TESTIMONY

OF

J. BRENT WALKER

ON BEHALF OF

THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS

BEFORE THE

SUBCOMMITTEE ON HOUSING AND COMMUNITY OPPORTUNITY

OF THE

HOUSE FINANCIAL SERVICES COMMITTEE

UNITED STATES HOUSE OF REPRESENTATIVES

REGARDING PROPOSED CHANGES TO HUD RULES

TUESDAY, MARCH 25, 2003

Introduction

Thank you, Mr. Chairman and members of the Subcommittee, for this opportunity to speak to you on a matter as important as religious liberty.

I am J. Brent Walker, executive director of the Baptist Joint Committee on Public Affairs (BJC). I am an ordained Baptist minister. I also serve as an adjunct professor of law at Georgetown University Law Center, where I teach an advanced seminar in church-state law. I speak today, however, only on behalf of the BJC.[1]

The BJC serves the below-listed Baptist bodies,[2] focusing exclusively on public policy issues concerning religious liberty and its constitutional corollary, the separation of church and state. For sixty-eight years, the BJC has advocated for a well-balanced, sensibly centrist approach to church-state issues. We take seriously both religion clauses in the First Amendment – No Establishment and Free Exercise – as essential guarantors of God-given religious liberty.

No principle is more important to Baptists and the BJC than religious liberty and separation of church and state. We embrace the words of John Leland, a colonial Virginia Baptist evangelist, who said: "The fondness of magistrates to foster Christianity has caused it more harm than all the persecutions ever did." That is why for the past eight years the BJC has fought various initiatives that would allow government to fund religious ministries. We specifically opposed H.R.7.

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[1] My curriculum vitae is attached as Exhibit A. Neither I nor the BJC has received a federal grant or contract in the current or preceding two fiscal years.

[2] Alliance of Baptists, American Baptist Churches in the U.S.A., Baptist General Association of Virginia, Baptist General Conference, Baptist General Convention of Texas, Baptist State Convention of North Carolina, Cooperative Baptist Fellowship, National Baptist Convention of America, National Baptist Convention U.S.A. Inc., National Missionary Baptist Convention, North American Baptist Conference, Progressive National Baptist Convention Inc., Religious Liberty Council, and Seventh Day Baptist General Conference.

The Problems with Government Funding Religion

We join others in applauding President Bush's recognition of religion's vital role in addressing social ills. We also appreciate the good works of non-profit organizations, including religiously affiliated ones, in careful cooperation with government entities, such as the Department of Housing and Urban Development. But we believe religion will be harmed, not helped, by efforts to direct government money to fund pervasively religious enterprises or otherwise to advance religion.

This is precisely what the administration is trying to do through its faith-based initiative and its proposed amendments to the HUD regulations. As the BJC has said for several years, government-funded religion is the wrong way to do right. Attempts to "level the playing field" to promote religion usually result in religion getting leveled.

The problems with government-funded religion are many.

First, it raises grave constitutional concerns. The United States Supreme Court has long said that governmental financial aid to pervasively sectarian organizations, even for ostensibly secular purposes, violates the Establishment Clause of the First Amendment. Pervasively religious entities–ones that are so fundamentally religious that they cannot or will not separate secular and religious functions – should be disqualified from receiving government grants because to fund them is to fund religion. The Supreme Court has also condemned funding religious activity even if done in a non-pervasively religious environment.

Second, it violates the rights of taxpayers. Just as funding pervasively religious organizations or specific religious activities violates the First Amendment's Establishment Clause, using taxes to advance religion violates the First Amendment's

free exercise principles. Although the Supreme Court has never ruled that taxpayers have standing to assert a free exercise challenge to a funding scheme, this is exactly what Thomas Jefferson had in mind when he said that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical." It was over 200 years ago, and it is today. Government should not be allowed to use your tax money to promote my religion.

Third, it results in excessive entanglement between government and religion. It is an iron law of American politics that government regulates what it funds. This is what a Virginia pastor friend of mine meant when he asked government not to give us any "pats on the back." For all too often a friendly pat by Uncle Sam turns into a hostile shove by Big Brother. There is nothing more detrimental to the autonomy of religious organizations than regulation at the hand of government officials.

Fourth, it dampens religion's prophetic voice. Religion has historically stood outside of government's control, serving as a critic of government. How can religion continue to raise a prophetic fist against government when it has the other hand open to receive a government handout? It cannot.

As Dr. Martin Luther King, Jr., arguably the twentieth century's best example of religion's prophetic voice, warned:

> The church must be reminded that it is not the master or the servant of the state, but rather the conscience of the state. It must be the guide and the critic of the state, and never its tool. If the church does not recapture its prophetic zeal, it will become an irrelevant social club without moral or spiritual authority.[3]

[3] King, Jr. Martin Luther, *Strength to Love*, 1963.

