

# United States Senate

WASHINGTON, DC 20510

February 19, 2020

The Honorable Eugene Scalia  
Secretary of Labor  
U.S. Department of Labor  
200 Constitution Ave. NW  
Washington, DC 20210

Dear Secretary Scalia:

We write to strongly oppose the Department of Labor's (DOL or the Department) proposed regulation, "Equal Participation of Faith-Based Organizations in the Department of Labor's Programs and Activities: Implementation of Executive Order 13831," which was published in the Federal Register on January 17, 2020. The proposed regulation—developed under the guise of religious liberty—is actually an attack on religious freedom that would open the door to federally-funded discrimination. The proposed rule drastically expands religious exemptions that could provide organizations that receive federal funds a license to discriminate against employees and beneficiaries who are LGBTQIA+ and women, and lifts protections designed to insure beneficiaries are not forced to participate in a religion not their own. We demand the Department immediately withdraw this proposed rule.

## **1. The Proposed Rule Would Allow Religious Organizations to Use Federal Funding to Discriminate Against Beneficiaries**

We are deeply concerned that by expanding religious exemptions, the Administration's proposed rule would allow faith-based organizations to discriminate against employees because of their sex, sexual orientation, or gender identity. The proposed rule would allow faith-based entities to make employment decisions on the "basis of [their employees'] acceptance to or adherence to the religious requirements or standards of the organization, but not on the basis of any other protected characteristic." There appear to be no guardrails to ensure faith-based providers receiving taxpayer funds do not use religion as a pretext to discriminate when making employment decisions.

This proposed rule will exacerbate ongoing forms of discrimination and harassment against the LGBTQIA+ community. In a 2017 nationally representative survey reporting harassment in the LGBTQ community, 20 percent of LGBTQ people said they were discriminated against when applying for jobs.<sup>1</sup> In the same survey, nearly 60 percent of LGBTQ people agreed with the statement, "LGBTQ people where I live have fewer employment opportunities."<sup>2</sup> In a March 2018 report on LGBTQ poverty and economic justice, between 15 percent and 43 percent of

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<sup>1</sup> <https://www.npr.org/documents/2017/nov/npr-discrimination-lgbtq-final.pdf>

<sup>2</sup> *Id.*

LGBTQ workers reported having experienced discrimination on the job.<sup>3</sup> In the 2015 U.S. Transgender Survey, 30 percent of survey respondents who had a job the previous year reported being fired, were denied a promotion, or experienced some form of mistreatment.<sup>4</sup>

The proposed rule will make it easier for employers to discriminate against women and pregnant workers. Women already face significant discrimination in the workplace, which this rule would further embolden.<sup>5</sup> In a 2017 survey, approximately four out of ten women reported facing discrimination in the workplace.<sup>6</sup> Historically, some of this discrimination has resulted from women exercising reproductive health decisions. For example, pregnancy discrimination cases filed with the EEOC have risen substantially over recent decades,<sup>7</sup> while a 2014 survey estimates nearly a quarter million women are denied requests for accommodations related to pregnancy each year.<sup>8</sup> Some employers have threatened to fire employees for using contraception, while others have fired workers for being unmarried and pregnant,<sup>9</sup> or for having an abortion.<sup>10</sup> The proposed rule could allow faith-based entities to exacerbate existing challenges facing women and discriminate against those employees who do not share the same beliefs of the employer.

## **2. The Proposed Rule Eliminates Requirements to Protect Religious Liberty for Beneficiaries**

The proposed regulation also eliminates protections for people who may be uncomfortable or unable to receive services from religious providers, implicating the religious liberty of those beneficiaries. In the existing Department regulation, if someone who is seeking services objects to the religious character of an organization that provides services under the program, that organization must promptly undertake reasonable efforts to identify and refer the beneficiary or prospective beneficiary to an alternative provider to which the beneficiary or the prospective beneficiary has no objection.<sup>11</sup> The Department's proposal abandons the referral requirement and provides no substitute to protect beneficiaries' ability to go to a non-religious provider.

