Rules²²

Virtually all federally supported programs dealing with the 2005 Gulf Coast hurricanes followed their regular rules regarding help delivered through faith-based organizations (including recent regulatory changes opening up participation to faith-based organizations). However, subject to some controversy, the Federal Emergency

²⁰ State contacts (and federal offices) may be reached through the White House faith-based and community initiative website: [<http://www.whitehouse.gov/government/fbci/>].

²¹ For more information, see *The State of the Law — 2005: Legal Developments Affecting Partnerships Between Government and Faith-Based Organizations*. This report is available at the website of the Roundtable on Religion and Social Welfare Policy: [<http://www.religionandsocialpolicy.org/>].

²² For more information, see the report cited in note 21 above.

Management Agency (FEMA) changed its prior rules so that faith-based organizations would be eligible for reimbursement for a wide array of costs — basic provisions (like food, water, blankets), facilities (rent, expenses for operation, modification, and repair), and services (medical care, counseling, and security).

Additional Resources

Two major organizations closely follow issues relating to government and faith-based organizations and Charitable Choice: (1) the White House Office of Faith-Based and Community Initiatives at [<http://www.whitehouse.gov/government/fbci/>]²³ and (2) the Roundtable on Religion and Social Welfare Policy at [<http://www.religionandsocialpolicy.org>].

Recent Legislative Developments

Workforce Investment Act (WIA).²⁴ WIA reauthorization legislation is pending. On March 2, 2005, the House passed the Job Training Improvement Act (H.R. 27; H.Rept. 109-9). This bill governs activities conducted under the WIA. Among other amendments, it would give grantees that are religious organizations an *exemption* from the WIA's general rule barring providers from discriminating in their employee hiring practices on religious grounds (similar to provisions in the House-passed WIA amendments of 2003 (H.R. 1261). A House floor amendment to delete this amendment, and thereby retain the WIA employment discrimination rule covering religious groups that are grantees, was defeated. The current Senate version of the WIA legislation (S. 1021) would not change existing law.

Community Services Block Grants (CSBG).²⁵ As with WIA reauthorization legislation, CSBG reauthorization is pending. On January 25, 2005, Representative Osborne (and other Republican Members, including the chairman of the House committee of jurisdiction) introduced the Improving the Community Services Block Grant Act of 2005 (H.R. 341). Among other amendments to the law governing CSBG, this bill proposes to *add* a provision barring providers that are religious organizations from discriminating against beneficiaries (or potential beneficiaries) on the basis of religion or religious belief.²⁶ It does not, however, include more controversial proposals that would *delete* some existing CSBG Charitable Choice rules (e.g., those allowing grantees to discriminate in hiring).

²³ This contact includes links to the offices of faith-based and community initiatives in individual federal agencies and states.

²⁴ For more information on the WIA and WIA reauthorization, see CRS Report RL32778, *Workforce Investment Act of 1998: Reauthorization of Job Training Programs*, by Ann Lordeman.

²⁵ For more information on CSBG and CSBG reauthorization (including discussion of proposals related to faith-based organizations in earlier Congresses), see CRS Report RL32872, *Community Services Block Grants (CSBG): Funding and Reauthorization*, by Karen Spar and Garrine P. Laney.

²⁶ As noted earlier, CSBG law does not now include this feature of Charitable Choice rules.

Head Start.²⁷ As with WIA and CSBG reauthorization legislation, Head Start reauthorization is pending. On September 22, 2005, the House passed a Head Start reauthorization measure (H.R. 2123), which, as amended on the House floor, includes a provision changing Head Start law to allow faith-based provider to discriminate in hiring based on religion. The current Senate version of the Head Start reauthorization bill (S. 1107) does not include a similar faith-based hiring provision.

Putting Executive Order 13279 into Law.²⁸ On March 2, 2005, Representative Green introduced a bill entitled the Tools for Community Initiatives Act (H.R. 1054). This bill would establish an Office of Faith-Based and Community Initiatives in the Executive Office of the President charged with encouraging faith-based and community initiatives and working to eliminate federal barriers to the participation of faith- and community-based entities in federal programs. In effect, it proposes to put into law the provisions of Executive Order 13279 (and its accompanying executive orders). Hearings on this bill were held on May 3 and June 21, 2005 — before the House Government Reform Committee’s Subcommittee on Criminal Justice, Drug Policy, and Human Resources. No further action has been taken.

²⁷ For more information on Head Start and Head Start reauthorization (including discussion of proposals related to faith-based organizations in earlier Congresses), see CRS Report RL30952, *Head Start: Background and Issues*, by Melinda Gish.

²⁸ For a discussion of Executive Order 13279 (and its accompanying executive orders), see the earlier part of this report entitled “What Are Charitable Choice Rules?”