Fifth, it encourages unhealthful rivalry and competition among religious groups. We enjoy religious peace in this country despite our dizzying diversity, for the most part, because government has stayed out of religion.

Government funding drags religion into the highly competitive governmental appropriations process. Government does not have the money to fund every religious group in this country. It will have to pick and choose. All too often, the majority faith in a particular area will prevail. But regardless of who wins, the process will not be pretty.

This is just a summary of a few examples of the problems with government funding of religion.[4]

Problems with Proposed Rules to HUD Programs Concerning Faith-Based Organizations

These criticisms of the faith-based initiatives, and "charitable choice" in particular apply to the proposed HUD rule changes. While these difficult and sensitive issues deserve debate by Congress, the administration is going forward aggressively in ways that tread dangerously on constitutional principles and threaten the autonomy of religious organizations and religious freedom generally.

The BJC is particularly concerned about three aspects of this proposal. A more comprehensive critique can be found in other publications.[5]

1. The Proposed HUD Rules Open the Door for Government-Funded Religion.

[4] For an elaboration of these principles, see testimony of J. Brent Walker regarding "Implementation of Existing Charitable Choice Programs," before Subcommittee on Constitution, April 24, 2001.

[5] See, Ira Lupu and Robert Tuttle, "Developments in the Faith-Based and Community Initiatives: Comments on Notices of Proposed Rule Making and Guidance Document," *The Roundtable on Religion in Social Welfare Policy*, January 2003. See also, Comments on Proposed Rule on "Participation in HUD programs by Faith-based Organizations; Providing for Equal Treatment of All HUD Program Participants," filed by members of this body, March 3, 2003.

It is settled that government may not fund pervasively sectarian or pervasively religious organizations and enterprises.[6] These institutions and enterprises are ones in which "religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission."[7] Although four current members of the Supreme Court have questioned the "pervasively sectarian" doctrine, it remains good law and an important concept in Establishment Clause jurisprudence.

The proposed HUD rules ignore the pervasively sectarian doctrine with regard to the eight programs covered. In fact, the proposed rules militate in the opposite direction. The proposed rules pick up language from the CARE bill to the effect that faith-based organizations are not required to remove "religious art, icons, scriptures, or other religious symbols"; and may "retain religious terms in its organization's name, select its board member on a religious basis, and include religious references in its organization's mission statements and other governing documents."

It is true that, if an organization is *otherwise qualified* (i.e., is not pervasively sectarian), the mere presence of icons, a religious name, board makeup or a faith-based mission statement by *themselves* do not vitiate that qualification. However, the proposed rules are written in a way that downplay the "otherwise qualified" concept and appear to open the door for pervasively sectarian organizations to participate in the HUD programs.

Even where an organization is not pervasively religious, but only "religiously affiliated," it cannot use government funds to finance "specifically religious activities."[8]

The proposed rules try to answer this constitutional requirement by prohibiting the funds from being used to support "inherently religious activities, such as worship,

[6] *Bowen v. Kendrick* 487 U.S. 589 (1988), *Hunt v. McNair* 413 U.S. 734 (1973).
[7] *Hunt* at 743.

religious instruction, or proselytization." As is ably and persuasively argued by Professors Lupu and Tuttle, the novel category of "inherently religious activities" is highly problematic.

Although mentioned in several concurring opinions, the "inherently religious" language has been included in only one majority opinion.[9] Nowhere does the Court in *Bowen* indicate that the Establishment Clause prohibits *only* "inherently religious activities." Indeed, the Court in *Hunt* made it clear that the Establishment Clause is violated when an organization funds a "specifically religious activity" – even in a "substantially secular setting."[10] The Court in *Hunt* does not employ the concept of "inherently religious."

The problem with this nebulous, ill-defined concept of "inherently religious" is that the Establishment Clause prohibits activities which, while perhaps not "inherently religious," may be administered in various religious ways and contexts (e.g., training seminars, counseling services, and other activities).

Additional language in the proposed rules belie attempts to respect settled constitutional strictures. Despite prohibitions on funding "inherently religious doctrines" and the requirement that such activities be privately funded, separately offered, and voluntarily attended, the proposed rules allow a religious organization to "retain its independence" from government and "retain its authority over its internal governance."

These bold caveats send a strong message to religious organizations that constitutional and statutory limits on government-funded religion need not be taken seriously or, at a minimum, create further ambiguity on where the lines are to be drawn.

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[8] *Ibid.*
[9] *Bowen* at 605.

Thus, as to both pervasively sectarian and religious affiliated providers, the proposed rule opens the door for government-funded religion that goes beyond what is allowed by the Supreme Court.

2. The Proposed HUD Rules Allow for Religious Structures to be Constructed with Government Funds that Violate the Establishment Clause.