The current referral requirement stems from the recommendations of the Advisory Council on Faith-Based and Neighborhood Partnerships (the Council), which President Obama initiated to strengthen and assess the relationships among faith-based entities, community-serving organizations, and the government.<sup>12</sup> The Council members believed the referral requirement

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<sup>3</sup> [https://socialjusticesexuality.com/intersecting\\_injustice/](https://socialjusticesexuality.com/intersecting_injustice/)

<sup>4</sup> <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>

<sup>5</sup> <https://www.cnbc.com/2017/12/19/one-fifth-of-american-adults-have-been-sexually-harassed-at-work.html>

<sup>6</sup> <https://www.pewresearch.org/fact-tank/2017/12/14/gender-discrimination-comes-in-many-forms-for-todays-working-women/>

<sup>7</sup> <https://www.americanprogress.org/issues/women/news/2018/11/02/460353/efforts-combat-pregnancy-discrimination/>

<sup>8</sup> <http://www.nationalpartnership.org/our-work/resources/workplace/pregnancy-discrimination/listening-to-mothers-experiences-of-expecting-and-new-mothers.pdf>

<sup>9</sup> [https://www.huffpost.com/entry/tom-price-women-fired-reproductive-rights\\_n\\_587fca54e4b00d44838ca8a5](https://www.huffpost.com/entry/tom-price-women-fired-reproductive-rights_n_587fca54e4b00d44838ca8a5)

<sup>10</sup> <https://louisianarecord.com/stories/512676950-u-s-district-court-rules-that-state-law-forbids-abortion-discrimination-in-workplace>

<sup>11</sup> 29 CFR § 2.35

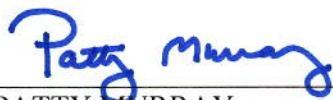
<sup>12</sup> The Advisory Council recommended the government "assure the religious liberty rights of the clients and beneficiaries of federally funded programs by strengthening appropriate protections." One of the protections included affirming "that a beneficiary who requests an alternative service provider, due to that beneficiary's

was critical to providing adequate protection for the “fundamental religious liberty rights of social service beneficiaries.”<sup>13</sup> The Department offers no reasonable explanation for its decision to abandon this careful, consensus-based effort by a diverse group of grassroots leaders and other religious experts to protect religious liberty.

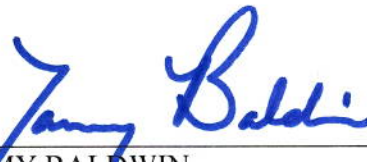
Similarly, the proposed rule eliminates the requirement that religious providers receiving taxpayer funding must explain peoples’ religious liberty and other rights in writing. Currently, religious providers must provide prior written notice to a beneficiary explaining they are not required to attend or participate in any explicitly religious activities (including activities that involve overt religious content such as worship, religious instruction, or proselytization) or activities that are voluntary. The notice also makes clear they can report suspected violations to the DOL’s Civil Rights Center.<sup>14</sup> The proposed rule eliminates this notice requirement.

People cannot exercise their rights if they have no understanding of the scope and nature of those rights. Eliminating the requirement risks exposing beneficiaries to, and leaving them unable to effectively object to, discrimination or religious coercion from a provider. These protections are vital to ensuring people never have to make the decision between accessing services, often critical, and retaining their religious freedom. Eliminating notice of these protections unfairly elevates the interests of entities over the needs and rights of people seeking vital services.

Sincerely,



PATTY MURRAY  
United States Senator



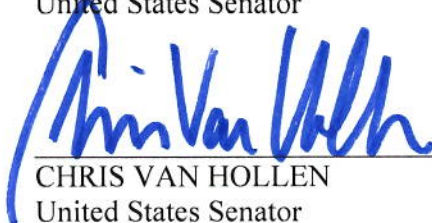
TAMMY BALDWIN  
United States Senator



KIRSTEN GILLIBRAND  
United States Senator



RICHARD J. DURBIN  
United States Senator



CHRIS VAN HOLLEN  
United States Senator



BENJAMIN L. CARDIN  
United States Senator

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objection to the religious character of the initial service provider, shall have his or her objection redressed either by referral to an alternative provider which is religiously acceptable to the beneficiary, or an alternative provider which is secular.”

<sup>13</sup> <https://obamawhitehouse.archives.gov/sites/default/files/microsites/ofbnp-council-final-report.pdf>

<sup>14</sup> 29 CFR § 2.34



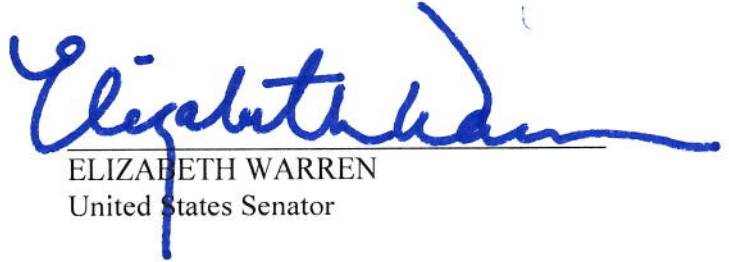
SHELDON WHITEHOUSE  
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