Testimony of
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Mr. Chairman

I am pleased to respond to the Subcommittee's invitation to testify concerning the proposed rules of the Department of Housing & Urban Development (HUD)to facilitate greater use of federal programs and funds by faith-based organizations (FBOs). It was my privilege to serve as the former head of the Office of Legal Counsel under President Reagan and the senior President Bush. For close to a quarter century, I have taught, practiced and written about constitutional law. For this reason, I will limit my testimony to the constitutional issues, if any, posed by these regulations. That is not to say that the constitutional issues are separate from the issue of removing barriers to the participation of FBOs. They are not. Indeed, it has been a profound misunderstanding of the nature of our Constitution's protection of religious liberty that, in the past, often led to the erection of artificial barriers, and therefore, deprived our government of the services of many who dedicate their lives, as a matter of religious conviction, to the well-being of others.

Let me begin with the conclusion: These proposed regulations do not transgress the guarantee of freedom of religion found in the First Amendment to the U.S. Constitution. To the contrary, these regulations continue the effort of the Bush administration to eliminate the unjustified discrimination against religious persons and organizations in the administration of social services funded by the government.

The proposed regulations apply to eight HUD programs that, among other things, promote home ownership, supply emergency and other shelter, create housing opportunities for those with AIDS, award community development grants, or involve young people. Under each program, the regulations have several essential elements:

1. Establishing the principle of nondiscrimination. Government funds shall be distributed neither giving favoritism to, nor discriminating against, religious organizations. Significantly, this applies to both the federal government and state and local governments that are often in partnership with HUD administering funds. Both are enjoined to treat religious organizations "under the same eligibility requirements."

This is unassailable and long overdue.

2. Explicitly providing that funds supplied directly to an FBO may not be used to support inherently religious activities, such as worship, religious instruction, or proselytization.

Importantly, from the standpoint of religious freedom and nondiscrimination, the regulations make clear that even though government funds cannot be used for these purposes,

nothing precludes the FBO from continuing – from non governmental sources – inherently religious activities. Analogously, the regulations ensure that FBOs can retain their independence, allowing for example the continued use of a religious organizational name and not banishing the inclusion of religion in the organization's "definition, practice and expression," so long as that is continued without government funding.

This is facially constitutional. Does it pose an administrative responsibility that must be carefully observed in application? Yes. Supreme Court case law requires reasonable assurance that direct government funding is employed for secular purpose. It does not require that a religious organization forsake religion to participate.

This is a constitutional breakthrough. For generations, a misinterpretation of the religion clauses were used to discriminate against religious social service organizations, even to the point of denigrating them as "pervasively sectarian organizations." The jurisprudence of the Supreme Court presently reveals that such prior exclusion and discrimination to be mistaken and wrongful. HUD's proposed rules eliminate these barriers.

Properly, as a matter of administration and observance of principles of non-establishment and non-endorsement, an FBO should conduct privately-funded religious activities separately from the secular services funded by HUD, and the regulations so provide. Analogously, if HUD funds are provided for "acquisition construction, or rehabilitation" these must be for structures that are either wholly secular, or if of mixed use, government funding cannot exceed the pro rata secular portion.

Again, this requires proper administration. HUD has provided in this regulation the needed distinctions to ensure constitutionality. In application, these distinctions need to be reasonably observed to avoid constitutional litigation over the issue of improper endorsement.

Note: As a matter of constitutional law and practice, it is preferable in as many cases as it is feasible for HUD to administer its funding programs through voucher-like mechanisms. As the HUD regulations properly observe, where HUD funds reach an FBO as a result of a genuine and independent private choice of a beneficiary, the religious body need not observe the various religious/secular distinctions incorporated for directed funding. Insofar as policy analysts believe that FBOs are more effective in the delivery of social service when this separation is not present, it would make both policy and constitutional sense to deliver HUD programs through this indirect alternative.

3. No current or prospective beneficiary of a government funded service shall be discriminated against on the basis of religion or religious belief. No genuine FBO would ever think otherwise. This affirms that and stands in league with the constitutional principal of free exercise.

All three of the above elements have been given approval by Congress in the past in Charitable Choice legislation. In addition, the regulations specifically incorporate the protection of religious organizations who become HUD grantees to draw distinctions on the basis of religion in employment. A similar provision is found in the President's Executive Order 13279,

which makes it clear that a previous Executive Order 11246 pertaining to nondiscrimination by government contractors does not preclude this latitude for the unfettered exercise of religious belief and practice by social security providers. This has long been ensured as a basic civil right of religious organizations under Title VII of the Civil Rights Act of 1964, and nothing in the regulations would weaken this protection for FBOs receiving HUD funding. While Title VII and its well-conceived religious exemption is a regulatory statute, the courts have found it fully applicable and available to organizations receiving public funds. And the free exercise clause, itself, has often been held to supply a ministerial exemption for ecclesiastical personnel. It should be carefully observed moreover that the protection of religious freedom does not exempt an FBO from Title VII's protection against racial, color, national origin, or gender discrimination.

The proposed regulations do not directly deal with disregard of this civil right of religious organizations by state and local laws which may unthinkingly preclude this aspect of religious exercise. HUD could argue that any state or local entity administering HUD funds could not preclude FBOs from observing religious character in staffing on the basis of the regulation's general statement that "state and local governments . . .are prohibited from discriminating against organizations on the basis of religion or their religious character," but perhaps even more specific words are needed. Either the general admonition or a specific one would be clearly enforceable under the Supremacy Clause.