While the proposed rules acknowledge that HUD funds cannot be used to pay for a structure to be used for "inherently religious activities," the rules allow such funding for structures used for other purposes. The rules specifically permit structures to be used for both secular and religious purposes, as long as the funding is proportionately reduced to equal the percentage of religious use.

This attempt to prorate the funding, first of all, raises severe constitutional concerns. Supreme Court decisions ban government construction grants that are used to fund buildings dedicated to religious uses.[11] Although the Supreme Court's Establishment Clause jurisprudence has been modified since the early 1970s, this principle has not been changed or compromised.

In addition, this approach creates the potential for excessive entanglement between church and state. It raises the specter of horrendous accounting problems, logistical difficulties, and burdensome auditing and record keeping. Moreover, it would almost certainly create the need for perpetual monitoring concerning the use of the buildings by government or administrative agencies.

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[10] *Hunt, at 743.*
[11] *Tilton v. Richardson*, 403 U.S. 672 (1971); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973).

This problem is exacerbated, as Professors Lupu and Tuttle point out, by "shifting allocations over time, between funding-eligible and funding-ineligible uses." Buildings last a long time. Staff come and go and programs change and are eliminated. What happens if, over time, the faith-based organization wants to increase its percentage of religious use? This would result in an unconstitutional funding, as was the case in *Tilton*, or even more monitoring of the internal affairs of the faith-based organization, or both.

In any case, the rule change on government funding of religious structures opens the can of constitutional and administrative worms that will be inimical to the autonomy of religious organizations and promote the very "excessive entanglement" which the First Amendment was designed to prohibit.

3. The Proposed HUD Rules Permit Discrimination on the Basis of Religion in Hiring in Government-Funded Programs.

We support Title VII's exemption for churches and other religious organizations allowing them to discriminate on the basis of religion in their employment practices. This exemption, when applied to privately funded activities and enterprises, appropriately protects the church's autonomy and its ability to perform its mission. Courts have interpreted this exemption not only to apply to clergy, but also to all of the religious organization's employees including support staff, and not only to religious affiliations, but also to religious beliefs and practices.[12] We support this expansive understanding of religious accommodation under Title VII.

However, the proposed rules purport to allow this kind of discrimination even in programs substantially funded by government money. While allowing religious organizations to discriminate in the private sector is a welcomed accommodation of

religion, to subsidize religious discrimination with tax dollars is arguably unconstitutional, and in any case, an unconscionable advancement of religion that simultaneously turns back the clock on civil rights.

Although the Supreme Court has never dealt with the issue of whether a religious organization may continue to discriminate on the basis of religion when funded by tax dollars, at least one federal district court has ruled that such funding violates the Establishment Clause.[13] At the very least, this new provision will invite a flood of litigation and ill will as, indeed, this subcommittee is aware. This was perhaps the most divisive issue presented in H.R. 7 in the 107th Congress.

The proposed changes to the HUD rules acknowledge (albeit inadequately as pointed out above), that government funds cannot be used to support "inherently religious activities" or to discriminate against program beneficiaries. Why then should they want or need to discriminate on the basis of religion in hiring? I can think of no reason other than to press the envelope of permissible religious activities beyond the nebulous confines of the limitations contained in the proposed rules.

Personal Experience

I have worked for the BJC for over thirteen years – first as associate general counsel, then as general counsel, and now as executive director. We receive calls every day from constituents, media, and other interested parties with questions, concerns, and issues on a variety of church-state matters. I do not recall a single problem being brought to my attention concerning the manner in which the HUD rules and regulations presently operate.

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[12] *Amos v. Bishop*, 483 U.S. 327 (1987).
[13] *Dodge v Salvation Army*, 48 EMPL. PRAC. DEC. P38, 619 (S.D. Miss. 1989) (Unpublished).

Moreover, in the early 1980s while in private practice, I did a *pro bono* HUD project with a local church in Tampa, Florida. We were able to develop the project and construct a home for profoundly mentally disabled adults, while remaining faithful to our religious motivation and commitment without difficulty or problem with HUD regulations.

In sum, from my experience, there is an absence of evidence sufficient to warrant the changes embodied in the proposed HUD rules, particularly given the church-state problems that are at stake here.

The Right Way To Do Right

Government should not fund organizations and enterprises that are pervasively religious. Government may fund religiously affiliated ones – organizations which serve out of religious motivation, but not in a way that (1) integrates religion into its programs, (2) involves religious worship, education, or proselytization or (3) discriminates on the basis of religion in hiring or serving beneficiaries. Ideally, these religious affiliates should be separately incorporated. Any religious programming by religious affiliates should be separately offered, privately funded, and voluntarily attended.

To the degree existing HUD regulations serve these ends, they should be retained; to the extent the proposed HUD regulations vary from these ends, they should be rejected.

Respectfully submitted,

J. Brent Walker