In sum, the HUD regulations eliminate a variety of constitutionally unwarranted regulations of the past that: (a) categorically excluded religious organizations; (b) imposed the costly and unnecessary expense of creating a separate secular organization; (c) precluded monies for mixed religious and nonreligious use projects; (d) forced religious organizations desiring to be HUD participants to forego religious belief and practice in matters of hiring of their own personnel; and (e) fundamentally, sought to banish all evidence of the religious character of the entity seeking to participate. These prior regulations were odious. They did not advance freedom of religion so much as freedom *from* religion, which stands the constitutional protection on its head.

The primary constitutional arguments against the HUD approach is that it requires the good faith of grantees to observe constitutional distinctions. Of course, it does, but this does not distinguish it from virtually all other government funding programs. HUD has established the constitutional rule. It is clear from the regulations that they will require FBOs as all other grantees to "carry out eligible activities in accordance with all program requirements and all other requirements governing the conduct of HUD-funded activities, including those prohibiting the use of direct HUD funds to engage in inherently religious activities." Those who bemoan that this is insufficient often seem to have a latent desire to continue the discrimination against religious organization. This is not warranted. As Justice O'Connor in her concurrence with Justice Breyer in *Mitchell v. Helms* 530 U.S. 793 (2000) made clear, it is not the possibility of diversion that results in unconstitutional application, it is its actuality.

Justice O'Connor wrote: "To establish a First Amendment violation, plaintiffs must prove that the aid in question actually is, or has been, used for religious purposes." *Mitchell, supra.* No longer will funds provided to religious entities be assumed to be misused. In *Mitchell*, the

assurances against divertibility was the grantee's promise and a periodic review of compliance under generally-applied eligibility criteria, just as HUD proposes. Four members of the Court in *Mitchell* would have required even less.

For **direct** assistance, *Mitchell* requires that the aid be "secular, neutral, and nonideological," and that its primary effect not result in government indoctrination, define recipients by reference to religion, or lead to excessive entanglement. The HUD regulations meet these criteria on their face.

A note of caution: the HUD programs involve direct grants of money, rather than in-kind assistance – e.g., computers, textbooks, school bus rides, etc. The Court in *Mitchell* observed that there are special dangers when government makes direct money payments. It can be anticipated that opponents of the President's faith based initiative will desire to litigate this issue in an effort to maintain the discriminatory exclusion of religious providers of the past. Insofar as HUD has carefully limited the use of program funds to secular purposes on the face of the regulations, any such challenge would likely have merit largely in the context of an as-applied challenge. The fact that the Court sees "special dangers," however should not be construed to imply a constitutional prohibition. It should, rather, simply invite careful administration.

A plurality of the Court (the Chief Justice, Justices Scalia, Kennedy and Thomas) emphasize the non-prohibitory nature of the *Mitchell* opinion by giving stress to formal neutrality. If the aid is secular and it is distributed in a religiously neutral fashion, the constitutional standard is fulfilled.

Of course, the greater latitude given to FBOs receiving funding **indirectly** is well-supported by the Court's decision in *Zelman v. Simmons-Harris* 122 S.Ct. 2460 (2002). That latitude depends upon the existence of true private choice among other comparable alternatives. HUD properly and constitutionally acknowledges, consistently with *Zelman*, that funds supplied by indirect choice of the beneficiary can be used for all of the FBOs functions, including those that are religious.

None of the HUD programs on their face seem, at this point, to employ the voucher-type alternative, but should they in the future, HUD would be well advised to have the secular and religious providers in place in advance, and not merely provide a notice to a program beneficiary that he or she may object to the religious nature of a provided service. Establishing the range of choices in advance will ensure the absence of impermissible (even implied) endorsement, and most closely resemble the *Zelman* facts approved by the Court.

In a recent case, the direct/indirect distinction was pivotal to a lower court. In *Freedom from Religious Foundation v. McCallum*, 179 F.Supp. 2d 950 (W.D. Wis. 2002), the district court found the directly given federal subsidy being improperly used for an alcohol addiction program ("Faith Works") with interwoven faith elements. The decision illustrates the analytical tension that exists between a limitation not to use federal funds for religious purposes and federal regulation that appropriately tries to avoid changing the religious character of a grantee. It is a difficult balance, but failure to keep it is administrative failure, not a constitutional one. As the court found, the limitations on religious use of public money cannot be allowed to exist only on

paper. So too, in *ACLU of Louisiana v. Foster*, 2002 U.S. Dist. Lexis 13778 (E.D. La. 2002), the constitutional violation stemmed from public funds being administratively allowed for the purchase of religious materials.

A related issue in the same case illustrates the advantages of pursuing a voucher-like alternative. In *McCallum II*, 214 F.Supp. 2d 905 (W.D. Wis. 2002), a federal court upheld the provision of state money where Faith Works was reimbursed for the cost of services only after it was picked by a program beneficiary from a list of similar programs. Having found that the addicted offenders participated in the religiously-based program only as a result of their free choice, the faith elements of the recovery program raised no constitutional issue.

HUD's regulation places religious organizations on an equal footing with other potential grantees. If administered properly and on their own terms, constitutional questions will surely arise in application. But the regulations themselves – establishing a vital precept of nondiscrimination – are constitutionally sound.